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**COMMISSION STAFF WORKING PAPER**

*Detailed report on the implementation by Member States of Directive  
2003/88/EC concerning certain aspects of the organisation of working time  
(‘The Working Time Directive’)*

*Accompanying document to the*

**REPORT FROM THE COMMISSION TO THE EUROPEAN PARLIAMENT, THE  
COUNCIL AND THE EUROPEAN ECONOMIC AND SOCIAL COMMITTEE**

**on the implementation by Member States of Directive 2003/88/EC concerning certain  
aspects of the organisation of working time (‘The Working Time Directive’)**

{COM(2010) 802}

## TABLE OF CONTENTS

1.	<b>Context</b> .....	6
1.1.	This Working Paper .....	6
1.2.	The Working Time Directive and its main provisions .....	7
1.3.	The Charter of Fundamental Rights .....	8
1.4.	Relationship to the Health and Safety Framework Directive.....	8
1.5.	The 1993, 2000 and 2003 Working Time Directives.....	9
1.6.	Transposition of the Working Time Directives .....	10
1.7.	Exclusions and Derogations .....	11
1.8.	Interpretation of the Working Time Directive .....	12
1.9.	Legislative review of the Working Time Directive .....	14
2.	<b>The Scope of the Directive</b> .....	17
2.1.	Personal scope .....	17
2.2.	Per-worker or per-contract application of the Directive .....	18
2.3.	Broad application to the public and private sectors .....	19
2.4.	Limited exception for certain public service activities .....	20
2.5.	Application in the Member States: public and private sectors.....	21
2.6.	Particular sectors of activity .....	23
2.6.1.	Transport sectors .....	24
2.6.2.	Doctors in training.....	27
2.6.3.	Application in the Member States: doctors in training .....	29
2.7.	Conclusions .....	36
3.	<b>Definition of Working Time</b> .....	38
3.1.	The concepts of working time and rest time .....	38
3.2.	Treatment of on-call time.....	38
3.3.	No implications for remuneration .....	42
3.4.	The concept of working time: application in the Member States .....	42
3.5.	Conclusions .....	56
4.	<b>Limits to weekly working time: reference periods</b> .....	57
4.1.	Limit to weekly working time.....	57

4.2.	Derogations from the limit to weekly working time .....	59
4.3.	Calculation of weekly working time - reference periods .....	60
4.4.	Maximum weekly working time: application in the Member States .....	62
4.5.	Conclusions .....	81
5.	<b>The 'opt-out'</b> .....	84
5.1.	The legal provisions .....	84
5.2.	Analysis and jurisprudence .....	84
5.3.	The use of the opt-out among the Member States.....	87
5.4.	Conclusions .....	96
6.	<b>Rest periods</b> .....	99
6.1.	Rest periods under the Directive .....	99
6.1.1.	The concept and objectives of rest periods .....	99
6.1.2.	The concept of 'adequate rest' .....	100
6.1.3.	The definition of rest periods .....	101
6.1.4.	On-call time and rest time .....	101
6.1.5.	Timing of weekly rest periods.....	101
6.1.6.	Obligations on Member States and employers.....	102
6.2.	Derogations from rest periods.....	103
6.2.1.	Derogations are only possible if compensatory rest is assured.....	104
6.2.2.	Nature and timing of compensatory rest .....	104
6.2.3.	'Alternative' protection to equivalent compensatory rest .....	105
6.3.	Application of minimum rest periods in national laws .....	106
6.3.1.	Application of minimum daily rest .....	106
6.3.2.	Application of minimum weekly rest.....	107
6.3.3.	Application of rest breaks during the working day .....	108
6.3.4.	Use of derogations.....	108
6.4.	Use of derogations which may not comply with the Directive.....	110
6.4.1.	Excluding workers from entitlement to minimum rest periods .....	110
6.4.2.	No requirement of equivalent compensatory rest .....	113
6.4.3.	Delays in affording compensatory rest .....	117

6.5.	Conclusions .....	122
7.	<b>Paid annual leave</b> .....	126
7.1.	Interpretation of the right to paid annual leave .....	126
7.2.	Transposition in the Member States.....	132
7.3.	Conclusions .....	135
8.	<b>Night work and shift work</b> .....	136
8.1.	The requirements of the Directive.....	136
8.1.1.	Concept of night work/night workers .....	136
8.1.2.	Special limits to night work .....	136
8.1.3.	Special health checks, and right to transfer to day work.....	137
8.1.4.	Notifying night work to the authorities .....	137
8.1.5.	Additional measures for night workers .....	137
8.1.6.	Shift work.....	138
8.2.	Application in the Member States.....	138
8.2.1.	Definition of 'night time' and 'night worker' .....	139
8.2.2.	Shift work.....	140
8.2.3.	Limits to night work.....	140
8.2.4.	Health checks and the right to transfer to day work.....	145
8.2.5.	Guarantees for certain categories of night workers.....	147
8.2.6.	Notification of regular use of night workers .....	149
8.2.7.	Safety and health protection for night workers and shift workers .....	149
8.2.8.	Obligations regarding organisation of work patterns.....	150
8.3.	Conclusions .....	152
9.	<b>General Issues</b> .....	154
9.1.	Social partners' evaluations: trade unions.....	154
9.2.	Social partners' evaluations: employers.....	158
9.3.	Social partnership in transposition .....	164
9.4.	Member States' evaluations .....	166
9.5.	Monitoring and enforcement at national level .....	167
9.6.	Conclusions .....	169

10. **APPENDIX I:** ..... 172  
11. **APPENDIX II:**..... 176

## 1. CONTEXT

### 1.1. This Working Paper

This Commission Staff Working Paper reviews the transposition and application<sup>1</sup> by the Member States of Council Directive 2003/88/EC of 4 November 2003 concerning certain aspects of the organisation of working time (afterwards the 'Working Time Directive')<sup>2</sup>. It is attached to the Commission's Report to the European Parliament, the Council and the European Economic and Social Committee on implementation of the Working Time Directive (COM(2010) 801).

The Report and Working Paper follow the requirements of Article 24 of the Working Time Directive, which provides that Member States shall communicate their transposition measures to the Commission, and shall report every five years to the Commission on the practical implementation of the Directive, indicating the views of the two sides of industry at national level. The Commission shall then submit, to the European Parliament, the Council and the European Economic and Social Committee, a Report<sup>3</sup> on the application of the Directive which takes account of the national reports, as well as of Article 22 (the 'opt-out') and Article 23 (the non-regression principle.)

The details of transposition into national law in this Working Paper are primarily based on the national reports and observations provided by the Member States to the Commission on their implementation of the Directive until September 2008. The Working Paper also takes account of reports by the social partners at national and European level, of various reports prepared by independent legal experts for the Commission on the detailed transposition of the Directive into national laws, and of correspondence between the Commission, national authorities and citizens about implementation of the Directive in specific instances.

The aim of this Working Paper is to provide a general overview of the way in which Member States have implemented the Working Time Directive. Many Member States have implemented the Directive by means of a range of different legislative and/or administrative acts and, in many cases, collective agreements. Consequently, it is not possible to provide an exhaustive detailed examination here of all national implementation measures. In particular, this Working Paper should not be taken as prejudging the stance which the Commission may

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<sup>1</sup> 'Transposition' refers to the legally binding measures (such as laws or where applicable, collective agreements) by which a Member State has ensured that national law complies with the minimum requirements laid down by the Directive. 'Application' refers to the actual practice within the Member State, which may differ from the formal legal position.

<sup>2</sup> *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. The Working Time Directive consolidates and repeals two earlier measures, the 1993 Working Time Directive (*Directive 1993/104/EC concerning certain aspects of the organisation of working time*, OJ L 307, 13.12.1993 p.18) and the 'Excluded Sectors' Working Time Directive (*Directive 2000/34/EC of the European Parliament and the Council, 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, 1.08.2000, p. 41.)

<sup>3</sup> Article 24.3 provides that the Commission shall report 'every five years from 23 November 1996.' The Commission's last reports on the Working Time Directive were in 2000 (COM(2000) 787) (overall transposition), and in 2003 (COM(2003) 843) (re-examination of various provisions, as required by Articles 19 and 22.1 of the Directive).

take in connection with any infringement procedure on the compatibility of such measures with Community law.

## 1.2. The Working Time Directive and its main provisions

The Working Time Directive was adopted by the European Parliament and the Council under Article 137(2) of the European Community Treaty<sup>4</sup>, which provides for Community measures to improve the working environment by protecting workers' health and safety<sup>5</sup>.

The Directive's main purpose is to lay down minimum safety and health requirements for the organisation of working time<sup>6</sup>. It establishes common minimum requirements for all Member States<sup>7</sup> which include:

- *daily and weekly rest breaks for workers (normally, 11 consecutive hours' daily rest and 35 hours' uninterrupted weekly rest)*
- *a rest break during working time (where the working day is longer than six hours)*
- *limits to weekly working time for workers (generally, 48 hours a week on average, including any overtime)*
- *paid annual leave for workers (at least 4 weeks per year)*
- *extra protection for night workers:*
  - *normal hours of work must not exceed 8 hours (average) in any 24-hour period*
  - *work must not exceed 8 hours in any 24-hour period, if it involves special hazards or heavy physical or mental strain*
  - *right of all night workers to a free health assessment before assignment, and at regular intervals afterwards.*
  - *right to a transfer 'whenever possible' to day work, if suffering from health problems connected to the night work,*
  - *measures to require employers who regularly use night work, to notify the responsible authorities if the latter so request.*

The Court of Justice has held in a number of rulings that the Directive's requirements concerning maximum working time, paid annual leave, and minimum rest periods:

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<sup>4</sup> Now Article 153(2) of the Treaty on the Functioning of the European Union ('the Lisbon Treaty').

<sup>5</sup> *UK v Council of the EU*, Case C-84/94, judgment dated 12 November 1996, ECR [1996] I-05755

<sup>6</sup> It should be noted that the Working Time Directive does not contain any provisions about remuneration (rates of pay or overtime pay), except the requirement that annual leave is paid at the worker's annual salary (designed to ensure that the worker is financially able to take up their full annual leave entitlements). See *Vorel*, C-437/05, Order dated 11 January 2007.

<sup>7</sup> Different rules apply under the Working Time Directive to two particular groups of workers: mobile workers in road, air or inland waterway transport (Article 20.1 of the Directive) and workers on board seagoing fishing vessels (Article 21 of the Directive.) See chapter 2.

*'constitute rules of Community social law of particular importance, from which every worker must benefit'.<sup>8</sup>*

### **1.3. The Charter of Fundamental Rights**

The Charter of Fundamental Rights of the European Union<sup>9</sup>, which entered into force on 1 December 2009 with the Lisbon Treaty, provides at Article 31 as follows:

*'Article 31*

#### ***Fair and just working conditions***

*1. Every worker has the right to working conditions which respect his or her health, safety and dignity.*

*2. Every worker has a right to limitation of maximum working hours, to daily and weekly rest periods and to an annual period of paid leave.'*

Article 51 of the Charter provides that its provisions are addressed to the EU institutions, and apply to the Member States only when they are implementing EU law<sup>10</sup>.

The explanatory notes on the drafting of the Charter<sup>11</sup> record that paragraph 2 of Article 31 is based on the Working Time Directive, on Article 2 of the European Social Charter and on point 8 of the Community Charter on the rights of workers.

Article 6 of the Treaty on European Union provides that *'the Union recognises the rights, freedoms and principles set out in the Charter of Fundamental Rights of the European Union ... which shall have the same legal value as the Treaties'*, although it notes that the Charter's provisions *'shall not extend in any way the competences of the Union as defined in the Treaties'*.

### **1.4. Relationship to the Health and Safety Framework Directive**

The Working Time Directive contains two important references to the Framework Health and Safety Directive, Directive 89/391/EEC<sup>12</sup>.

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<sup>8</sup> See *Dellas*, Case C-19/04, [2005] ECR-I-10253, paras 40-41 and 49, and the caselaw cited at that passage; similarly regarding paid annual leave, *FNV*, Case C-124/05, para 28.

<sup>9</sup> Charter of Fundamental Rights of the European Union, OJ C303/1, 14.12.2007.

<sup>10</sup> *'Article 51: Field of application:*

*1. The provisions of this Charter are addressed to the institutions, bodies, offices and agencies of the Union with due regard for the principle of subsidiarity and to the Member States only when they are implementing Union law. They shall therefore respect the rights, observe the principles and promote the application thereof in accordance with their respective powers and respecting the limits of the powers of the Union as conferred on it in the Treaties.*

*2. The Charter does not extend the field of application of Union law beyond the powers of the Union or establish any new power or task for the Union, or modify powers and tasks as defined in the Treaties.'*

<sup>11</sup> Explanations Relating to the Charter of Fundamental Rights, (OJ C303/17, 14.12.2007) at page 26.

<sup>12</sup> 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.

Firstly, Article 1.3 of the Working Time Directive states that the Directive applies to all sectors of activity, both public and private, '*within the meaning of Article 2 of Directive 89/391/EEC....*' .

For this reason, the Court of Justice's decision of 12<sup>th</sup> January 2006 in *Commission v Spain*<sup>13</sup>, on the interpretation of the Framework Health and Safety Directive, also clarifies how the Working Time Directive applies to non-civilian workers within the public service such as the armed forces or military police and customs forces.<sup>14</sup>

Secondly, there is an important provision at Article 1.4 of the Working Time Directive, which states that "*The provisions of Directive 89/391/EEC are fully applicable to the matters referred to in paragraph 2 [that is, the operational provisions of the Working Time Directive], without prejudice to more stringent and/or specific provisions contained in this Directive.*" Therefore, provisions of the Framework Health and Safety Directive such as Articles 6 (general obligations on employers), 7 (protective and preventive services), 10 (worker information), 11 (consultation and participation of workers regarding safety and health at work), or 12 (training of workers) are also relevant to the provisions of the Working Time Directive.

### **1.5. The 1993, 2000 and 2003 Working Time Directives**

The Working Time Directive 2003/88/EC consolidates and repeals two earlier measures, the 1993 Working Time Directive<sup>15</sup> and the 2000 'Excluded Sectors' Working Time Directive<sup>16</sup>.

The original Working Time Directive (1993) provided at Article 1.3 that it did not apply to certain specified sectors: workers in air, rail, road, sea, inland waterway or lake transport, workers in sea fishing, other work at sea (including offshore work such as on oil platforms) and the activities of doctors in training. These were known as the "excluded sectors".

In 2000, Directive 2000/34/EC amended the 1993 Directive, to cover all workers in the excluded sectors who are not the subject of other, more specific Community laws. (The scope of the Directive, including its application to doctors in training and to transport workers, is discussed in more detail in Chapter 2.)

Other than the enlargement of the scope of the 1993 Directive and one other legal change<sup>17</sup>, the provisions of Directive 2003/88/EC are materially identical to those of Directive 93/104/EC<sup>18</sup>.

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<sup>13</sup> *Commission v Spain*, Case C-132/04

<sup>14</sup> See the detailed discussion at chapter 2.

<sup>15</sup> *Directive 1993/104/EC concerning certain aspects of the organisation of working time*, OJ L 307, 13.12.1993 p.18

<sup>16</sup> *Directive 2000/34/EC of the European Parliament and the Council, 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, 1.08.2000, p. 41.

<sup>17</sup> The deletion of the earlier provision that weekly rest should '*in principle, include Sunday*', in response to a judgment of the European Court of Justice invalidating the provision: see chapter 6 for the background.

<sup>18</sup> Although the numbering of provisions may have changed: details are set out in the table at Annex II to Directive 2003/88/EC.

For this reason, the term 'Working Time Directive' is used in this Working Paper to refer to either the 1993 Directive or the 2003 Directive, depending on the context. Similarly, many of the decisions of the European Court of Justice, refer to the 1993 Working Time Directive, but apply equally to the materially identical provisions in the 2003 Directive.

## 1.6. Transposition of the Working Time Directives

Community law Directives are adopted by agreement of the Member States in Council and (as concerns Working Time) also require the agreement of the European Parliament<sup>19</sup>. They set down minimum standards which are binding on Member States. Each Member State has an obligation to ensure that those minimum standards are transposed in a legally binding form, either by national laws or by collective agreements, before a deadline fixed by the Directive.

As Article 23 of the Directive provides, Member States retain the right to develop their legislative, regulatory and contractual provisions in the field of working time, so long as the minimum requirements of the Directive are still complied with. However, implementation of the Directive shall not constitute valid grounds for any reduction in the general level of protection afforded to workers. Conversely, Article 15 of the Directive acknowledges that Member States have the right to maintain or to introduce legal or administrative provisions which are more favourable to the protection of workers' health and safety than the minimum requirements contained in the Directive. Similarly, they may allow for the application of collective agreements, or agreements between the social partners, which are more favourable to the protection of workers' health and safety than the minimum requirements contained in the Directive.'

This Working Paper analyses the transposition and application of the Working Time Directive in all 27 Member States.

The 1993 Working Time Directive was due to be transposed by all Member States by 23<sup>rd</sup> November 1996. Its transposition by the EU-15 Member States was also reviewed in the Commission's two previous Reports in 2000 and 2003<sup>20</sup>.

The deadline for transposition of Directive 2000/34/EC, which extended the scope of the original Working Time Directive to cover previously excluded sectors, was set at the 1<sup>st</sup> August 2003 at the latest (1<sup>st</sup> August 2004, as regards doctors in training.) The Commission issued infringement proceedings against a number of Member States which were found to have failed to transpose, in full or in part, within the required time<sup>21</sup>.

This Working Paper also analyses transposition of Directive 2000/34/EC as regards some of the previously excluded sectors (in particular, doctors in training, at chapter 2.) However, it does not cover the detailed transposition as regards the previously excluded transport sectors. This is due to the level of detail which would be required, and to the fact that separate Reports

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<sup>19</sup> Since the entry into force of the Amsterdam Treaty of 1997.

<sup>20</sup> Commission Report on implementation of Directive 93/104/EC, COM (2000) 787; Commission Report on re-examination of Directive 93/104/EC, COM (2003) 843.

<sup>21</sup> *Commission v Belgium*, C-22/05, judgment dated 17 November 2005; *Commission v Luxembourg*, C-23/05, judgment dated 27 October 2005; *Commission v France*, C-73/05, judgment dated 17 November 2005.

on several aspects of this issue have recently been published, or are due to be prepared shortly, under specific requirements in the Working Time Directive<sup>22</sup>.

For all the Member States which have acceded since the Commission's last Report (the EU-10 countries<sup>23</sup> on 1<sup>st</sup> May 2004 and the EU-2, Bulgaria and Romania, on 1<sup>st</sup> January 2007), the Working Time Directive and its *acquis* was due to be transposed in full before the accession date.

All Member States have transposed the Working Time Directive. The Working Paper therefore concentrates on analysing the nature and comprehensiveness of transposition, and providing a general overview of how the Directive is applied in practice.

## 1.7. Exclusions and Derogations

The Working Time Directive is a relatively complex piece of Community law, partly because it consolidates two previous Directives, and partly because it seeks to provide elements of flexibility appropriate to different activities, while ensuring a solid level of minimum protection.

As a result, the Directive contains a range of different exclusions and derogations<sup>24</sup>, sometimes applying to different activities and sometimes to differing rights, which can be difficult to follow. A table of these derogations and exclusions is provided at Appendix I to this Working Paper.

The Court of Justice has held that exclusions from the scope of the Working Time Directive must be '*interpreted in such a way that their scope is limited to what is strictly necessary in order to safeguard the interests which the exclusions are intended to protect*'.<sup>25</sup> It has also stated that the derogations listed in the Working Time Directive must be taken as exhaustive<sup>26</sup>, and that such derogations are to be implemented '*subject to [the] strict conditions intended to secure effective protection for the safety and health of workers*', which are set out in the Directive<sup>27</sup>.

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<sup>22</sup> Report on working time for workers in urban passenger transport services, COM (2006) 371; Report on Directive 2003/88/EC and offshore workers, COM (2006) 853; Report on working time of workers on seagoing fishing vessels, COM (2010) \*\*\* [update following adoption]

<sup>23</sup> Cyprus, the Czech Republic, Estonia, Hungary, Latvia, Lithuania, Malta, Poland, Slovakia and Slovenia.

<sup>24</sup> It may be useful to explain the difference between exclusions and derogations. An *exclusion* is an absolute provision, which prevents the Directive or certain provisions of the Directive from applying to a particular context. (A Member State may choose to voluntarily apply an equivalent level of protection under national law to an area which is excluded from the Directive, but this would remain a matter of national law, and Community law cannot apply.) For example, Article 1.3 provides that the Directive does not apply to seafarers covered by Directive 1999/63/EC. Conversely, a *derogation* allows a Member State flexibility in applying the Directive (or certain provisions of the Directive) in a particular context. This creates two practical differences from exclusions. Firstly, derogations are *optional* – if a Member State does not choose to use a derogation, then the Directive continues to apply. Secondly, a derogation allows a Member State *extensive* flexibility, but *not absolute* flexibility – it may be subject to conditions, and must also be exercised in a way which respects the principles on which the Directive is based.

<sup>25</sup> Pfeiffer, Joined Cases C-397/01 – C/403/01, para. 67.

<sup>26</sup> Jaeger, Case C-151/02, para.80; Pfeiffer, , paras. 77 and 96.

<sup>27</sup> Pfeiffer, , para. 77.

The most frequently used derogation is Article 17(3), which allows Member States to derogate from the Directive's requirements regarding daily and weekly rests, rest breaks, length of night work, and length of reference periods (but not regarding paid annual leave, maximum weekly working time or other night work provisions) in a detailed range of specific situations or activities. (These activities are set out in Appendix II to this Working Paper.) However, such derogations are subject to the condition that the workers concerned receive periods of equivalent compensatory rest in respect of any missed or shortened minimum rest periods.

### 1.8. Interpretation of the Working Time Directive

The Court of Justice has interpreted the Working Time Directive in a number of important judgements and Orders<sup>28</sup> since the Commission's last Report in 2003. They are set out in the following table: each is discussed in more detail in the relevant chapter of this Working Paper.

<i>Case</i>	<i>Date of judgement</i>	<i>Subject</i>
<i>Pfeiffer</i> , C-397/01	5 October 2004	Scope of Directive (medical emergency staff of ambulance services) – definition of 'road transport' – 'on-call time' ( <i>Arbeitsbereitschaft</i> ) - maximum weekly working time – direct effect of Article 6 - conditions for opt-out -
<i>Feuerwehr Hamburg</i> , C-52/04 ,	Order of the Court, 14 July 2005	Scope of Working Time Directive regarding certain public sector activities – operational crews of public firefighter services – application of Directive – relevance of Framework Health and Safety Directive
<i>Dellas</i> , C-14/04	1 December 2005	'Working time' – on-call time of staff in residential care institutions – ' <i>système d'équivalence</i> ' whereby on-call duties is calculated proportionately to the intensity of activity required
<i>Robinson-Steele</i> , C-131/04	16 March 2006	Right to paid annual leave – 'rolled-up holiday pay', whereby payment for annual leave is spread over periods actually worked, instead of related to the period of leave
<i>FNV</i> , Case C-124/05	2 April 2006	Right to paid annual leave – payment in lieu of annual leave – carrying forward annual leave entitlements to a following year
<i>Commission v UK</i> , Case C-484/04	7 September 2006	Limits to derogations for 'autonomous workers' under Art. 17.1 – obligations of Member States and employers regarding rights to daily and

<sup>28</sup> The Court's judgments and Orders are published in all EU languages under their reference numbers (e.g. C-14/04) in the 'Caselaw' collection on the Eur-Lex website: (<http://eur-lex.europa.eu>) and on the Court of Justice's website (<http://curia.europa.eu>).

		weekly rest
<i>Vorel</i> , C-437/05	Order of the Court, 11 January 2007	'Working Time' – on-call time by hospital doctors - relevance of Working Time Directive to rates of remuneration for on-call time -
Joined cases <i>Schultz-Hoff</i> , C-350/06 and <i>Stringer &amp; ors</i> , C-520/06	20 <sup>th</sup> January 2009	Right to paid annual leave - workers on long-term sick leave – whether right may be exercised during sick leave – whether right may be extinguished following the end of the leave year concerned – payment in the event of termination of employment
<i>Pereda</i> , Case C-277/08	10 September 2009	Right to paid annual leave – dates for annual leave fixed by collective bargaining or national law – individual worker on sick leave during those dates – whether the worker has a right to take the missed annual leave at another time
<i>Zentralbetriebsrat der Landeskrankenhäuser Tirols</i> , Case C-486/08	22 April 2010	Right to paid annual leave – Application in the context of workers moving from full-time to part-time work – Combined effect of the Working Time Directive and the Part-Time Work Directive (Directive 97/81/EC)
<i>Commission v Spain</i> , C-158/09	Order of the Court, 20 May 2010	Non-transposition of the Directive to non-civilian staff in the public services
<i>Fuß (I)</i> , Case C-243/09	14 October 2010	Limit to weekly working time – Requirement to work average hours exceeding that limit without the consent of the worker – Whether worker was subjected to detrimental treatment by employer for withholding such consent – Position where 'opt-out'- derogation not taken up under national law
<i>Isère</i> , Case C-428/09	14 October 2010	Scope of Directive (workers on short-term seasonal contracts) – On-call time at the workplace during holiday residential and day-care for children – Minimum daily rest period - Whether derogations at Articles 17.1 or 17.3 applicable— Compensatory rest
<i>Accardo</i> , Case C-227/09	21 October 2010	Scope of Directive (municipal police forces) – Minimum weekly rest period – Derogations regarding timing - Whether directly effective in the absence of transposition by national law or by collective agreements – Effect where requirements under national law are more favourable to workers
<i>Fuß (II)</i> , Case C-429/09	25 November 2010	Direct effect – Whether Member State liable for acts of public authority which requires its employees to exceed the working time limit – Procedural requirements under national law – Nature of any remedies applicable

In addition, a number of cases have been referred by national courts to the Court of Justice and are currently awaiting its ruling on the interpretation of the Directive:

<i>Case</i>	<i>Reference</i>	<i>Subject</i>
<i>May</i> , Case C-519/09	Germany	Scope of Directive – Concept of 'worker' – Application regarding civil servants and public servants in Germany – Right to paid annual leave -
<i>Williams</i> , Case C-155/10	UK	Civil Aviation Working Time Directive (2000/79/EC) – Provisions regarding paid annual leave – Whether Directive 2003/88/EC relevant to interpretation – Whether EU law lays down any requirements regarding the nature and level of pay during paid annual leave under Directive 2000/79/EC
<i>KHS</i> , Case C-214/10	Germany	Right to paid annual leave – Worker absent on long-term sick leave – Whether the Directive permits national law to set limits to the accumulation of entitlements to paid annual leave during successive years of absence
<i>Grigore</i> , Case C-258/10	Romania	Concept of working time – Public service forestry official with responsibility for supervising sector of forest outside normal working hours – Whether period of responsibility is to be interpreted as working time – Provision by the employer of residential accommodation within the forest sector concerned
<i>Dominguez</i> , Case C-282/10	France	Paid annual leave where worker absent due to illness – Conditions imposed by national law for acquisition by a worker of rights to paid annual leave - Effect where requirements under national law are more favourable to workers in some types of sick leave - Obligations of a national court in a dispute between private parties
<i>Neidel</i> , Case C-337/10	Germany	Scope of Directive – Concept of 'worker' – Application regarding civil servants and public servants in Germany – Right to paid annual leave– Effect where national law is more favourable to workers - – Absence due to illness – Whether payment of occupational pension is relevant to payment in lieu of outstanding leave entitlements on termination of employment.

## 1.9. Legislative review of the Working Time Directive

Following a legal requirement in the Working Time Directive to review its provisions, the Commission made a legislative proposal in 2004 to amend various provisions of the Directive. This proposal was the subject of extensive discussions in Council and Parliament over the period 2004-2009. Ultimately, the Council and Parliament were not able to reach agreement on how the Directive should be amended, and the amending proposal lapsed automatically as a result.

The Commission launched a new review of the Directive in March 2010, with a consultation of the European social partners. That review is continuing at the date of adoption of this Report.

Further details on each review are provided below.

### *The 2004-2009 review*

Two provisions of Directive 93/104/EC required the Commission to carry out a review of specific provisions (the reference period and the opt-out), and report to Council, before November 2003. Firstly, Article 19 of the Directive required the Commission to present an appraisal report to the Council on the limits to reference periods for averaging weekly working time, so that the Council could re-examine them before 23 November 2003 and decide what action to take. Secondly, Article 22 of the Directive required the Commission and Council to do the same regarding the 'opt-out'<sup>29</sup>.

The Commission duly carried out its re-examination and presented its Report to the Council and Parliament in 2003<sup>30</sup>. In addition to its review of the reference period and the opt-out, the Report also reviewed the question of improving the reconciliation of work and family life, as well as the implications of the recently-issued *SIMAP* and *Jaeger* judgments of the European Court of Justice, about the treatment of on-call time for the purposes of the Directive<sup>31</sup>.

Arising from the 2003 Report, the Commission proceeded with extensive consultations with the European social partners on what action should be taken, including the possibility of amending the Working Time Directive<sup>32</sup>.

In September 2004, the Commission adopted a legislative proposal to amend the Working Time Directive<sup>33</sup>. Opinions were given by the European Economic and Social Committee, and by the Committee of the Regions<sup>34</sup>. The European Parliament adopted its Report on the proposal in April 2005<sup>35</sup>.

Following the Parliament's Report and the Opinions of the other institutions, the Commission amended its legislative proposal<sup>36</sup>, and the modified proposal was discussed by the Council on a number of occasions. The Council ultimately reached a political agreement on the amending proposal, by qualified majority, at the EPSCCO Council of June 2008. The Council's

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<sup>29</sup> The 'opt out' is the derogation at Article 22 of the Directive which allows Member States to permit non-application of the 48-hour limit to average weekly working time, subject to agreement of the worker concerned. See chapter 5.

<sup>30</sup> COM (2003) 843, *Communication of the Commission to the Council, Parliament, Economic and Social Committee, Committee of the Regions and the European social partners on the Re-examination of Directive 93/104/EC on certain aspects of the organisation of working time*.

<sup>31</sup> The outcomes of the *Dellas* and *Feuerwehr Hamburg* cases, regarding residential care and public emergency services, were not yet known at that stage.

<sup>32</sup> SEC 2004 610, *Second Phase of Consultation of the Social Partners at Community Level on revision of Directive 93/104/EC* (the 2003 re-examination report constituted the first stage of consultation).

<sup>33</sup> COM (2004) 607, 22 September 2004.

<sup>34</sup> Opinion of the Economic and Social Committee, 11 May 2005 (OJ C 267/16 of 27.10.2005); Opinion of the Committee of the Regions, 14 April 2005 (OJ C 231/69, 20.9.2005).

<sup>35</sup> Report of the European Parliament dated 25 April 2005 (rapporteur: Alejandro Cercas) (A6/2005/0105, OJ C 92E/292 20.4.2006).

<sup>36</sup> COM (2005) 246, 31 May 2005.

Common Position was formally adopted on 15<sup>th</sup> September 2008<sup>37</sup>, and transmitted to the European Parliament on 22<sup>nd</sup> September 2008, thus beginning the second reading of the amending proposal under the co-decision procedure.

The Parliament adopted a Resolution, proposing a number of amendments to the Common Position, on 17<sup>th</sup> December 2008<sup>38</sup>. A number of these were accepted, in whole or in part, by the Commission in its Opinion of 4<sup>th</sup> February 2009<sup>39</sup>. The Council however decided to reject the changes proposed by Parliament. Despite a conciliation procedure between Council and Parliament with the support of the Commission, it was not possible for the co-legislators to find agreement within the required six weeks<sup>40</sup>, with the result under Article 251(5) TEC<sup>41</sup> that the legislative proposal lapsed automatically.

### *A new review: 2010*

In September 2009, the Commission announced its intention to launch a new review of the Working Time Directive, based on a consultation of the European social partners in accordance with Article 154 TFEU and on a detailed impact assessment.<sup>42</sup>

The Commission launched the first phase of the consultation of the European social partners in March 2010<sup>43</sup>, asking whether they saw a need for action at EU level, what in their view could be its scope, whether they considered that the Commission should launch an initiative to amend the Directive, and whether they wished to consider entering a dialogue of the European social partners under Article 155 TFEU on any of the issues raised.

After analysing the replies of the social partners, the second stage of consultation was launched in December 2010<sup>44</sup>, regarding possible action at EU level.

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<sup>37</sup> Council of the EU, Common Position adopted on 15<sup>th</sup> September 2008, OJ C 254 E 254 p. 26, 07.10.2008; see also Communication from the Commission to the Parliament concerning the common position, COM (2008) 568 of 18<sup>th</sup> September 2008.

<sup>38</sup> European Parliament Resolution P6\_TA (2008) 0615 on the Council common position (rapporteur: A. Cercas), 17.12.2008 (A6-0440/2008, OJ C 45E 53 p. 141, 23.02.2010).

<sup>39</sup> Opinion on the Parliament's amendments to the Common Position, COM (2009) 57, OJ C76 53 p. 22, 25.03.2010.

<sup>40</sup> Letter of the co-chairs of the Conciliation Committee dated 29.04.2009 to the Presidents of the European Council and European Parliament.

<sup>41</sup> See now Article 294 TFEU on the conciliation procedure.

<sup>42</sup> Speech of President Barroso to the European Parliament Plenary, Strasbourg, 15 September 2009.

<sup>43</sup> COM(2010) 106, 24.03.2010.

<sup>44</sup> COM(2010) 801.

## 2. THE SCOPE OF THE DIRECTIVE

### 2.1. Personal scope

The operative provisions of the Working Time Directive refer to a 'worker' (often, to 'any worker' or 'every worker'). This concept is not defined in the Directive itself.

In Article 3 of the Framework Health and Safety Directive (89/391/EEC), which defines the *material* scope of the Directive, a worker is defined as:

*"any person employed by an employer, including trainees and apprentices but excluding domestic servants",*

while an employer is defined as:

*"any natural or legal person who has an employment relationship with the worker and has responsibility for the undertaking and/or establishment".*

However, in its ruling in *Isère*<sup>45</sup>, the Court doubted that this concept of 'worker' in the Framework Health and Safety Directive would necessarily apply to the Working Time Directive, commenting that the Directive made no specific reference to it.

The Court also noted that the Directive did not refer either to definitions of 'worker' derived from national law and practice, concluding that it applied an autonomous EU definition:

*'The consequence of that fact is that, for the purposes of applying Directive 2003/88, that concept [of 'worker'] may not be interpreted differently according to the law of Member States but has an autonomous meaning specific to European Union law. The concept 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 ...'*<sup>46</sup>

*It 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. ...'*<sup>47</sup>

In the *BECTU* case, the Court of Justice took a broad interpretation of 'workers', and held that the Directive precludes national legislation which has the effect of excluding certain workers (in this case workers in the film, theatre and broadcasting sectors who were typically engaged

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<sup>45</sup> *Isère*, Case C-42809, para 27.

<sup>46</sup> (The Court referred by way of analogy here to its comments in Case 66/85 *Lawrie-Blum* [1986] ECR 2121, at paragraphs 16 and 17, (regarding Article 39 EC) and also in Case C-138/02 *Collins* [2004] ECR I-2703, paragraph 26.)

<sup>47</sup> *Isère*, Case C-42809, paras 28 – 29.

on successive very short fixed-term contracts with different employers) from entitlement to paid annual leave under Article 7 of the Working Time Directive. The Court stated that the Directive 'must be interpreted as precluding Member States from unilaterally limiting the entitlement to paid annual leave conferred on all workers, by applying a precondition for such entitlement which has the effect of preventing certain workers from benefiting from it.'<sup>48</sup>

Similarly, in *Isère*, the Court held that casual seasonal staff at holiday and leisure centres, who worked on fixed-term contracts not exceeding 80 days, were clearly 'workers' covered by the Directive. It did not matter that under national law, their employment contracts were excluded from application of certain provisions of the Labour Code: '... it must be recalled that the Court has held that the *sui generis* legal nature of the employment relationship under national law cannot have any consequence in regard to whether or not the person is a worker for the purposes of European Union law.'<sup>49</sup>

This Working Paper deals with the Working Time Directive, which applies to workers generally. It should be mentioned that three other Community law directives contain more specific rules<sup>50</sup> on working time for younger workers<sup>51</sup> and for workers who are pregnant or breastfeeding<sup>52</sup>, and on leave for workers who are parents<sup>53</sup>. The Commission has already published separate Reports on the application of these Directives within the Member States, and their provisions are not considered here.

## 2.2. Per-worker or per-contract application of the Directive

The Working Time Directive does not contain any express provision indicating whether the working time and rest period limits set out in the Directive are absolute limits (in the sense that the hours worked for two or more employers should be added together in order to assess whether the limits are respected: application 'per-worker'), or are set for each employment relationship separately (application 'per-contract').

In this respect the situation differs markedly between Member States.

According to the information provided by Member States, *Austria, Bulgaria, Cyprus, Germany, Estonia, Greece, France, Ireland, Italy, Luxembourg, the Netherlands, Slovenia and the United Kingdom* apply the Directive per-worker (mostly under express legal provisions to that effect).

Similarly, in *Lithuania*, the national authorities indicate that where a worker has more than one contract of employment, compliance with the Directive's limits to working and rest hours

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<sup>48</sup> *BECTU*, Case C-173/99, judgment dated 26<sup>th</sup> June 2001.

<sup>49</sup> (The Court referred here to Case C-116/06 *Kiiski* [2007] ECR I-7643, para 26, and the case-law cited there.)

<sup>50</sup> For example, the limits to weekly working time are more stringent for younger workers (defined as those aged under 18), and extra provisions apply to night work both by younger workers, and by pregnant or breastfeeding workers or workers who have recently given birth. Parents, including adoptive parents, and breastfeeding mothers have additional rights to leave.

<sup>51</sup> Younger Workers' Directive, Council directive 94/33/EC of 22 June 1994 on the protection of young people at work

<sup>52</sup> Pregnant Workers' Directive, Council directive 92/85/EEC of 19 October 1992 on safety and health of pregnant workers and workers who have recently given birth or are breastfeeding

<sup>53</sup> Parental Leave Directive, Council Directive 96/34/EC of 3 June 96 on parental leave.

is checked for the total number of hours worked. Thus, where there is more than one contract with the same employer, the overall working time may not exceed 40 hours per week<sup>54</sup>. A worker who wishes to conclude a secondary employment contract with a different employer must obtain a certificate from the principal employer of his working and rest hours, and present it to the secondary employer, who must check that the total working requirements will comply with the limits under national legislation.<sup>55</sup>

Conversely, the *Czech Republic, Denmark, Hungary*<sup>56</sup>, *Latvia, Malta, Poland, Portugal, Romania, Slovakia, Spain and Sweden* apply the Directive per-contract.

The position is more complex in Belgium and in Finland. *Belgium* applies the Directive per-worker where there is more than one contract with the same employer, but per-contract where a worker has more than one contract with different employers. The position is similar in *Finland*, where the national authorities indicate that the Directive is applied per-contract; but that where an employee works under simultaneously valid contracts for the same employer, these contracts are then considered as a single contract of employment for the purposes of the Working Time and Annual Holidays Acts.

The Commission has already stated that as far as possible, the Directive must be applied per worker<sup>57</sup> in the case of workers working concurrently under two or more employment relationships falling under the scope of the Directive. 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, particularly where there are concurrent contracts with the same employer.

### **2.3. Broad application to the public and private sectors**

Article 1.3 of the Working Time Directive states that:

*'This Directive shall apply to all sectors of activity, both public and private, within the meaning of Article 2 of Directive 89/391/EEC....'*

Article 2 of the Framework Health and Safety Directive 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.).'*

The Court of Justice has held that the scope of both the Framework Health and Safety Directive and the Working Time Directive must be interpreted broadly, both because of their objectives of protecting health and safety of workers, and in view of the specific provisions mentioned above.<sup>58</sup>

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<sup>54</sup> Labour Code, Article 114(1).

<sup>55</sup> Labour Code, Article 114(2).

<sup>56</sup> Except in health care activities, where the Health Services Act no. LXXXIV of 2003 (Eütev.tv) provides that all health care activities performed by a worker must be added together, when calculating the daily or weekly working time.

<sup>57</sup> COM (2000) 787, at point 14.2.

<sup>58</sup> See *Feuerwehr Hamburg*, paras 38-61; *SIMAP*, paras 31-38; *Pfeiffer*, paras 47-63; *Commission v Spain*, Case C-132/04, paras 22 – 28.

## 2.4. Limited exception for certain public service activities

However, Article 2.2 of the Framework Directive also provides a limited exception for certain public service activities:

*'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. '*

The limited range of this exception has been emphasised by the Court of Justice in several cases relating to certain specific public service activities such as public sector medical services<sup>59</sup>, emergency medical services<sup>60</sup>, public service firefighters<sup>61</sup> and to armed military police forces<sup>62</sup>.

The Court noted that significantly, the exception did not refer to whole services, but only to *'certain specific activities of those services, the characteristics of which are such as inevitably to conflict with the rules laid down in the directive.'*<sup>63</sup> It followed that the exception must be interpreted narrowly, and *'confined to what is strictly necessary in order to safeguard the interests which it enables the Member States to protect.'*<sup>64</sup>

The correct interpretation, according to the Court, is that the **normal** activities of the armed forces, emergency services, or civil protection services - including, for example, fighting a fire or providing emergency medical services to accident victims – still fall within the scope of the Directives concerned. This applies even where the service concerned *'must deal with events which, by definition, are unforeseeable'*, since *'the activities which it entails in normal conditions... are nonetheless capable of being organised in advance, including.... the working hours of its staff and the prevention of risks to safety and health.'*<sup>65</sup>

The exclusion must be understood as referring only to **'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. That must be so in the case of 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 [the Framework Health and Safety and Working Time Directives] were to be observed.'**<sup>66</sup>

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<sup>59</sup> *SIMAP*, Case C-303/98, judgment dated 3 October 2000

<sup>60</sup> *Pfeiffer*, Case C-398/01, judgment dated 5 October 2004

<sup>61</sup> *Personalrat der Feuerwehr Hamburg*, Case C-52/04, Order of the Court of Justice dated 14<sup>th</sup> July 2005.

<sup>62</sup> *Commission v Spain*, Case C-132/04, judgement dated 12<sup>th</sup> January 2006 (on the application of the Framework Health and Safety Directive); *Commission v Spain*, Case C-158/09, judgment dated 20 May 2010 (on the application of the Working Time Directive) .

<sup>63</sup> *Commission v Spain*, Case C-132/04, para 24; *Feuerwehr Hamburg*, para 51.

<sup>64</sup> *Commission v Spain*, Case C-132/04, para 23; *Feuerwehr Hamburg*, para 42.

<sup>65</sup> *Commission v Spain*, Case C-132/04, para 25; *Feuerwehr Hamburg*, para 52.

<sup>66</sup> *Feuerwehr Hamburg*, paras 53-54.

The Court underlined that '*even in such exceptional circumstances, the second subparagraph of Article 2(2) of Directive 89/391/ requires the competent activities to ensure the safety and health of workers 'as far as possible'.*'<sup>67</sup>

Therefore, the normal activities of armed forces, emergency services or civil protection forces are covered by the Working Time Directive, and should be included in transposing legislation. According to the Court's judgment, it is only in exceptional situations that such specific public service activities can be excluded from application of the normal rules laid down in the Directive.

## 2.5. Application in the Member States: public and private sectors

From the available information it can be concluded that in all Member States, the Directive has generally been transposed regarding both the public and the private sectors. In some cases the public sector is covered by the same Working Time rules as the private sector, while in many cases there are different legal instruments governing the public and the private sector. For the public sector, transposition is most complete regarding the civil service.

However, in a number of Member States, the Directive does not appear to be transposed correctly, or transposed at all, regarding certain parts of the public service. This applies particularly to the armed forces, police, prison staff, and other security forces, and in some cases to civil protection services such as public service firefighters or environmental officers. Information on this aspect was particularly lacking in some national reports from Member States.

There are also a few cases where Member States have entirely excluded from their transposing legislation, whole categories of workers in the private sector.

Such exclusions would not appear consistent with the requirements of the Working Time Directive, unless equally (or more) protective standards are ensured by other means<sup>68</sup>.

For example, *Cyprus* states that when transposing the Directive, it has excluded its armed forces and police. *Italy* has transposed regarding the public sector, but the armed forces and police are excluded from the scope of transposing law<sup>69</sup>, while firefighters, the courts and prisons, public security and civil protection services, are all excluded if their duties impose particular demands, or for reasons of public order and security, and a Ministerial Decree so provides<sup>70</sup>. By 2010 *Spain* had not yet transposed the Working Time Directive as regards non-civilian members of the public services, and in particular the Guardia Civil, a military police force<sup>71</sup>; moreover, Spain does not appear to have transposed regarding the public service generally (other than healthcare workers). *Ireland* has transposed the Directive

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<sup>67</sup> *Feuerwehr Hamburg*, para 56.

<sup>68</sup> See Article 15, Working Time Directive.

<sup>69</sup> Decreto Legislativo 8 aprile 2003, no 66, Art. 2(3).

<sup>70</sup> Decreto Legislativo 8 aprile 2003, no 66, Art. 2(2). It seems that at present, only one such Decree has been passed, regarding the private security sector (see below.)

<sup>71</sup> *Commission v Spain*, Case C-158/09, judgment dated 20 May 2010. Spain indicates that it has transposed the Directive regarding its armed forces by Article 5 of Law 39/2007 of 19 November 2007, combined with Ministerial Order 121/2006 of 4 October 2006 and Ministerial Order 107/2007 of 26 July 2007.

regarding the public service, but has excluded the armed forces and police. *Greece* has suspended transposition of the Directive to doctors working in public health services<sup>72</sup>.

On the other hand, *Slovakia* has transposed the Directive for its armed forces and firefighters, with some exclusions for exceptional situations. *Greece* has transposed the Directive regarding its public service<sup>73</sup>, armed forces, public order and security services, with a limited exception for specific operations where residual health and safety provisions still apply. *Slovenia* appears to have transposed the Directive regarding all areas of their public services, including armed and security forces, although with some special provisions whose compliance with the Directive may be questioned. *Hungary* seems to have transposed the Directive regarding most of the public sector, including law enforcement and emergency services. Belgium has transposed for the public sector generally<sup>74</sup>, and also regarding its police and military forces<sup>75</sup>. *Denmark* and the *UK* have transposed the Directive regarding the whole of the public sector, including the armed forces, police and civil protection services, with an exception which follows the exact wording of Article 2.2 in the Framework Health and Safety Directive. In *Sweden*, the police, civil protection services and defence forces are exempt from certain sections of the Working Hours Act. The national authorities state however that this relates only to tasks which are particular to these activities, and fall within the exceptions permitted by section 2 of the Health and Safety Framework Directive.

Under new rules introduced in 2008<sup>76</sup>, *Italy* has provided that the national measures transposing key provisions of the Directive (the limit to weekly working time, and minimum daily rest periods) does not apply to 'managers' operating within the National Health Service. This appears to raise problems of compliance with the Directive, since doctors working in public health services in Italy are formally classified as 'managers' under sectoral laws and collective agreements, without necessarily enjoying managerial prerogatives or autonomy over their own working time.

*Italy* has excluded employees in libraries, museums and State archaeological areas from the scope of its transposing legislation<sup>77</sup>: this does not appear compatible with the requirements of the Directive.

School staff are also excluded from the Italian transposing legislation. The national authorities state, however, that other legislation applicable to this sector<sup>78</sup> can be regarded as providing 'more favourable' provisions under Article 15 of the Directive; no detailed information is presently available to the Commission.

Private sector security guards are also excluded from the Italian transposing legislation: an Inter-ministerial decree specifies that the workers excluded are armed supervision services

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<sup>72</sup> See details in chapters 3 and 4.

<sup>73</sup> Though, as mentioned above, transposition has been suspended regarding doctors working in public health services.

<sup>74</sup> Law of 14 December 2000.

<sup>75</sup> Royal Decree of 30 March 2001, chapter III (police); Royal Decree 18 March 2003, Article 41 ff (military).

<sup>76</sup> Act 133/2008, Article 41(13)

<sup>77</sup> Decreto Legislativo 8 aprile 2003, no 66, Art. 2(2).

<sup>78</sup> The Legislative Decree, and the Single Text on education, of 16 April 1994, No. 297, as amended and coordinated by Act No. 53 of 28 March 2003 (the "Moratti Reform") and by Presidential Decrees Nos. 121 of 30 March 2004 and 122 of 30 March 2004.

guarding institutions or sensitive objectives, security services in airports and various forms of transport, security services for cash or valuables in transit, and night supervision and security services. However, the Decree also specifies that a sectoral collective agreement is to set out detailed alternative provisions regarding maximum daily working time, limits on night work, rest breaks and overtime limits<sup>79</sup>.

**Belgium** excluded employed doctors, vets and dentists from its transposing legislation as regards limits to working time and minimum rest periods<sup>80</sup>, and also excluded trainee dentists and trainee vets from transposition. On 13 December 2010, a new legislative proposal to transpose the Directive for these groups had been approved by both Chambers of parliament,<sup>81</sup> and was awaiting royal signature.

In **Portugal**, Article 11 of the Labour Code states that the Code applies to private sector contracts, unless its rules are incompatible with a more specific applicable legal regime. This rule seems to have created some uncertainty about whether certain sectors, for example rural workers or rail transport workers, are covered by the working time provisions of the Code<sup>82</sup>. The national authorities indicated in their report that they consider both rural and rail workers to be clearly covered by the Labour Code in this respect.

## 2.6. Particular sectors of activity

With effect from 1<sup>st</sup> August 2004<sup>83</sup>, the Working Time Directive applies to all sectors of activity, unless other Community instruments contain more specific requirements on the organisation of working time for certain occupations or occupational activities<sup>84</sup>.

The previously excluded workers who are now covered by the Directive include doctors in training, offshore workers<sup>85</sup>, workers on seagoing fishing vessels, non-mobile workers in civil aviation, workers in inland waterway or lake transport, most rail workers, and some workers in local road transport<sup>86</sup>.

Special provisions of the Working Time Directive apply to some of these groups. The main differences in practice relate to *mobile workers in local road or inland waterway transport* (who are subject under Article 20.1 of the Directive to different provisions regarding rest periods and night work) and *workers on board seagoing fishing vessels* (who are subject under Article 21 of the Directive to different provisions regarding rest periods, maximum weekly working time, and night work.)

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<sup>79</sup> *Decreto Legislativo* 8 aprile 2003, no 66, Art 2(3), as amended by Act no 133 of 2008; inter-ministerial decree of 26 April 2006 and sectoral collective agreement dated 2 May 2006..

<sup>80</sup> Art. 3ter, *Loi sur le travail*, 16 March 1971, as amended by the *Loi-programme* of 2 August 2002.

<sup>81</sup> *Projet de loi fixant la durée du travail des médecins, dentistes, vétérinaires, des candidats ... en formation et étudiants stagiaires...*, 12 February 2010.

<sup>82</sup> Contribution of Confederation of Portuguese Industry; independent expert report.

<sup>83</sup> The transposition date was 1<sup>st</sup> August 2003 generally, and 1<sup>st</sup> August 2004 for doctors in training: Excluded Sectors Directive (*Directive 2000/34/EC*, OJ L 195, 1.08.2000, p. 41.)

<sup>84</sup> Article 14, Working Time Directive; for interpretation, see *Bowden v Tufnalls Parcels Express*, Case C-133/00, judgment dated 4 October 2001.

<sup>85</sup> *Report on Directive 2003/88/EC and offshore workers*, COM (2006) 853

<sup>86</sup> *Report on working time for workers in urban passenger transport services*, COM (2006) 371

The other groups mentioned either are covered by the main provisions of the Working Time Directive completely, or with very few differences<sup>87</sup>; or are now covered by other more specific Community law instruments (see below).

### 2.6.1. *Transport sectors*

A number of other Community instruments do set out more specific working time requirements for particular sectors or occupational activities, which thus take precedence over the provisions of the Working Time Directive. This relates principally to seafarers, to mobile workers in civil aviation, and to some mobile workers in road transport and cross-border rail transport. They are set out in the table on the following page.

It is worth also setting out here the specific position regarding mobile road transport workers, who may fall under different legal rules, depending on the heaviness of their vehicle and the distance over which they are transporting goods or passengers.

The general rule is that broadly speaking, mobile workers in road transport services are covered by Directive 2002/15/EC (which sets limits to *working* time, and also applies to self-employed drivers in commercial road transport of passengers or goods). In addition, mobile drivers in such services are also covered by Regulation 561/2006 (the ‘Tachograph’ Regulation) which sets maximum limits to *driving* time.

However, certain mobile workers are expressly excluded from the scope of the Directive and Regulation. The main exceptions are: mobile workers in vehicles weighing less than 3.5 tonnes, vehicles suited to carrying fewer than 10 passengers, and in regular passenger transport services whose route is less than 50 km.

These workers are still covered by Directive 2003/88/EC, for example as regards the limit to weekly working time under Article 6, the right to annual paid leave under Article 7 and the right to regular health assessments for night workers under Article 9.

However, Article 20.1 provides that Articles 3, 4, 5 and 8 of the Directive (the normal rules on minimum daily and weekly rest periods, rest breaks and limits to night work), do not apply to these workers. Instead, Member States shall take the necessary measures to ensure that such workers are entitled to ‘adequate rest’. That term is defined in Article 2(9) of the Directive as requiring 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.’*

**TABLE: SPECIFIC WORKING TIME MEASURES IN THE TRANSPORT SECTORS**

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<sup>87</sup> Doctors in training (covered by the main provisions but with special transitional arrangements); offshore workers (covered by the main provisions, but with a special 12-month reference period for average weekly working time.)

Sector	Specific instrument(s) on working time
<b>Seafarers</b>	<p>Council Directive 1999/63/EC concerning the Agreement on the organisation of working time of seafarers concluded by the European Community Ship Owners' Association (ECSA) and the Federation of Transport Workers' Unions in the European Union (FST) ('the Seafarers' Directive')<sup>88</sup>.</p> <p>Applies to 'seafarers', defined as '<i>any person who is employed or engaged in any capacity on board a seagoing ship</i>' which is either publicly or privately owned, is registered in the territory of a Member State, and is ordinarily engaged in commercial maritime operations. )</p> <p>Deadline for transposition: 30 June 2002.</p> <p>Council Directive 2009/13/EC 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</p> <p>Deadline for transposition: within 1 year of the date of entry into force of the Directive<sup>89</sup></p>
<b>Civil aviation</b>	<p>Council Directive 2000/79/EC 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).<sup>90</sup></p> <p>Applies to 'mobile staff in civil aviation', defined as 'crew members on board a civil aircraft, employed by an undertaking established in a Member State'.</p> <p>Deadline for transposition: 1 December 2003</p>
<b>Civil aviation</b>	<p>Regulation (EC) No 1899/2006 of the European Parliament and the Council, of 12 December 2006, amending Council Regulation (EEC) No 3922/91 on the harmonisation of technical requirements and administrative procedures in the field of civil aviation<sup>91</sup></p> <p>Applies to aircraft (whether registered in a Member State or in a third country) operated for civil aviation by an operator resident or established in a Member State, or by a Community air carrier.</p> <p>Subpart Q deals with flight and duty time limitations and rest requirements for</p>

<sup>88</sup> Seafarers' Directive, OJ L 167, 02.07.1999, p. 33.

<sup>89</sup> This date is conditional on the date of entry into force of the Maritime Labour Convention. At the date of this Working Paper, the Convention was still in the process of ratification.

<sup>90</sup> Civil Aviation Directive, OJ L 302, 01.12.2000, p. 57.

<sup>91</sup> 'EU-OPS' or Civil Aviation Regulation, OJ L 377, 27.12.2006, p. 1.

	members of <u>flight crews</u> ) on aircraft covered by the Regulation. (Entry into force of Subpart Q: 16 July 2008.)
<b>Road transport</b>	<p>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<sup>92</sup></p> <p>Applies to '<i>mobile workers</i>' employed by undertakings established in a Member State participating in road transport activities covered by Regulation (EEC) No 3820/85, or failing that, by the AETR Agreement: A '<i>mobile worker</i>' is defined as '<i>any worker forming part of the travelling staff, including trainees and apprentices, who is in the service of a transport undertaking which operates transport services for passengers or goods by road for hire or reward or on its own account</i>'. Road transport activities covered by Regulation (EEC) No 3820/85 are journeys on public roads, within the Community, of motor vehicles for the carriage of passengers or goods, but with various exceptions for light or local transport, (for example, excepting vehicles weighing under 3.5 tonnes, vehicles suited to carrying fewer than 10 persons, and regular passenger transport services whose route is less than 50 km).</p> <p>Deadline for transposition: 23 March 2005. Also applies to self-employed drivers in transport by road of passengers or goods for hire or reward, from 23 March 2009 (see Article 2(1) of Directive 2000/15 EC).</p>
<b>Road transport</b>	<p>Regulation (EC) No 561/2006 of the European Parliament and of the Council of 15<sup>th</sup> March 2006 on the harmonisation of certain social legislation relating to road transport ...and repealing Council Regulation (EEC) No 3820/85: (the 'Tachograph Regulation'<sup>93</sup>)</p> <p>Applies to carriage by public road of goods by vehicles exceeding 3.5 tonnes, or of passengers by vehicles suited to carrying more than 9 persons, within the Community (or between the Community, Switzerland and EFTA countries), but with various specific exceptions such as regular passenger transport services whose route is less than 50 km.</p> <p>Includes provisions on rest periods and limits to 'driving time' for drivers (note that 'driving time' is a narrower concept than 'working time' under Directive 2002/15/EC, which still also applies.)</p> <p>Entry into force 11<sup>th</sup> April 2007 (some tachograph-related provisions, on 1 May 2006.)</p>
<b>Rail transport</b>	Council Directive 2005/47/EC of 18 <sup>th</sup> 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

<sup>92</sup> Road Transport Directive, OJ L 80, 23.03.2002, p. 35.

<sup>93</sup> Road Transport Regulation, OJ L 102, 11 April 2006, p. 1.

	<p>mobile workers engaged in interoperable cross-border services in the railway sector<sup>94</sup></p> <p>Applies to mobile railway workers assigned to inter-operable cross-border services carried out by railway undertakings (optional for certain primarily local cross-border services). A mobile worker is any worker who is a member of a train crew and is assigned to interoperable cross-border services for more than one hour on a daily shift basis.</p> <p>Deadline for transposition: 27 July 2008</p>
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### 2.6.2. *Doctors in training*

Doctors in training were expressly excluded from the scope of Working Time Directive 93/104/EC<sup>95</sup>. However, this was changed by the amending Directive 2000/34/EC. Therefore, doctors in training are now covered by the Working Time Directive in the same way as other workers, except that in three Member States<sup>96</sup> which have chosen to use extended transitional arrangements, working time of doctors in training may average up to 52 hours per week until 1 August 2011.

The Directive was to be transposed into national law as regards doctors in training by the 1<sup>st</sup> August 2004 at latest<sup>97</sup>. Article 17(5) allowed for a more gradual introduction of the 48-hour limit to average weekly working time, under special transitional arrangements which are summarised in the table below. All other provisions of the Directive are fully applicable to doctors in training since 1<sup>st</sup> August 2004.

Article 17(5) also provides for consultation between employers and employees' representatives about the implementation of any transitional arrangements: *'the employer shall consult the representatives of the employees in good time with a view to reaching an agreement, wherever possible, on the arrangements applying to the transitional period.'* Such an agreement may set out, in particular, the measures to be adopted to reduce weekly working hours to an average of 48 by the end of the transitional period.

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<sup>94</sup> Cross-border Rail Directive, OJ L 195, 27.07.2005, p. 15. The Commission services are currently preparing a report to the Parliament and Council in accordance with Article 3 of Directive 2005/47/EC on 'the implementation of this Directive in the context of the development of the railways sector', which is expected to be completed by July 2011.

<sup>95</sup> Article 1(3) of that Directive provided that *'This Directive shall apply to all sectors of activity, both public and private, within the meaning of Article 2 of Directive 89/391/EEC ..., with the exception of .... the activities of doctors in training.'*

<sup>96</sup> Hungary, the Netherlands and the UK.

<sup>97</sup> Directive 2000/34/EC, Article 2(1). (The transposition date for doctors in training was thus fixed a year later than for the other changes made by the Excluded Sectors Directive.)

**Table: Transitional provisions for doctors in training**

<i>Period</i>	<i>Derogation possible</i>	<i>Conditions</i>
1 August 2004 – 31 July 2009	Derogation from 48-hour limit to average weekly working time	Transitional limits applied to average weekly working time:  <u>1 August 2004 - 31 July 2007:</u> May not exceed average 58 hours/week. Reference period may not exceed 12 months.  <u>1 August 2007 – 31 July 2009:</u> May not exceed 56 hours per week. Reference period may not exceed 6 months.
1 August 2009- 31 July 2011	Extension of above derogation from 48-hour limit	If necessary to take account of difficulties in meeting the working time provisions given responsibilities for organising and delivering health services/medical care.  A Member State wishing to use this derogation had to notify Commission (with reasons) by 31 January 2009. The Commission gives an opinion within 3 months.  In any event, average weekly working time may not exceed 52 hours per week. Reference period may not exceed 6 months.
1 August 2011 – 31 July 2012	Possible further extension of above derogation	If necessary to take account of special difficulties in meeting the above responsibilities.  A Member State wishing to use this derogation must notify Commission (with reasons) by 31 January 2011. The Commission gives an opinion within 3 months.  In any event, average weekly working time may not exceed 52 hours per week. Reference period may not exceed 6 months.

For 24 of the Member States, the transitional arrangements expired on 31 July 2009, and weekly working time for doctors in training should not now exceed 48 hours per week on average, according to Article 6 of the Directive.

Three Member States (Hungary, the Netherlands and the UK) notified the Commission by 31 January 2009, in accordance with Article 17.5, that they wished to use the extended transitional provisions <sup>98</sup>.

<sup>98</sup> Commission Opinions on extension of transitional arrangements for working time of doctors in training, dated 28.09.2009: (Hungary, C(2009) 7385; Netherlands, C (2009) 7381; UK, C (2009) 7380.) In the

Accordingly, in those Member States doctors in training may work up to 52 hours per week, averaged over not more than 6 months, until 31 July 2011, subject to the conditions set out in the Commission's Opinions on their notifications.

### 2.6.3. Application in the Member States: doctors in training

#### (i) Same (or more favourable) rules as for other workers

The following Member States<sup>99</sup> indicate that they have not used the transitional provisions, and that their national rules on Working Time applicable to doctors in training are the same as those applicable to other doctors:

*Austria, Czech Republic, Denmark, Estonia, Finland, Germany, Italy, Latvia, Lithuania, Luxembourg, Poland, Portugal, Romania, Slovakia, Sweden.*

However, where doubts are expressed elsewhere in this Working Paper about the conformity with Community law of national rules or collective agreements governing doctors (such as regarding the treatment of on-call time, compensatory rest for missed or shortened minimum rest periods, or the extension of reference periods beyond what the Directive allows), those reservations may also apply when the same rules are applied to doctors in training.

In *Italy*, the national authorities state that the rules applicable to doctors in training are the same as for other workers. It appears that national rules provide for a weekly working time of 38 hours<sup>100</sup>, although some reports indicate that in practice, average weekly hours are closer to 50 per week.

In *Lithuania*, doctors in training who carry out duties in hospitals were formerly treated as postgraduate students. In such cases, there was no obligation to conclude an employment contract, and the doctor was not covered by labour laws, including the transposition of the Working Time Directive.

However, the national authorities indicate that national law has been amended to provide that employment contracts must be concluded with all doctors in training, and that accordingly, the usual national rules on working time and rest time apply fully to doctors in training, with effect from 1 January 2008<sup>101</sup>.

In *Luxembourg*, the transitional provisions under Article 17(5) of the Directive have not been used, and national law provides that from June 2006 onwards, working time of doctors in training shall not exceed 48 hours per week on average, over a reference period of not more than 6 months<sup>102</sup>. The national authorities state that before that date, the general Working Time limits (48 hours per week averaged over 4 weeks) also applied in principle to doctors in

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case of the Netherlands, the extension was subject (at the request of the national authorities) to the national social partners concerned reaching agreement on a joint plan for achieving a 48-hour average weekly working time in hospitals by 1 August 2011.

<sup>99</sup> In several of these Member States, doctors in training were already covered by national provisions transposing the 93/104 Working Time Directive.

<sup>100</sup> Legislative Decree 368/1999, as amended by Act no 266 of 2005.

<sup>101</sup> Amendments to Article 3(4) of the Law on Medical Practice, No X-1376, *Žin.* 2007, No 138-5642.

<sup>102</sup> Art. L. 211-33 *Code du Travail*, with effect from 31 May 2006.

training in Luxembourg, but that it was found very difficult to comply with that stricter limit, due to the specific features of this sector.

In *Poland*, the national authorities indicate that there are no special rules regarding working time of doctors in training and that the applicable rules are the same as for other doctors (the Healthcare Institutions Act 1991, 'ZOZ'). Until 31 December 2007, these rules did not comply with the Directive: however, since amendments which took effect on 1 January 2008, the general rules under the ZOZ comply with the Directive.<sup>103</sup>

In *Portugal*, national rules formerly did not fix any legal limit to overtime hours for doctors in training. The national authorities indicate that these were amended during 2009 and that the new rules provide that the regular working time of doctors in training is 40 hours per week, while overtime is limited to 100 hours per year<sup>104</sup>.

*(ii) Doctors in training: special rules within the transitional period*

Seven Member States used transitional rules on the working hours of doctors in training up to 31 July 2009, as permitted by Article 17(5) of the Directive: *Cyprus, Hungary, Malta, the Netherlands, Slovenia, Spain and the UK*. Three of these Member States (Hungary, the Netherlands and the UK), use the possibility of extended transitional arrangements under Article 17(5) until 31 July 2011, as mentioned earlier in this chapter. The other four Member States did not use this option; therefore, in those Member States, the 48-hour limit to average weekly working time applies with effect from 1 August 2009.

In *Cyprus*, the transitional arrangements available under Article 17(5) were fully used up to 31 July 2009. The national legislation appears to provide for a maximum of 52 average weekly working hours after that date. This would exceed what Article 17(5) allows; however, the national authorities indicate that the legislation is to be understood as providing for a 48-hour limit to apply from 31 July 2009. Cyprus also derogates, as regards doctors in training, from the paragraph of Article 16(b) which provides that annual leave and sick leave are not counted in calculating average weekly working time.<sup>105</sup> However, the national authorities state that this possibility is not actually used, since it would be regressive compared to existing practice.

In *Hungary*, before 2004 there were no special rules for doctors in training, who were subject to an overall limit of 48 working hours per week on average (and a further 12 hours' overtime where the doctor in training so agreed), as for other health services staff.

The national authorities indicate that under an amending Act of 2004<sup>106</sup>, working time of doctors who have not yet completed their first specialist qualification could not exceed 58 hours per week on average up to 1 August 2007, and 56 hours per week on average up to 1 August 2009. A ministerial decree set out conditions for using these extra hours, which were aimed at ensuring sufficient numbers of doctors to staff emergency and on-call services.

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<sup>103</sup> See under Poland in chapters 3 and 4 of this Report.

<sup>104</sup> Amending law 45/2009 of 13 February 2009: Article 13.3 (applying the overtime limits contained in Art. 161 (1)(a) the Regime Jurídico do Contrato de Trabalho em Funções Públicas, September 2008, published as Annex I to Law 59/2008) and Article 16 of the consolidated text.

<sup>105</sup> Organisation of Working Time Law, 2002, Article 16(4)

<sup>106</sup> Act XXVI of 2004 amending the Health Services Act No. LXXXIV of 2003

Hungary notified the Commission by 31 January 2009 that it wished to use the extended transitional provisions under Article 17.5. Accordingly, in Hungary doctors in training may work up to 52 hours per week, averaged over not more than 6 months, until 31 July 2011<sup>107</sup>.

However, further hours could be worked voluntarily by doctors in training who sign an opt-out.

In *Malta*, the transitional arrangements available under Article 17(5) were fully used up to 31 July 2009 regarding both maximum weekly working time and the length of reference periods. Moreover, the national legislation appears to allow working time of up to 56 hours per week (averaged over up to 6 months) up to 31 July 2012, which would not be consistent with the Directive. The national authorities add that Malta's particular situation and size constraints necessitate the continued use of the opt-out in provision of medical services.

In the *Netherlands*, the national authorities state that doctors in training were covered by national transposing legislation<sup>108</sup> before 1 August 2004, which provided for a maximum weekly working time of 48 hours, averaged over 13 weeks. However, the Working Hours Decree amended national law in 2005 to provide that where working time includes on-call time, maximum working hours for doctors in training could be up to 58 hours per week until 1 August 2007, and up to 56 hours per week until 1 August 2009, over the same reference period, thus partly using the transitional possibilities under Article 17(5).

The Netherlands notified the Commission by 31 January 2009 that it wished to use the extended transitional provisions under Article 17.5. At the request of the national authorities, the extension was conditional on the joint plan agreed by the national social partners concerned on achieving a 48-hour average weekly working time in hospitals by 1 August 2011. Accordingly, doctors in training in the Netherlands may work up to 52 hours per week, averaged over not more than 6 months, until 31 July 2011<sup>109</sup>.

*Slovenia* used the transitional arrangements under Article 17(5), allowing average working time for doctors in training of up to 58 hours per week (until 31 July 2007) and then up to 56 hours per week (until 31 July 2009), though the average could not be calculated over longer than 4 months<sup>110</sup>.

National legislation appears to allow average working time of up to 56 hours per week to continue after that date until 31 July 2011; this would not be consistent with the Directive.

In *Spain*, the national authorities indicate that working time of doctors in training was not legally regulated before 2006. Law 44/2003 on the organisation of the health professions did not cover doctors in training, but provided for this aspect to be covered by subsequent Royal Decree. In 2006, a decree<sup>111</sup> then provided for partial use of the transitional provisions

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<sup>107</sup> Commission Opinions on extension of transitional arrangements for working time of doctors in training in Hungary, C (2009) 7385, dated 28.09.2009.

<sup>108</sup> Working Hours Act 1996; and later, by the Working Hours Decree 605/2005.

<sup>109</sup> Commission Opinions on extension of transitional arrangements for working time of doctors in training in the Netherlands, C (2009) 7381, dated 28.09.2009.

<sup>110</sup> Amendment and Completion of Medical Services Act (ZZdrs-A) no 67/2002, Article 11.

<sup>111</sup> Royal Decree 1146/2006 of 6 October 2006 on the special employment relationship of trainee health specialists in residency. It followed a consultation and negotiation process between the Autonomous Communities and the health sector unions, as well as a decision of the Spanish High Court no IV which

available under Article 17(5). Weekly working time, including overtime and on-call time, was limited to 58 hours averaged over 12 months until 31 July 2007, and to 56 hours per week averaged over 6 months until 31<sup>st</sup> July 2008, (thus, a slightly shorter period than was permitted by the transitional provisions). From 1<sup>st</sup> August 2008, weekly working time is limited to 48 hours, averaged over the same reference period as applies to the health sector generally.

The Decree provides for normal weekly working time to be decided by collective agreement (up to a maximum of 37.5 hours per week averaged over 6 months) with a maximum of seven on-call periods per month, and for compensatory rest arrangements. However, comments of the social partners attached to the national report for Spain question the consistency of the compensatory rest arrangements with the requirements of the Directive.

In the *United Kingdom*, the Directive was transposed to doctors in training with effect from 1 August 2004<sup>112</sup>. The transitional provisions were fully used up to 31 July 2009 as regards weekly working time, while the reference period was set at 6 months throughout, reflecting the working patterns of UK doctors in training. (Doctors in training also have the possibility of 'opting-out' of these limits, under UK legislation.) Other provisions of the Directive have been fully applied from 1<sup>st</sup> August 2004.

The UK notified the Commission by 31 January 2009 that it wished to use the extended transitional provisions under Article 17.5 until 31 July 2011 for specified posts in a number of defined specialties and hospitals. Accordingly, doctors in training in the UK in those specified posts may work up to 52 hours per week, averaged over not more than 6 months, until 31 July 2011<sup>113</sup>.

(iii) Doctors in training: special rules which do not seem to comply with the Directive

In *Belgium*, transposition of the Directive regarding doctors, vets or dentists in training was not yet enacted on 13 December 2010, but was just completing the legislative process. In *France*, the national rules do not yet set clear limits to the working time of doctors in training. In *Greece*, the transposition of the Directive has been suspended for doctors in training. In *Ireland*, the Directive has been transposed but national practice does not yet comply with the Directive, although recent collective agreements and rulings should lead to an improved standard of compliance.

In *Belgium*, it was intended to transpose the Directive to doctors, dentists and veterinarians in training, by a Royal Order of 16<sup>th</sup> June 2003<sup>114</sup>. This Order set a limit of 48 hours for their weekly working time, averaged over 8 weeks. However, this measure was annulled for

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applied directly the provisions of Directive 2000/34/EC (as limiting maximum average working time of doctors in training to 58 hours per week).

<sup>112</sup> Working Time (Amendment) Regulations 2003 (S.I. 2003/1684).

<sup>113</sup> Commission Opinion on extension of transitional arrangements for working time of doctors in training in the UK, dated 28.09.2009: C (2009) 7380; Working Time (Amendment) Regulations 2009, SI 2009/1567 and SI 2009/2766.

<sup>114</sup> *Arrêté Royal du 16 juin 2003*. These groups are excluded (article 3ter, Law of 16 March 1971 as amended by the Loi-programme of 2 August 2002) from application of the general transposing legislation as regards working time limits and minimum rest periods, unless an *arrêté royal* provides otherwise.

procedural reasons by the *Conseil d'Etat* early in 2004<sup>115</sup>. A Ministerial Order of 1999<sup>116</sup> regarding qualification to supervise trainee doctors set out some rules on working time limits and rest time for the trainees; the supervisor (*maitre de stage*) was to ensure that working time of doctors in training does not exceed 9 hours per day and 48 hours per week, when averaged over 8 weeks. However, these limits did not apply to on-call time; doctors in training could be required to undertake one overnight on-call duty in each 5-day period, and at most one weekend on-call duty (from Saturday midday to Monday morning) in 3 weekends. Such a roster could give an average of 79 working hours per week. Furthermore, the Order was not an adequate transposition of the Directive, since its provisions could not be legally enforced by doctors in training.

However, on 13 December 2010, a draft transposing law<sup>117</sup> for doctors, vets and dentists (either employed or in training) had been approved by both Chambers of parliament and was awaiting royal signature.

The draft law provides a limit to weekly working time of 48 hours on average (over a reference period of 13 weeks), of which 60 hours at most may be worked in any one week. Working time at the workplace may not exceed 24 continuous hours. The draft would allow average weekly working time to be increased by a maximum of 12 hours per week, provided that the worker gives in advance a written individual consent under Article 22 of the Directive (opt-out). Workers may not be rostered for longer than 24 continuous hours, and must be provided with a minimum rest of 12 continuous hours immediately after any shift lasting between 12 and 24 hours.

In *France*, an agreement between the social partners on working time of doctors in training is reflected in Decree 2002/1149 of 10 September 2002<sup>118</sup>. This provides that doctors in training must perform eleven half-days' service per week, of which two half-days are devoted to academic education. However, it is not clear that the 48-hour average weekly limit has been effectively transposed.

French law does not formally define the length of a 'half-day', but in practice, medical rosters in public hospitals consider a day service as running from 8h to 18h 30 (10.5 hours), and a night service as running from 18h30 to 8h30 (14 hours). Whether the service is a day service or a night (on-call) service, it is counted as two half-days' service; thus, in practice a 'half-day' amounts to 5.25 hours if served during the day, and amounts to 7 hours if served at night. (An obligation of nine half days' hospital activity per week is thus equivalent to about 47 hours if entirely served during the day, and to 63 hours if entirely served at night, in addition to the two half-days' academic education.)

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<sup>115</sup> Conseil d'Etat, 9 February 2004. It seems that the Order was, effectively, annulled at the request of certain university hospitals because the ECJ's judgment in *Jaeger* in September 2003 made it impracticable to proceed with a planned parallel Royal Order, which would have provided that 'inactive' periods of on-call duty at the workplace need not be counted as working time, if the worker is provided with a room where s/he can rest between calls.

<sup>116</sup> *Arrêté ministerial du 30 avril 1999, Moniteur Belge 29 mai 1999.*

<sup>117</sup> *Projet de loi fixant la durée du travail des médecins, dentistes, vétérinaires, des candidats ... en formation et étudiants stagiaires...*, 12 February 2010.

<sup>118</sup> *Décret 2002-1149 du 10 septembre 2002, inserted as R6153-2 Code de la santé publique.*

Doctors in training are obliged to participate in on-call duty<sup>119</sup>. The 'normal' on-call obligations for a doctor in training are one overnight duty per week, which is to run from 18h30 to 8h30, and one Sunday or holiday on-call duty per month, which is to run from 8h30 to 18h30. This would bring the prescribed weekly working time for the hospital activities of a doctor in training to about 51 hours (seven half-days during the day, of 5.25 hours each, and two half-days during the night, of 7 hours each.)

The national transposing legislation also seems to allow exceptions which would go beyond what the Directive permits. Although doctors in training are obliged to perform a *minimum* of eleven half-days, there is no norm which would prevent them being asked to work additional hours, either on-call<sup>120</sup> or during the day, and there is no mandatory upper limit to the total working time. Doctors in training may be asked to undertake '*gardes supplémentaires*', in activities where this is essential in order to achieve continuity of service, in addition to their normal on-call duties as described above<sup>121</sup>. This is only permitted where it is considered impossible to organise the work roster otherwise<sup>122</sup>: however, in practice national law provides<sup>123</sup> that doctors in training may be paid for up to twenty on-call duties per five-week period (which seems to considerably exceed the five on-call duties per month envisaged by the 'normal' rules described above.)

In *Greece*, the national authorities indicate that the transposition of the relevant provisions of the Working Time Directive to doctors in training has been suspended.<sup>124</sup>

They state that according to Presidential Decree 76/2005<sup>125</sup>, during the transitional period 1 August 2004 – 31 July 2009, doctors in training could not work more than 58 hours per week on average over a 12-month reference period. (This exceeded what Article 17(5) allowed, since the transitional limit was already 56 hours per week during this period.) However, the national authorities considered that implementing the Presidential Decree would create problems for the smooth operation of hospitals, notably those located outside Athens, regarding on-call schedules. For this reason, the entry into force of the provisions transposing the Directive as regards doctors in training was postponed from 1 January 2007 onwards by successive Ministerial decisions. Under Law no 3654/2008 of 3 April 2008, the suspension of the relevant provisions of the Presidential Decree was continued for an indefinite period.

In practice, doctors in training are required to complete 40 hours' normal weekly working time, but are also obliged to participate in on-call time at the workplace according to the needs of the hospital, for which no legal limit is set. On-call time at the workplace, of the type considered by the Court of Justice in *Jaeger*, is not considered as working time under Greek law, either as regards 'active' or as regards 'inactive' periods. It appears from the reports received that due to long and frequent on-call duties at the workplace, minimum rest requirements are not satisfied and working hours required of doctors in training (including on-

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<sup>119</sup> However, doctors in training may not be required to work more than 24 hours' continuous on-call time, and must take a 11-hour '*repos de sécurité*', during which they have a complete break from hospital and academic duties, immediately after a night on-call. *Arrêté du 10 septembre 2002 relatif aux gardes des internes* ....., Arts. 1-2.

<sup>120</sup> R6153-2 *Code de la santé publique*.

<sup>121</sup> *Arrêté du 10 septembre 2002 relatif aux gardes des internes*, Article 1.

<sup>122</sup> *Arrêté du 10 septembre 2002 relatif aux gardes des internes*, Article 3.

<sup>123</sup> *Arrêté du 20 mars 2008 relatif à l'indemnisation des gardes effectuées par les internes*, Article 3.

<sup>124</sup> See the details regarding Greece in chapters 3 and 4.

<sup>125</sup> Which transposed the Excluded Sectors Directive, Directive 2000/34/EC.

call time at the workplace) considerably exceed what the transitional provisions would allow. Commonly, doctors in training are required to work between 66 and 80 hours per week on average, depending on the hospital, when on-call time at the workplace is included.

Arising out of this situation, the Commission issued a letter of formal notice in 2008 regarding Greece's transposition of the Directive for doctors in training<sup>126</sup>.

A sectoral collective agreement was subsequently concluded between the Greek State and the OENGE (Federation of Greek Hospital Doctors' Associations) on 1 December 2008. It provides that doctors in training shall work sufficient on-call time to ensure the safe operation of hospitals and health centres, but does not fix a limit to their working time. After each period of active on-call duty, the worker concerned shall be given a compensatory 24-hour rest period, which may not be postponed for longer than one week. The agreement also indicated that the Government planned to recruit a large number of additional doctors, with the intention that by 1 July 2009 no doctors would be obliged to undertake more than 7 active on-call shifts per month, or more than 11 on-call shifts of any sort per month.

The relevant provisions of the sectoral collective agreement were enacted, with minor amendments, in Act 3574/2009, which entered into force on 11 March 2009. The validity of the collective agreement was limited to the calendar year 2009. It appears that there has been no successor agreement between the sectoral social partners.

However, the Act 3574/2009 appears to have been partly amended by Act 3868/2010<sup>127</sup>, which entered into force on 3 August 2010. Article 4 of that Act provides that doctors in training shall work seven active on-call shifts per month (in addition to regular working time). However, it also provides that additional on-call shifts may be rostered by regional health management, depending on the hospital's needs.

In *Ireland*, legislation passed in 2004 transposes the Directive regarding doctors in training<sup>128</sup>, using the transitional provisions in Article 17(5) up to 1 August 2009. The same legislation also defines on-call duty of doctors in training, where the worker must remain present at the workplace, as working time. In principle, therefore, average weekly working time for all doctors in training, including on-call time in accordance with the *SIMAP* and *Jaeger* cases, should comply with the Directive.

Nevertheless, substantial non-compliance in practice was underlined by several public reports during 2007 and 2008.. The national authorities indicate that before 1 August 2004, average weekly working hours of doctors in training in Ireland were estimated at 75 hours. By 2007 a national survey showed that 31% of doctors in training reported that their average weekly working hours still exceeded 65 hours, and 13% stated that their average weekly working hours still exceeded 75 hours. Some reported an average of up to 97 working hours per week, particularly in specialisations such as surgery and anaesthetics. Fewer than 16% of respondents reported compensatory rest arrangements which complied with the Directive<sup>129</sup>.

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<sup>126</sup> Commission letter of formal notice 2008 D/206272 (press release IP-08-1539, 16.10.2008).

<sup>127</sup> Act 3868/2010 on Improving the National Health System, Government Gazette, A 129/03.08.2010

<sup>128</sup> European Communities (Organisation of Working Time Act) (Activities of Doctors in Training) Regulations 2004, S.I. no 494/2004) with effect from 1 August 2004. Before that date, doctors in training were not covered by the Organisation of Working Time Act 1997, section 3(2)(a)(iii).

<sup>129</sup> *National Implementation Working Group on European Working Time Directive, Interim Report*, September 2007, Appendix H; published by the Health Services Employers' Agency, at [www.hsea.ie](http://www.hsea.ie).

The Final Report of the National Implementation Working Group on the directive considered, in December 2008, that these figures were still broadly valid. It concluded that '*No hospital in Ireland is currently fully compliant with the provisions of the [Directive as regards doctors in training] i.e. hours worked and rest break provision.*'<sup>130</sup>

During 2009 there was considerable progress between the national social partners in agreeing changes which aimed to secure better compliance with the Directive<sup>131</sup>. Following these changes, weekly working time (including relevant on-call time) should not exceed 65 hours in any one week, doctors should not be rostered to work for any continuous period exceeding 24 hours, and equivalent compensatory rest should be ensured in all cases. The national authorities and the relevant social partners also affirm their commitment to continue working towards full compliance with the Directive in all hospitals. However, by autumn 2010 there were still reports of doctors in training being expected to work very long average hours.

## 2.7. Conclusions

From the available information, it can be concluded that the Directive has generally been transposed regarding all sectors of activity, and regarding both the public and the private sectors.

Nevertheless, in a number of Member States, the Directive does not seem to be transposed correctly, or transposed at all, regarding certain parts of the public service, as required by the Court of Justice's decisions in *Feuerwehr Hamburg* (C-52/04) and *Commission v Spain* (C-132/04), discussed in this chapter. Information on this aspect is particularly lacking in national reports from some Member States.

As regards doctors in training, it is clear that including these workers in the scope of the Directive has led to significant improvements in health and safety protection in a number of Member States where no minimum rest periods or limits to working time previously applied. Even the transitional limits to working time have resulted in a significant reduction in average working hours for this group in several Member States.

However, the picture regarding transposition is not yet satisfactory. As a result, some doctors in training are still working excessively long hours.

The Commission has indicated before its view that in order to effectively achieve the Directive's objectives to protect workers' health and safety, Member States should provide for appropriate measures to ensure that the provisions on maximum weekly working time and minimum rest periods are applied, as far as possible, per worker rather than per contract. It is noted that the situation in this respect differs markedly between Member States.

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See also the report of an independent review into an incident of serious surgical error, published by a major public children's hospital (October 2008, [www.olhsc.ie](http://www.olhsc.ie)), which concluded that during the period January to April 2008, the doctors in training who performed surgery in the unit concerned worked an average of 73 hours per week when they did not undertake on-call time, and 107 hours per week when they did undertake on-call time.

<sup>130</sup> *Final Report of the National Implementation Working Group on the European Working Time Directive*, December 2008, published by the Health Services Employers' Agency, at [www.hsea.ie](http://www.hsea.ie).

<sup>131</sup> Labour Court Recommendations LCR 19559 of 15 June 2009 and LCR 19702 of 22 December 2009; collective agreement between HSE and IMO dated 22 January 2010. See also HSE, *Guidance to health service management on implementation of EWTD, Parts I and II*, June 2009 and September 2009.

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The following Member State does not appear to have transposed the Directive completely as regards the public services: *Spain*.

The following Member States do not appear to have transposed the Directive completely as regards armed forces, police and/or emergency services: *Cyprus, Ireland, Italy, Spain*.

The following Member States do not appear to have transposed the Directive as regards particular sectors in the public service: *Italy (courts, prisons; workers in libraries, museums and archaeological sites)*.

The following Member State has suspended transposition of the Directive for certain groups of workers: *Greece (as regards doctors in public services and doctors in training)*.

Questions also arise about the conformity of recent legal measures in *Italy* regarding doctors in public health services.

The following Member States have not fully transposed the Directive as regards doctors in training, or have not fully implemented their transposing measures: *France, Ireland*. (*Belgium* is in the process of transposing, as regards employed doctors, vets and dentists, and doctors, dentists and vets in training.)

### 3. DEFINITION OF WORKING TIME

#### 3.1. The concepts of working time and rest time

Article 2(1) of the Working Time Directive defines 'working time' as "any period during which the worker is working, at the employer's disposal and carrying out his activities or duties, in accordance with national laws and/or practice".

'Any period which is not working time' is to be considered as 'rest time', according to Article 2(2).

These definitions are of central importance to the Directive, since they decide the extent of the maximum limits to weekly 'working time' under Article 6 (discussed in chapter 4), and of the minimum rest periods required under Articles 3, 4, and 5 (discussed in chapter 6.)

The Court of Justice has underlined that although Article 2(1) contains a reference to national laws and practices, the concepts of working time and rest time are concepts of Community law, and therefore may not be unilaterally limited by a Member State:

*[the concepts of "working time" and "rest period"]" 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. Accordingly, the fact that the definition of the concept of working time refers to 'national law and/or practice' does not mean that the Member States may unilaterally determine the scope of that concept. Thus, those States may not make subject to any condition the right of employees to have working periods and corresponding rest periods duly taken into account since that right stems directly from the provisions of that Directive".<sup>132</sup>*

The Court underlined that the Directive does not contemplate any intermediate category: in the scheme of the Directive, '[working time] is placed in opposition to rest periods, the two being mutually exclusive'.<sup>133</sup>

#### 3.2. Treatment of on-call time

All Member States provide for some intermediate categories of working time (on-call duty, readiness to work, stand-by duty) which are not defined by the Directive. The exact terms and the legal treatment of these categories differ between Member States. However, all these intermediate categories of working time are characterised by the fact that the employee is not obliged to carry out his/her normal tasks with the usual continuity, but has to be ready to work if called upon to do so, in response to specific events which cannot be predicted precisely in advance. The distinctions between the different intermediate categories relate to the degree of

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<sup>132</sup> *Dellas*, Case C-14/04, judgment dated 1 December 2005, paras 44-45; *Jaeger*, Case C-151/02, paras 58-59.

<sup>133</sup> *SIMAP*, Case C-303/98, judgment dated 3 October 2000, para 47; *Dellas*, Case C-14/04, judgment dated 1 December 2005, paras 42 and 43.

availability, which the employee must provide: for example, whether the employee must be present at the workplace or can remain at home till called, and whether they must remain constantly alert, or can rest or sleep until called. National laws frequently distinguish between the '*active*' periods of on-call time where the worker is actually called upon to work (either at home or at the workplace) and the '*inactive*' periods of on-call time where the worker is still on call, but is not called upon to carry out tasks.

For clarity, in this Working Paper terms are used with the following meanings unless otherwise indicated:

*'on-call time'* = any period where the worker is not required to carry out normal work with the usual continuity, but has to be ready to work if called upon to do so,

*'on-call time at the workplace'* = any period of on-call time where the worker is required to remain present at the workplace or at another place determined by the employer,

*'active on-call time'* = any part of on-call time (at the workplace, at home, or at another place determined by the worker) during which the worker carries out work in response to a call,

*'inactive on-call time'* = any part of on-call time (at the workplace, at home, or at another place determined by the worker) where the worker has not been called on to carry out work,

*'stand-by time'* = any period of on-call time when the worker is *not* required to remain at the workplace (or another place chosen by the employer), and can remain at home (or at another place selected by the worker) until he or she is called to work.

In practice, on-call time at the workplace is widely used for particular sectors of activity which need to provide continuous service; particularly, in health services such as hospitals, in residential care services, for emergency services such as fire-fighters or ambulance crews, and sometimes for police and security forces. However, the length of on-call time, whether it is regular or occasional, the extent to which it may follow consecutively after periods of normal working time, the cumulative working hours which can result, and the frequency and intensity of the demands which may be made, all vary considerably between different sectors and different Member States.<sup>134</sup>

In the *SIMAP* case<sup>135</sup>, the European Court of Justice held in a reference from a Spanish court that **on-call time where doctors were required to remain present at the workplace must be regarded in its entirety as working time within the meaning of the Working Time Directive**. The Court considered that to exclude on-call duty of this sort would 'seriously undermine' the Directive's health and safety objectives:

*"time spent on call by doctors in primary health care teams must be regarded in its entirety as working time and, where appropriate as overtime, within the meaning of Directive 93/104*

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<sup>134</sup> Although this issue falls outside the scope of the Working Time Directive, it is relevant to note that remuneration arrangements also vary considerably, even for the most demanding forms of on-call duty. In practice, on-call time may be paid at overtime rates, at normal hourly rates, at less than normal hourly rates, paid under special systems designed to reflect the intensity of demands actually made, or may be added to normal working time without extra payment.

<sup>135</sup> *SIMAP*, Case C-303/98, [2000] ECR I-07963, judgment dated 3 October 2000

*concerning certain aspects of the organisation of working time, if they are required to be at the health centre.*"<sup>136</sup>

Conversely, the Court held that **on-call time where the doctors were obliged to remain contactable, but were not obliged to be present at the workplace, need not be considered as working time**, save for those periods which were actually spent in providing medical services following a call:

*'the situation is different where doctors in primary care teams are on call by being contactable at all times without having to be at the health centre. Even if they are at the disposal of their employer, in that it must be possible to contact them, in that situation doctors may manage their time with fewer constraints and pursue their own interests. In these circumstances, only time linked to the actual provision of primary care services must be regarded as working time within the meaning of Directive 93/104.'*<sup>137</sup>

In *SIMAP*, the referring court concluded that the on-call arrangements could result in doctors being required to work for up to 31 hours without a break or night rest. In *Jaeger*<sup>138</sup>, the Court was asked in a reference from a German court to clarify the position regarding periods of on-call time ('*Bereitschaftsdienst*') where a hospital doctor was required to remain present at the hospital, but was also provided with a bedroom where he could sleep if not called upon. Here, national law provided that doctors could not be called upon to work during more than 49%, on average, of on-call time, and the other half of on-call time was therefore counted as rest time. The Court confirmed that **on-call periods during which workers had to remain at the workplace, but could rest if not called upon, must also be fully considered as working time and could not be counted as rest periods**:

*"Directive 93/104 must be interpreted as meaning that a period of duty spent by a doctor on call ('Bereitschaftsdienst'), where presence in the hospital is required, must be regarded as constituting in its entirety working time for the purposes of that Directive, even though the person concerned is permitted to rest at his place of work during the periods when his services are not required, with the result that that Directive precludes a Member State's legislation which classifies as a rest period an employee's periods of inactivity in the context of such on-call duty".*<sup>139</sup>

In both cases, the Court considered that the workers in question must be taken as 'carrying out their duties' throughout such periods, for the purposes of the Directive's definition of 'working time', because of the obligation to remain present at the workplace and available to the employer:

*"the decisive factor in considering that the characteristic features of the concept of 'working time' within the meaning of Directive 93/104 are present in the case of time spent on call by doctors in the hospital itself is that they are required to be present at the place determined by the employer and to be available to the employer in order to be able to provide their services immediately in case of need. In fact, as may be inferred from paragraph 48 of the judgment in *SIMAP*, those obligations, which make it impossible for the doctors concerned to choose the*

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<sup>136</sup> *SIMAP*, Case C-303/98, para 49.

<sup>137</sup> *SIMAP*, para 50.

<sup>138</sup> *Jaeger*, Case C-151/02, judgment dated 9<sup>th</sup> September 2003.

<sup>139</sup> *Jaeger*, paras 60 and 61.

place where they stay during waiting periods, must be regarded as coming within the ambit of the performance of their duties".<sup>140</sup>

The Court confirmed this interpretation again in *Pfeiffer* (regarding on-call time ('*Arbeitsbereitschaft*') served by emergency ambulance workers, during which they were obliged to remain at the workplace and to 'remain continuously attentive, in order to be able to act immediately should the need arise'<sup>141</sup>); and in its Order in *Vorel*, which held that Czech law on the work of hospital doctors was incompatible with the Working Time Directive, in not treating inactive periods of on-call time requiring presence at the workplace, as working time for the purposes of the Directive<sup>142</sup>.

In *Dellas*, a reference from a French court, the Court was asked to rule on the compatibility of the '*système d'équivalence*' applied to night duty worked on-call by teaching or nursing staff in residential care establishments. The duty lasted a maximum of 12 hours, between residents' bedtime and rising time, and was spent in a 'watch room' ('*chambre de veille*') provided by the establishment. For working time purposes, the first nine hours of an on-call night duty were counted as equivalent to three hours of normal working time, while each hour after the first nine hours was counted as equivalent to half an hour of normal working time. It was contended that this reflected the low intensity of the work done during night periods, based on experience. The Court noted the French Government's acknowledgement, that on an hour-for-hour basis, '*the method of calculation of on-call duty in the system of equivalence in issue ... is such as to impose on the worker concerned an overall working time which can amount to or even exceed 60 hours a week.*'<sup>143</sup>

The Court again confirmed its previous caselaw, and held that **the Directive did not allow for on-call time requiring presence at the workplace to be calculated as working time in proportion to its intensity**, if this meant that the Directive's minimum requirements were not observed:

*'The conclusion must be in this context, ... that the intensity of the work done by the employee and his output are not among the characteristic elements of the concept of 'working time' within the meaning of [the Working Time Directive]. ... In the first place, it is settled law that on-call duty performed by a worker where he is required to be physically present on the employer's premises must be regarded in its entirety as working time within the meaning of Directive 93/104, regardless of the work actually done by the person concerned during that on-call duty ... [SIMAP, Jaeger, Pfeiffer]. The fact that on-call duty includes some periods of inactivity is thus completely irrelevant in this connection.... Community law requires those hours of presence to be counted in their entirety as working time.'*<sup>144</sup>

Finally it should be noted that the Court's decisions refer not only to on-call time requiring presence at the workplace but also, more widely, to **on-call time which requires presence at any other place determined by the employer.**<sup>145</sup>

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<sup>140</sup> *Jaeger*, para 63.

<sup>141</sup> *Pfeiffer*, Case C-398/01, judgment dated 5th October 2004, paras 16 and 93-95.

<sup>142</sup> *Vorel*, Case C-437/05, Order of the Court dated 11 January 2007, paras 27 and 28.

<sup>143</sup> *Dellas*, para 54.

<sup>144</sup> *Dellas*, paras 43, 46 – 47, 57; see also para 64.

<sup>145</sup> See for example *Jaeger*, paras 63, 65, 69; *Pfeiffer*, para 93.

### 3.3. No implications for remuneration

The decisions regarding on-call time under the Working Time Directive do not necessarily affect remuneration of on-call time or overtime, since remuneration is not covered by the Directive. In *Dellas*, the Court remarked that:

*'it must be pointed out at the outset that, as follows from both the purpose and the actual wording of its provisions, [the Working Time Directive] does not apply to the remuneration of workers. Moreover, that interpretation now follows unambiguously from Article 137(6) EC, which states that the minimum requirements the Council of the European Union may adopt by means of directives intended... to ensure protection of the health and safety of workers, cannot apply to pay.'*<sup>146</sup>

The Court returned to this point in *Vorel*, a case which asked whether Czech law governing the work of hospital doctors was compatible with the Working Time Directive, in providing rates of remuneration which differentiated between active and inactive on-call time:

*'It follows from the case-law of the Court that, save in a special case such as that envisaged by Article 7(1) of [the Directive] concerning annual paid holidays ... [the directive] is limited to regulating certain aspects of the organisation of working time, so that, generally, it does not apply to the remuneration of workers. ... Directives 93/104 and 2003/88 do not prevent a Member State applying legislation on the remuneration of workers and concerning on-call duties performed by them at the workplace which makes a distinction between the treatment of periods in the course of which work is actually done, and those during which no actual work is done, provided that such a system wholly guarantees the practical effect of the rights conferred on workers by the said directives in order to ensure the effective protection of their health and safety.'*<sup>147</sup>

### 3.4. The concept of working time: application in the Member States

In general, the formal definition of working time set out in the Working Time Directive does not appear to give rise to problems of application, though some queries are raised about whether working time includes areas not specifically covered by the Directive, such as time travelling for work purposes, or washing or changing clothes after shifts. National implementation measures tend to reproduce, at the very least, the Directive's definition of 'working time'.

However, difficulties do arise with the transposition of the Court of Justice's interpretation that working time includes on-call time at the workplace. For this reason, the analysis which follows focuses on the transposition of the Directive's requirements as concerns on-call time.

In *Austria*, on-call time at the workplace is fully counted as working time, both for employees generally under the *Arbeitszeitsgesetz*, and within the health services under the legislation governing hospitals. On-call time by civil servants is generally treated as working time, although some regions such as Carinthia do not count inactive on-call time of civil servants as working time.

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<sup>146</sup> *Dellas*, paras 38-39.

<sup>147</sup> *Vorel*, Case C-437/05, Order of the Court dated 11 January 2007, paras 32 and 35.

In **Belgium**, the national authorities report that the definition of working time is broader and more favourable to workers than required by the Directive, and includes both active and inactive on-call time. (Thus, the main law governing working time in the private sector defines working time as all time where the worker is at the employer's disposal<sup>148</sup>.) However, derogations to this definition may be made; if the sectoral social partners unanimously so request, a royal Decree may set out whether 'inactive' on-call time at the workplace is to be counted as working time, in specified sectors (in transport enterprises, transport activities, for film technicians, and in 'essentially intermittent' occupations (those using on-call time in health and education)).

Such Decrees introduce specific provisions regarding the counting of on-call time in boarding schools and certain residential care establishments<sup>149</sup>. Effectively, these provide for a '*système d'équivalence*' similar to that considered in the *Dellas* case. Following the *Dellas* judgment, a further Decree was enacted regarding residential education and accommodation in the Flemish Community to provide that the equivalence system must be applied in such a way as to ensure that total working time could not exceed the maximum limits set by the Directive<sup>150</sup>. The law does not appear to have been amended as concerns the other Communities in Belgium.

Under the Belgian system, working time arrangements are frequently regulated by collective agreements between the sectoral social partners. The treatment of on-call time in these agreements is variable and it appears that there are gaps in the recognition of on-call time at the workplace as working time, including within the public health services and regarding public sector firefighters.

In **Bulgaria**, the Labour Code was amended in 2006 to define 'working time' as any period during which the worker is obliged to perform the work which s/he has agreed to perform. The national authorities state that Article 139(5) of the Labour Code allows provision to be made by law for regulating on-call time for some categories of workers and employees. The only such provision is Ordinance 2 of 22 April 1994 on regulating the duration of on-call time. This measure provides at Article 3 that where the particular nature of the work so requires, a collective agreement or an individual labour contract may regulate on-call time, during which the worker will be available *outside* the workplace, at a place agreed between the employer and the worker or employee, to carry out his functions if called. (This would effectively be *stand-by* time, for the purposes of this chapter.) Stand-by time of this sort is not counted as working time, according to the Ordinance, but is paid at minimum rates. However, work which is performed in response to a call while on stand-by is counted as working time, and in this case the worker or employee is guaranteed their minimum daily or weekly uninterrupted rest period.

**Cyprus** has no specific national legal provisions regarding the treatment of on-call time, but states that on-call time is treated in practice according to the requirements of Community law. However, the Commission emphasises that where a Member State does not transpose a directive by express legal provisions, it must ensure that the legal position is sufficiently clear

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<sup>148</sup> Loi sur le Travail, 16 March 1971, Article 19.

<sup>149</sup> Royal Decrees of 18th January 1995 (internats de l'enseignement subventionnée, Moniteur Belge 03.02.1995); 4th June 1999 (services de garde: M.B. 29.06.1999); 14th February 2000 (maisons d'éducation et d'hébergement: M.B. 24.02.2000).

<sup>150</sup> Royal Decree of 7<sup>th</sup> January 2007 (M.B. 22.01.2007)

and precise to enable individuals to be fully aware of the rights conferred on them by the directive, and to vindicate those rights effectively, where needed, before a national courts or tribunal<sup>151</sup>.

The **Czech Republic** has amended its Labour Code in this respect. With effect from the 1<sup>st</sup> January 2007, Article 79(1)(a) of the Labour Code<sup>152</sup> provides that all on-call time at the workplace is to be considered as working time. Before this, Czech law provided that on-call time requiring presence at the workplace was not to be considered as working time (doctors and health services are also governed by the Labour Code). The national authorities state that treating inactive on-call time as working time has had major negative effects regarding budget implications and shortage of qualified skilled staff on the labour market (doctors, police, fire-fighters, transport employees). Trade unions at national level disagree on this point.

In **Denmark**, working time is traditionally governed by collective agreements, with legislation<sup>153</sup> applying only to workers who are not covered by the collective agreements or whose collective agreements do not provide at a minimum level of protection required by the Directive. Health sector collective agreements generally recognize active, but not inactive on-call time as working time. It appears, furthermore, that such collective agreements often consider inactive on-call time at the workplace as rest time and count it toward minimum rest periods required by the Directive.

The national authorities agree that in many cases, collective agreements do not consider on-call time at the workplace as working time for the purposes of the Directive. The national authorities add that they are reluctant to intervene in collectively-agreed regulations which, overall, provide a high level of protection, and ensure that workers are well remunerated for any on-call time; moreover, they consider that treating on-call time as working time would create significant staffing problems for the public health sector.

In **Estonia**, working time was formerly governed by the Working and Rest Time Act 2001. This measure was repealed by the Employment Contracts Act 2009, which entered into force on 1 July 2009.

Section 2(1) of the Working and Rest Time Act formerly defined working time as time during which a worker is required to perform their normal duties under the supervision of the employer. The national authorities stated that under the Act, all time where a worker is at the workplace and is at the employer's disposal, is always fully counted as working time; even in respect of periods during which the worker is not actively carrying out tasks. A similar definition is contained in Articles 1(1) and 5(7) of the Employment Contracts Act.

Section 10 of the Working and Rest Time Act formerly defined stand-by time as rest time during which the worker must be available to the employer, and not as working time. The national authorities stated that this concept is only used where the worker is outside of the workplace, and it seems that in practice, on-call time was normally spent at home. If the

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<sup>151</sup> *Commission v Germany*, C-131/88, para 6; *Commission v Sweden*, C-287/04, para 6.

<sup>152</sup> Labour Code, Act 262/2006 Sb.

<sup>153</sup> Act no 248 of 8 May 2002, as amended by Act no 258 of 8 April 2003 (Section 2 of Consolidating Act no 896/2004) defines Working Time in Denmark (unless defined otherwise by collective agreement) according to the wording of the Working Time Directive, with effect from 31 July 2003. There is no express provision about on-call time.

worker was required to be present at the workplace, or to undertake work at home, during standby time, then such time is to be recorded as working time. Trade unions stated during the national consultation that they would like the concept to be defined more precisely.

Article 48 of the Employment Contracts Act now refers to on-call or standby time as '*time when the employee is available to the employer by agreement for performing duties outside of working time*', although it adds that '*the part of the on-call time during which an employee is in subordination to the management and supervision of the employer is considered working time*.'

In **Finland**, section 4 of the Working Time Act provides that active or inactive on-call time requiring presence at the workplace is treated as working time. However, section 40 of the Act allows for derogations from this principle by collective agreements. The national authorities agree that in practice, the main collective agreement for doctors provides that inactive periods of on-call time will not be counted as working time; although active periods of working time are always considered as working time.

The national authorities add that they consider it extremely difficult for Finland to treat inactive on-call time fully as working time within the public health service, in view of the continuing shortage of qualified staff in Finland (9% too few doctors, despite expanded training opportunities, and the reluctance of many doctors to accept on-call work due to its implications for family responsibilities.)

In **France**, the Labour Code defines 'actual working time' (*temps de travail effectif*) at Article L 3121-1 (formerly Article 2) as the time during which the worker is at the disposal of the employer and must follow the latter's instructions so that s/he cannot attend freely to personal activities.

There are no express provisions in the Labour Code about active or inactive on-call time requiring presence at the workplace, but the definition of 'actual working time' appears to clearly include active on-call time at the workplace. The Code also refers specifically to 'stand-by duty' at home, and 'periods of inactivity'. Article L-212-4 bis provides that stand-by duty at home, is to be regarded as actual working time for the duration of any intervention that the worker is actually called upon to make, which seems consistent with the Court's decisions.

Article L 3121-9 (formerly Article L.212-4) of the Code then provides that a '*système d'équivalence*' may be set up by decree, following a collective agreement, within specified occupations and jobs which entail 'periods of inactivity'. Such occupations are specified, for example, by the codes governing public health and residential care establishments. In effect, the '*système d'équivalence*' refers to a mechanism whereby it is agreed to calculate a period of on-call time involving significant periods of inactivity as a proportion of the equivalent period of normal working time (for example, that each hour of on-call time at night is counted as a third of a normal working hour.) It gave rise to a number of decrees representing collective agreements in different sectors.

The Code on social and family action (*Code de l'action sociale et des familles*) formerly contained a similar provision<sup>154</sup> which was the legal base for the Decree considered in the

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<sup>154</sup> See Code de l'action sociale et des familles, R.314-202 (version in force 26.10.2004).

*Dellas* case, which applied to teaching or nursing staff performing on-call night duty in residential care establishments.

The national authorities consider that *Dellas* should not be interpreted as invalidating the '*système d'équivalence*' as such, but rather as invalidating a use of the '*système d'équivalence*' which resulted in the total working time infringing the requirements of the Working Time Directive<sup>155</sup>.

Consequently, Decree no 2007-106 of 29<sup>th</sup> January 2007 amended the Code on social and family action to provide that the '*système d'équivalence*' must be applied in such a way as to ensure that the working time limits prescribed by the Directive are not exceeded<sup>156</sup>. The national authorities indicate that the detailed application of this principle is seen as primarily the responsibility of the relevant sectoral social partners, and that the government has invited all such partners to review their collective agreements, in order to ensure that they are in full conformity with the Directive.

In such a situation, the Member State remains responsible, under Article 151(3) of the Treaty on the Functioning of the European Union, for ensuring that EU law is respected.

Working time in public hospitals is governed by laws specific to the public health sector. The definition of working time<sup>157</sup> is identical to that formerly at Article 2 of the Labour Code (above). Before 2003, on-call time of medical staff at the workplace was not treated as working time. However, the national authorities indicate that the law has been changed: with effect from 1<sup>st</sup> January 2003, all on-call time at the workplace is fully treated as working time<sup>158</sup>. In the case of on-call time away from the workplace which does not require continuous and immediate availability to the employer, inactive on-call time is not counted, but active periods where the worker is acting in response to a call (including travelling time to the workplace where applicable) are treated as working time<sup>159</sup>. In December 2006, the *Conseil d'Etat* annulled Decree 2002/1162 (relative to on-call time at night in public hospitals), following the principles established in its *Dellas II* judgment of April 2006, for failing to fix limits to ensure that its '*système d'équivalence*' did not result in incompatibility with the requirements of the Working Time Directive.

Decree 2007/106 of 29 January 2007 fixes limits for the '*système d'équivalence*' in residential care establishments, to ensure that working time in practice remains compatible with the Directive. It provides that workers to whom the '*système d'équivalence*' is applied may not work more than 48 hours per week averaged over 4 months, or 12 hours at night within a 24-hour period, when all hours are fully counted. Similarly Decree 2007-826 of 11 May 2007, providing that the '*système d'équivalence*' in public hospitals must ensure compatibility with the requirements of the Directive.

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<sup>155</sup> See para 64 of the Court's judgment.

<sup>156</sup> The provisions at issue in *Dellas* (of Decree 2001/1384 relative to residential care) had already been annulled by the referring French court, following the Court of Justice's ruling, in April 2006.

<sup>157</sup> Article 5, Decree no 2002-9 of 4<sup>th</sup> January 2002.

<sup>158</sup> Protocole d'accord du 22.10.2001 relatif à l'aménagement et la réduction du temps de travail des médecins...; Décret 2002/1421 (JO 8.12.2002 p. 20310); Arrêté du 30.04.2003 relatif à l'organisation de la continuité des soins..., JO 2.05.2003 p. 7655.

<sup>159</sup> Article 20, Decree no 2002-9 of 4<sup>th</sup> January 2002.

On-call time of professional firefighters is governed by separate legal provisions, under which 'effective' working time may not exceed 1600 hours per year (equivalent to about 34 hours per week). However, this consists of between 2160 and 2400 hours' total working time, organised largely as 24-hour shifts including on-call time at the workplace<sup>160</sup>. If on-call time at the workplace is fully counted, this would represent up to 50 hours per week on average. These rules do not seem compatible with the Court of Justice's decisions regarding on-call time.

**Germany** defines working time (Article 2(1) *Arbeitszeitgesetz*) only as the period between the beginning and the end of work, excluding breaks. Jurisprudence, however, recognises three forms of on-call time: *Arbeitsbereitschaft* ('readiness for work'), *Bereitschaftsdienst* ('on-call service') and *Rufbereitschaft* (stand-by).

*Arbeitsbereitschaft* means that the worker must be available at the workplace, and remain continuously attentive in order to be able to act immediately should the need arise (as in *Pfeiffer*, where the ambulance services had to be able to respond immediately to an emergency). *Bereitschaftsdienst* means that the worker must be available to respond to a call, either at the workplace or another place determined by the employer, but need not be constantly attentive: s/he may rest or sleep, for example, until called (as in *Jaeger*). *Rufbereitschaft* means that the worker need not remain at a place determined by the employer, but must be constantly reachable so that they can be called upon at short notice to act (for example, stand-by at home.)

Formerly, only *Arbeitsbereitschaft* was normally treated fully as working time under German jurisprudence. *Bereitschaftsdienst* and *Rufbereitschaft* were considered as rest periods, except for the periods where the worker was actually called upon to work. Following the Court of Justice's decisions, it appears that it would be necessary to consider *Bereitschaftsdienst* in its entirety as working time and not as rest time.

Germany duly amended the *Arbeitszeitgesetz* in 2003<sup>161</sup> to provide that both *Arbeitsbereitschaft* and *Bereitschaftsdienst* are to be considered as working time. However, there remained some points on which national law or practice was still incompatible with the Directive.

Firstly, Article 25 of the *Arbeitszeitgesetz* initially provided for the transitional continuation in force of collective agreements which did not comply with the Court's decisions regarding on-call time<sup>162</sup>. However, the Federal Labour Court (*Bundesarbeitsgericht*) ruled in January 2006 that such transitional arrangements were not permissible; all such provisions must be interpreted in a way which complied with Community law. Consequently, the transitional period was not renewed again, and was allowed to expire on 31st December 2006.

Secondly, civil servants who are officials (*Beamte*) are not covered by the *Arbeitszeitgesetz*.<sup>163</sup> The national authorities indicate that the law governing the *federal* civil service also treats on-call time requiring presence at the workplace as working time 'under normal circumstances'. They acknowledge that the laws governing civil and public servants of the *Länder and municipal authorities* do not all yet comply with this requirement, particularly as regards on-

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<sup>160</sup> Décret 2001/1382 of 31.12.2001.

<sup>161</sup> *Gesetz zu Reformen am Arbeitsmarkt*, 24 December 2003, with effect from 1.01.2004.

<sup>162</sup> Initially, until 31.12.2005; this period was then extended until 31.12.2006.

<sup>163</sup> Conversely, *employees* in the civil service are covered by the *Arbeitszeitgesetz*.

call time of police and of public service firefighters. However, the national authorities state that "*the principle that 'Bereitschaftsdienst constitutes working time' is ultimately adhered to in practice in the public service, through an interpretation and implementation in line with the Directive.*"

Thirdly, there have been doubts about the conformity of a provision in one collective agreement in the public sector, which appears to provide that on-call time (*Bereitschaftsdienst*) is to be calculated as one-half of regular working time<sup>164</sup>. However, it appears from the available information that in practice, this approach only applies to overtime pay for such periods, and not to their calculation as working time.

Some earlier reports suggested that inactive on-call time at the workplace was still frequently not counted as working time, for example in health services and in private sector fire services. The national authorities disagree with this view.

In *Greece*, the legislation on working time (presidential decrees 88/1999 and 76/2005) contain a definition of working time similar to that in the Directive. There are no specific legislative provisions about the treatment of on-call time. The national authorities indicate that Greek jurisprudence recognises two forms of 'readiness for work': '*true readiness*', (*gnisia etimotita*) where the worker has to remain at a defined place, constantly alert and ready to intervene; and '*simple readiness*', (*apli etimotita*) where the worker has to remain at a defined place<sup>165</sup>, ready to intervene when called, but need not be constantly alert and may sleep or rest if no call is made. The latter category includes<sup>166</sup> a doctor working on-call overnight at a hospital.<sup>167</sup> The national authorities also state that under Greek jurisprudence, '*true readiness*' is considered fully as working time, but '*simple readiness*' is not, and is counted only in respect of 'active' periods. Thus, inactive on-call time at the workplace is not counted as working time. This is not compatible with the Court of Justice's decisions.

Moreover, the situation in public health services in Greece is anomalous. Successive legal measures<sup>168</sup> have suspended the application of the relevant provisions of the presidential decrees to the public health sector, based on the 'urgent need to ensure good 24-hour functioning of hospital institutions.' Many reports indicate that in practice, medical staff working in public hospitals or in dispensaries within the national health system are required to work extremely long and frequent on-call hours at the workplace, and that neither active nor inactive on-call time of this sort is counted as working time.

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<sup>164</sup> '*Bereitschaftszeiten werden zur Haelfte als tarifliche Arbeitszeit gewertet*', Article 9(1)(a), Tarifvertrag fuer den oeffentlichen Dienst (TVoED); '*Die Summe aus Vollarbeits- und Bereitschaftszeiten darf durchschnittlich 48 Stunden woeentlich nicht ueberschreiten*,' Article 9(1) TVoED. In contrast, provisions allowing proportionate counting of on-call time in other public sector collective agreements (Art 9(2) TV-Aerzte-TdL and Art 46(1) TVoED-BTK) are expressly limited to calculation for pay purposes (and cannot apply when calculating working time limits.)

<sup>165</sup> For both '*true readiness*' and '*simple readiness*', the defined place need not be the workplace, and can also be the home, for example, if so agreed between the parties.

<sup>166</sup> Supreme Court decision 459/65.

<sup>167</sup> In cases where the worker must remain at the workplace or at another place selected by the employer, '*true readiness*' appears equivalent to the on-call time considered by the Court of Justice in *Pfeiffer*, while '*simple readiness*' appears equivalent to the on-call time considered by the Court of Justice in *Jaeger*.

<sup>168</sup> Article 6(1) of Act 3527/2007, Government Gazette 25/A/09-02-07, and successive joint Ministerial decisions of the Ministers of Health and Finance made under that Act; Law no 3654/2008 of 3 April 2008, with retroactive effect from 01.01.2008.

In *Hungary*, working time is defined by the Labour Code as the period from the beginning to the end of the time prescribed for working, including any preliminary and finishing activities related to work. National law recognises two concepts of availability for work outside normal working time limits: on-call duty (*ügyelet*), and stand-by duty (*készenlét*). In either case, the worker is obliged to remain available for work, but may rest if they are not called. The difference is that during *ügyelet* the worker must remain at a place specified by the employer (equivalent to the type of on-call time at issue in *Jaeger*), while *készenlét* is spent at a place chosen by the worker that can be reached from the place of work, and is normally spent at home.

Formerly, national law only treated active periods of either *Ügyelet* or *Készenlét* as working time, but the Court of Justice's decisions would also require inactive periods of *Ügyelet* to be treated as working time.

With effect from 1 January 2008, Act LXXIII of 2007 amends Section 117 of the Labour Code to provide that the entire duration of *Ügyelet* shall be considered as working time when calculating maximum weekly working time. In this respect, Hungarian law appears now to comply with the Directive.

These definitions regarding *Ügyelet* and *Készenlét* are applied generally, with some specific derogations in the health sector and public education sector.

The detailed rules for on-call time in the health sector have undergone changes. Government Decree 233/2000 formerly provided that either on-call time was not counted as working time, or active periods (only) could be partly counted as working time (proportionate to the average intensity of the work actually performed). The Supreme Court held in 2005 that on-call time must be fully counted as working time, following *SIMAP*, *Jaeger* and *Dellas*<sup>169</sup>. It appears that Act LXXII of 2007 amending the Health Service Act now provides for all on-call time at the workplace within the health sector (active and inactive periods) to be fully considered as working time.

In the public education sector, the national authorities state that national law generally considers active or inactive on-call time at the workplace as working time, in accordance with the Labour Code. However, derogations are allowed in the context of boarding schools, or of school expeditions and any other programme organised outside the educational institutions and specified in an educational plan, where a teacher has on-call responsibilities to take care of pupils at night, or during the weekly rest day or holiday.<sup>170</sup> (It is not clear whether these derogations comply with Community law, as no details are yet available.)

Finally, it is worth noting the existence in Hungary of 'stand-by jobs' (*Készenléti jellegű munkakör*<sup>171</sup>). These are defined by Section 117(1)k. of the Labour Code<sup>172</sup> as jobs where due

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<sup>169</sup> Decision BH 2006/374.

<sup>170</sup> The national authorities state that these derogations are allowed by Government Decree 138/1992 on the basis of Act LXXIII of 2007 amending the Labour Code.

<sup>171</sup> Despite the name 'stand-by job', it cannot be assumed in these cases that any inactive time will be 'stand-by' rather than 'on-call' as the terms are used in this Report (that is, spent at a place selected by the worker, such as at home, rather than by the employer).

<sup>172</sup> Before 2007 there was no formal definition of 'stand by jobs' in national law, but the concept was used with a similar meaning. The definition was inserted by Act LXXIII of 2007, with effect from 1 July 2007.

to the nature of the tasks involved and the working conditions, at least one-third of total working time is effectively inactive and the employee can rest during those periods, *or* the work performance is considered to involve a significantly lower burden for the employee, compared to the average. (Security staff, concierges, private-car drivers and repair workers are often employed on stand-by contracts. The national authorities estimate that about 20,000 workers are concerned). National law allows a number of derogations from Working Time rules for ‘stand-by jobs’, and these are discussed in the following chapters.

In **Ireland**, the Organisation of Working Time Act 1997 defines working time as any time during which the employee is at the workplace or at the disposal of the employer, and is carrying out their activities or duties.

Irish law does not contain any provisions regarding on-call time at the workplace, other than regarding doctors in training<sup>173</sup>. On-call time at the workplace is widely used, including within the public health services, in private security services, residential care and in boarding schools, and practice does not comply with the Court of Justice's decisions.

In **Italy**, Legislative Decree 66/2003 defines working time according to the definition in the Working Time Directive. The detailed organisation of working time is normally regulated by collective agreements. There are no specific provisions regarding on-call time; however, national jurisprudence and practice have always considered both active and inactive on-call time at the workplace to be working time, and practice (both in the health sector for doctors and nurses, and generally) seems to comply with the Court of Justice's decisions.

In **Latvia**, Art. 130 of the Labour Code defines working time as the period within which the employee performs work or is at the disposal of the employer, except for breaks. The Code makes no specific provision for on-call time. The national authorities state that since a worker remains at the disposal of the employer during on-call time, on-call time is considered as working time in Latvia and is not to be considered as rest time.

In **Lithuania**, Articles 142 – 144 of the Labour Code define working time as including the time taken to actually do any work, together with hours of duty on-call at home and at the workplace. Other periods treated as working time include the length of a business mission or travel to another locality for work purposes; time needed to prepare a work station, equipment or safety measures; mandatory medical check-ups; and work-related training).

The Labour Code in Lithuania provides that a worker may be assigned to on-call duty at the workplace or at home, though not more than once a month or (with the worker's consent) once a week. Neither the Labour Code nor other laws distinguishes between active and inactive periods of on-call time: Article 155 Labour Code provides that all on-call time at the workplace must be treated entirely as working time, while on-call periods where the worker may remain at home must be counted at least as 50% working time.) A decision of the Administrative Court in 2005 held that inactive on-call time of public service firefighters must be treated as working time under the Labour Code. On-call shifts, whether at the workplace or at home, may not exceed 8 hours per day; if total working time (including the on-call time at home or at the workplace) exceeds normal working hours (40 hours per week), then the

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<sup>173</sup> Statutory Instrument 494/2004 provides that on-call time at the workplace must be counted as working time in the case of doctors in training, with effect from 1 August 2004 (see chapter 2).

worker is entitled to compensatory rest during the following month, equivalent to the excess hours, or to payment at overtime rates.

In **Luxembourg**, national legislation defines working time as any period during which the worker is at the employer's disposal. This appears to cover active or inactive on-call time at the workplace. In practice, the detailed arrangements for organisation of working time are generally set out by sectoral collective agreements, but no detailed information is available on how they treat on-call time. In such a situation, the Member State remains responsible, under the EC Treaty, for ensuring that Community law is respected.

In **Malta**, the Working Time Regulations (247/2003) do not contain any provisions regarding on-call time. The national authorities indicate that it was established jurisprudence and practice in Malta (even before the *SIMAP* decision) to treat as working time all time where the worker is required to be present at the workplace, and that this principle is consistently applied.

In the **Netherlands**, the Working Hours Act 1996 formerly defined inactive on-call time at the workplace as rest time. However, the Court of Justice's decisions were applied by national courts in a number of cases<sup>174</sup> brought by firefighters and ambulance workers about the treatment of on-call time. Consequently, the Working Hours Decree 605/2005 amended national law to define inactive on-call time at the workplace as working time, with effect from 1 June 2006. According to national law, collective agreements which pre-date the Decree are now void, to the extent that they define inactive on-call time other than as working time.

The national authorities indicate that treating inactive on-call time as working time is considered to have considerable implications for a large numbers of sectors – health, residential care, nursing homes, support services for people with disabilities, midwifery, ambulance and fire services, and defence forces. As a temporary measure, the Netherlands has introduced a limited opt-out within sectors using extensive on-call time (see details in chapter 5.3).

In **Poland**, the Labour Code defines working time as time during which the worker is at the disposal of the employer, either at the workplace or at another place designated for work performance. There is no express requirement that the worker is actually carrying out work, provided s/he is at the employer's disposal to do so.

However, Article 151 of the Labour Code specifies that only active periods of on-call time at the workplace need to be treated as working time. Inactive periods do not need to be treated as working time; though they are not to be treated as rest periods, and must result in compensatory rest, or, if that is impossible, financial compensation.<sup>175</sup>

Doctors and other graduate healthcare workers in health institutions providing 24-hour care, are governed by separate health legislation, the Law on Healthcare Establishments (Law no 91/1991, 'ZOZ'). This law formerly provided at section 32 that on-call time at the workplace

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<sup>174</sup> Arnhem Court of Appeal, 16 January 2007 (RAR 2007 42); Divisional judge, Arnhem, 9 September 2005 (LJN: AU 2499.)

<sup>175</sup> On 28 February 2008, the national authorities published proposals to amend the Labour Code, to require that both active and inactive on-call time at the workplace must be treated as working time. However, they state that work on these amendments has been halted, following the EPSSCO Council's agreement in June 2008 on a Common Position on the legislative proposal to amend the Working Time Directive.

by these workers (whether inactive or active) was not counted as working time. A judgment of the Supreme Court in 2006 held that the concept of working time under the ZOZ must be interpreted in accordance with the Working Time Directive<sup>176</sup>. The national authorities have amended these provisions by an Act of 27 August 2007, with effect from 1 January 2008, to provide that on-call time at the workplace is to be counted as working time. This covers both active and inactive periods of on-call time.

The national authorities indicate that compliance with the Court of Justice's rulings in this sector will impose considerable challenges for funding and organisation of the health services, and have introduced an opt-out within the health sector at the same time as the amendment regarding on-call time (see details in chapter 5.3).

The national authorities state that under a legislative change in 2008, on-call duty for professional soldiers is counted fully as working time<sup>177</sup>.

In **Portugal**, working time is defined under Article 197 of the revised Labour Code as '*any period during which the worker is carrying on activity or is required to be at the employer's disposal,*' together with various interruptions and intervals, specified in Article 197(2), which go beyond the requirements of the Directive (including, for example, occasional interruptions inherent to satisfying urgent personal need of the worker, interruptions caused by factors such as shortages of power, raw materials, interruption in orders, or meteorological factors affecting the undertaking's activities).

It appears that Article 197 is interpreted as requiring active or inactive periods of on-call time to be considered as working time. It is not possible to derogate from this rule, including by collective bargaining. The national authorities indicate that the rules on working time applicable to civil servants also comply with the requirements of the Working Time Directive.

In **Romania**, working time is defined by the Labour Code 2003 at Art. 108, as it is defined in Article 2 of the Directive; except that the national law qualifies this by adding 'in accordance with the provisions of the individual labour contract, the applicable collective agreement and/or national laws in force'. There are no specific provisions in the Labour Code regarding active or inactive on-call time at the workplace.

In addition, separate legislation regulates working time for civil servants, and collective labour contracts regulate working time for various sectors including the health, transport, mass-media, glass, construction and automotive sectors. According to Law 330/2009 of 9 November 2009, overtime hours worked by public servants are to be compensated by corresponding free time, and not by overtime payments. Overtime exceeding 180 hours per year requires the approval of the workers' union or of employees' representatives. The national authorities state that all time where police or firefighters are on duty is counted fully as active working time, and may not exceed an average of 48 hours per week over a 3-month reference period.

Working time in the public health sector is governed both by the sectoral collective agreement mentioned above, and by several Orders of the Minister of Health, 2003 – 2009. Under

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<sup>176</sup> Supreme Court, I PK 265/05, judgment dated June 6<sup>th</sup>, 2005.

<sup>177</sup> Art. 4(2)(1), Ordinance of the Minister of National Defence of 26 June 2008 on professional soldiers' duty time (Dz.U. No 122, item 780), with effect from 25 July 2008.

Ministerial Order 556/2009, on-call hours at the workplace are to be recorded as working time. A Ministerial Order of 2004<sup>178</sup> provides that continuity of medical assistance is ensured through night shifts which last from the end of working time on Day 1 until the beginning of working time on Day 2, or for 24 hours during weekly rest days and legal holidays. It is not clear whether these shifts are consistent with limits to weekly working time.

In the *Slovak Republic*, working time is defined (both at Article 85 of the Labour Code and in the various Acts regulating working time for different sectors of the public service) as it is in the Working Time Directive.

Regarding on-call time, the Labour Code formerly provided at Article 96 that inactive periods during on-call time at the workplace were not treated as working time. However, this provision has been amended with effect from September 2007<sup>179</sup>, to provide that both active and inactive periods of on-call time at the workplace must be treated as working time. Where on-call time is spent outside the workplace<sup>180</sup>, only active periods need to be treated as working time.

Similarly, in the health services, inactive on-call time at the workplace was not considered as working time before 2007; following the 2007 amendments, it is understood that active and inactive on-call time at the workplace are now treated as working time. The national authorities indicate that complying with the Court's interpretation presented serious challenges, both in employing more doctors, and in reorganising service provision, in order to ensure adequate and continuous medical care. Serious problems were likely for smaller medical facilities, which would need a greater range of qualified specialists. The Slovak Republic therefore introduced an opt-out for the health sector at the same time as the change regarding on-call time (see details in chapter 5.3).

It is not clear whether on-call time at the workplace in other sectors of the public service, and particularly for firefighters, is fully counted as working time.

In *Slovenia*, the Employment Act (No 42/2002) governs both the public and private sectors, unless more specific legislation applies (or a collective agreement, which may not lay down less favourable provisions for workers than those contained in the Act). Article 141 of the Act defines a concept of '*effective working time*' which follows the definition of working time at Article 2 of the Working Time Directive. This '*effective working time*', together with a 30-minute pause break during working time, and justified absences from work, are all defined as working time. However, the Employment Act does not appear to contain any provisions about on-call time, and this question is regulated by special acts or by collective agreements. No information is available about the compliance of collective agreements with the Court's decisions on on-call time.

Working time for doctors is regulated by the Articles 41 and 42 of the Medical Services Act 2002 (No 67/2002, ZZdrS-A), which was amended in 2003 and 2006 regarding on-call time, while working time for other staff in the health sector is regulated by the Health Services Act (ZZdej-G), amended by Act no 2/2004 regarding on-call time. Both Acts now provide that on-

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<sup>178</sup> Ministry of Health Order no 870/2004

<sup>179</sup> Labour Code, Article 96.

<sup>180</sup> Article 96(4) of the Labour Code provides that '*the place where the inactive part of on-call time is spent outside the workplace is always determined by mutual agreement of the employer and the employee.*'

call time at the workplace is a special category of working time, which includes both active and inactive periods of work; all hours spent on-call at the workplace are considered as working time ‘for the purposes of the right to breaks and rest’<sup>181</sup>. However, it is indicated that due to serious shortages of qualified medical personnel, Slovenia introduced an opt-out, limited to the health sector, at the same time in order to safeguard continuous provision of medical care (see details in chapter 5.3).

The legal acts regulating the armed forces, police, prisons, judges, and prosecutors, expressly provide that inactive periods during on-call time at the workplace are not to be treated as working time. This would not comply with the Court of Justice’s decisions.

In *Spain*, the national authorities indicate that the generally applicable labour law (the Workers’ Statute) has always considered on-call time at the workplace, whether active or inactive, as working time.

Statutory personnel in the public health sector were subject to exceptional rules (discussed in the SIMAP case), which were amended in December 2003 (Law no 55/2003) to provide that on-call time requiring presence at the workplace is treated as working time. At the same time, a limited opt-out was introduced for performance of on-call time necessary to ensure continuity of care (see details in chapter 5.3). This law primarily covers doctors and nurses in public health centres and institutions. The national authorities indicate that officials and other non-statutory personnel in such centres are also covered by some provisions of the Law 55/2003.

Officials in the public sector are not regulated by the Workers’ Statute but by rules of administrative law, which do not always comply with the Directive. In a judgment of 14<sup>th</sup> May 2004, the Spanish High Court held that the Directive must be applied to officials in the prison health services; this was subsequently done by Instruccion 7/2005 of 23 May 2005. However, Spain does not appear to comply with the requirements of the Directive regarding on-call time within the Guardia Civil. Nor is it clear that the rules on on-call time at the workplace for public service firefighters comply with the Court of Justice’s judgments.

In *Sweden*, the Working Hours Act 1982 (as amended in 2005, SFS 2005:165) does not contain any specific provision requiring that on-call time at the workplace is treated as working time. However, the commentary accompanying the 2005 amendments, which influences interpretation of the law under the Swedish legal system, refers to the Court of Justice’s decisions regarding on-call time. The Working Hours Act applies to the public sector, such as hospitals, while exempting the police, civil protection services and defence forces.

In practice, the definition of working time is extensively regulated by collective agreements, including in the public health sector. The Working Hours Act provides that collective agreements are, however, void to the extent that they provide less favourable rules for workers than those which apply under the Working Time Directive. The 2005 amendments allowed a transitional period until 1 January 2007, for collective agreements already in force. Despite the commentary to the 2005 amendments, and the transitional period, it seems to be

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<sup>181</sup> This formulation seems curious, as it makes it unclear whether on-call time is – most importantly – also treated as working time for the purposes of Article 6 of the Directive (limits to maximum weekly working time.)

generally agreed that most collective agreements in 2007 did not provide that active and inactive on-call time at the workplace are to be treated as working time.

Both the national authorities, and independent reports, state that the acquis regarding on-call time is considered as imposing severe restrictions on a subject which ‘*has been regulated for decades by collective agreement to the satisfaction of both employers and employees.*’ Protective provisions should be maintained, but it should be possible to derogate from them by collective agreements.

The national authorities indicate that in general, the same rules regarding working time apply to the public service as in the rest of the labour market, (including the Court of Justice's decisions regarding on-call time.) The only exceptions are ones which relate to the specific characteristics of certain activities in the defence forces and police, and the national authorities consider that these comply with the Directive.

In the *United Kingdom*, the Working Time Regulations 1998 define ‘working time’ similarly to the definition contained in Article 2 of the Working Time Directive, and apply both to the public and to the private sectors.

The Regulations do not contain any specific provisions regarding the treatment of on-call time. The national authorities indicate that the UK courts have consistently applied the Court of Justice's interpretation that active and inactive on-call time at the workplace must be fully counted as working time<sup>182</sup>, and that the SIMAP-Jaeger decisions are explained in the Government guidance on working time. Some contributions from the social partners dispute that this is the case in practice.

Working time and related conditions in the public health services are regulated by two wide-ranging national sectoral agreements (1991 ‘*New Deal*’ and 2004 ‘*Agenda for Change*’) between the Government and several professional bodies representing doctors and medical training. The New Deal agreement treats both active and inactive on-call time at the workplace as working time. (The UK uses the opt-out, but both the national authorities and the TUC state that the opt-out is used by only a small proportion of doctors (particularly senior doctors), and nurses, and is not widely used in the public health sector. See details in chapter 5.3.)

The national authorities in the UK are critical of the impact of the *SIMAP-Jaeger* decisions. They argue that while working time limits and rest breaks benefit doctors and patients, treating inactive on-call time at the workplace as working time has distorted medical training. They also state that it has caused particular problems for residential care services, where sharing 24-hour care between larger teams can be impractical and expensive.

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<sup>182</sup> See *Gallagher v Alpha Catering*, EAT, [2004] EWCA Civ 1559 (inactive on-call time cannot be treated as a rest break); *MacCartney v Oversley House Management*, EAT, [2006] ICR 510 (resident manager of sheltered accommodation who was on call for 24-hour periods 4 times per week: entirety of on-call time to be treated as working time); *Anderson v Jarvis Hotels*, EAT/0062/05 (guest care manager required to be available to guests during ‘sleep-overs’ at hotel several times each week: entirety of sleepover time to be treated as working time.)

### 3.5. Conclusions

In general, the formal definition of working time set out in the Working Time Directive does not appear to give rise to problems of application, though some queries are raised about whether working time includes areas not specifically covered by the Directive, such as time travelling for work purposes, or washing or changing clothes after shifts.

Essentially, difficulties arise rather with its interpretation as including on-call time at the workplace, following the Court of Justice's decisions in *SIMAP* (C-303/98), *Jaeger* (C-151/02), *Pfeiffer* (C-398/01) and *Dellas* (C-14/04). For this reason, the analysis in this chapter has focused on the transposition of the Directive's requirements as concerns on-call time.

A number of Member States (Czech Republic, France, Germany, Hungary, the Netherlands, Poland, Slovakia and the UK) have made significant changes to their legislation or practice in order to comply more closely with the *acquis* regarding on-call time.

It is worth noting that in some Member States, an 'opt-out' under Article 22 of the Directive was introduced as part of these changes (for example, in Czech Republic, France, Germany, Hungary, the Netherlands, Poland, Slovakia, Slovenia, Spain.) (Details are given in chapter 5.3.)

***On-call time at the workplace still does not appear to be correctly treated as working time, according to the Court of Justice's decisions, in the following Member States:***

Active and inactive on-call time, and for various sectors:

Ireland

Active and inactive on-call time, by derogation for specific sectors:

Greece (doctors in public health services); Spain (police, public service firefighters);

Inactive on-call time only, for various sectors:

Denmark (under wide range of collective agreements); Finland (derogations by collective agreements); Greece: Poland (other than health sector and army); Sweden (collective agreements)

Inactive on-call time only, for specific sectors:

Belgium (derogations by Royal decree or collective agreement in the sectors of education, health, firefighters, transport, film technicians)

France (firefighters)

Slovenia (armed forces, police, prisons, judges and prosecutors)

***The compatibility of national law with the Directive is unclear in the following Member States:***

Cyprus (lack of any express legal provisions),

France (uncertainty about the compliance of collective agreements generally),

Hungary (derogations in public education),

Luxembourg (uncertainty about the compliance of collective agreements generally),

Romania,

Slovakia (parts of public service, firefighters),

Slovenia (public and private sectors, other than in the public services listed under the previous heading).

## 4. LIMITS TO WEEKLY WORKING TIME: REFERENCE PERIODS

### 4.1. Limit to weekly working time

Article 6 of the Working Time Directive provides that:

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

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

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

The Article thus provides, firstly, that weekly working time must be limited by specific measures, and secondly, that the limit to average weekly working time<sup>183</sup> shall be less than or equal to 48 hours per week. Any overtime should be included in this average.

'Average working time' is calculated under the Directive by averaging weekly working time over a 'reference period'. This is normally four months, under Article 16(b) of the Directive; by way of derogation from Article 16(b), it may be up to six months in specified situations, or up to 12 months by collective agreement<sup>184</sup>. The four weeks' minimum paid annual leave required by the Directive, and any sick leave, must be excluded or neutral in calculating this average<sup>185</sup>.

The Court of Justice has repeatedly held that *'in view of both the wording of Article 6(2) ... and the purpose and scheme of the directive, the 48-hour upper limit on average weekly working time, including overtime, constitutes a rule of Community social law of particular importance from which every worker must benefit, since it is a minimum requirement necessary to ensure protection of his safety and health'*<sup>186</sup>.

Similarly, the Charter of Fundamental Rights of the European Union provides at Article 31(2) that *'Every worker has the right to limitation of maximum working hours ...'*<sup>187</sup>

The Court has also indicated that Article 6(2) *'fulfils all the conditions necessary for it to produce direct effect'*. Accordingly, it provides a Community law right for individuals whose minimum level of protection may be enforced against public authorities; as well as obliging national courts, in disputes between individuals, to *'consider the whole body of rules of national law and to interpret them, so far as possible, in the light of the wording and purpose of the directive in order to achieve an outcome consistent with the objective pursued by the directive ...* [In the *Pfeiffer* case, this meant that] *the national court must thus do whatever lies*

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<sup>183</sup> Following the Court of Justice's decisions, working time in this context includes all on-call time at the workplace. See chapter 3.1.

<sup>184</sup> See detailed discussion below.

<sup>185</sup> Article 16(b) Working Time Directive.

<sup>186</sup> *Pfeiffer*, para 100; *Dellas*, para 49; *Vorel*, para 23; *Fuß*, Case C-243/09, para 33.

<sup>187</sup> Charter of Fundamental Rights of the European Union, OJ 2000 C 364, p. 1.

*within its jurisdiction to ensure that the maximum period of weekly working time, which is set at 48 hours by Article 6(2) of [the Working Time Directive] is not exceeded.'*<sup>188</sup>

Moreover, the Court has held that *'in order to ensure that [the Directive] is fully effective, the Member State must prevent the maximum weekly working time laid down in Article 6(b) of the Directive from being exceeded'*.<sup>189</sup> If a worker is required under national rules to exceed the 48-hour average limit, such rules *'constitute an infringement of [Article 6(b) of the Directive], without there being any need to establish in addition whether that worker has been subjected to a specific detriment.'* Indeed, in enacting the Directive, the EU legislature is taken to have considered that exceeding the 48-hour limit (unless a relevant derogation applies) *'in itself causes workers to suffer detriment since their safety and health are adversely affected.'*<sup>190</sup>

Since Article 6(b) is considered as having direct effect, it may in such circumstances *'be relied on by individuals against the [Member] State, including in its capacity as an employer, in particular where it has failed to transpose that directive into national law or has transposed it incorrectly.'*<sup>191</sup> The Member State in this context includes all its authorities including regional authorities, cities and towns or communes, as well as national courts<sup>192</sup>.

An exception exists where the Member State concerned has used a relevant derogation such as Article 22(1); however, this is *'subject to compliance with all the conditions'* set out for that derogation under the Directive<sup>193</sup>.

In *Fuß II*<sup>194</sup>, the Court underlined that Member States may not unilaterally limit the scope of Article 6(b), by attaching conditions or restrictions to the worker's right not to work more than 48 hours per week on average.

Workers on board seagoing fishing vessels are excluded from the application of Article 6; Article 21(1) lays down specific requirements on maximum working time for this group.

#### *4.1.1 Need for effective application of limit to weekly working time*

In *Fuß*, the Court considered a situation where an employee of a public authority was obliged under national regulations to work a standard 54-hour week (including on-call time at the workplace.) The worker asked to have the 48-hour limit to average weekly working time under the Directive applied to his job, and was transferred the following month (without his agreement) to a different job with the same employer, though at the same grade, where the 48-hour limit was applied to him. The national court asked the Court of Justice for a ruling on whether the compulsory transfer, which was lawful under national law, was contrary to the Directive.

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<sup>188</sup> *Pfeiffer*, para 106 and discussion at paras 107-120. The Court had noted that no derogations applied in this case.

<sup>189</sup> *Fuß*, para 51,

<sup>190</sup> *Fuß*, paras 53-55.

<sup>191</sup> *Fuß*, para 56.

<sup>192</sup> *Fuß*, para 61.

<sup>193</sup> *Fuß* para 58.

<sup>194</sup> *Fuß II*, C-429/09

The Court held that such a transfer was contrary to Article 6(b) of the Directive, since workers could not enjoy effectively the right to a 48-hour maximum limit if they were liable to compulsory transfer for requesting its application to their job:

*'It must be stated that the effect of a compulsory transfer such as that in the main proceedings deprives of all substance, in regard to a fire fighter, such as Mr Fuß, employed in an operational service, the right to a maximum working week of 48 hours in that post, conferred by Article 6(b) and recognised by the Court in the order in Personalrat der Feuerwehr Hamburg. Consequently, such a measure destroys the useful effect of that provision in regard to that worker. It is evident, therefore, that that measure does not ensure either the implementation in full of Article 6(b) of Directive 2003/88 or the protection of the rights which that provision confers on workers in the Member State concerned.*

*In addition, ... the fundamental right to effective judicial protection, guaranteed by Article 47 of the Charter of Fundamental Rights of the European Union, which, according to the first subparagraph of Article 6(1) EU, has 'the same legal value as the Treaties', would be substantially affected if an employer, in reaction to a complaint or to legal proceedings brought by an employee with a view to ensuring compliance with the provisions of a directive intended to protect his safety and health, were entitled to adopt a measure such as that at issue in the main proceedings'*

The Court added that *'Fear of such a reprisal measure, where no legal remedy is available against it, might deter workers who considered themselves the victims of a 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 ..'*<sup>195</sup>

*The answer to the questions referred is therefore that Article 6(b) of Directive 2003/88 must be interpreted as precluding national rules, such as those at issue in the main proceedings, which allow a public-sector employer to transfer compulsorily to another service a worker employed as a fire fighter in an operational service on the ground that that worker has requested compliance, within the latter service, with the maximum average weekly working time laid down in that provision. The fact that such a worker suffers no specific detriment by reason of that transfer, other than that resulting from the infringement of Article 6(b) of Directive 2003/88, is irrelevant in that regard.'*<sup>196</sup>

#### **4.2. Derogations from the limit to weekly working time**

It is important to note that while the Directive provides a relatively broad range of derogations from Article 16(b) regarding the period over which working time may be averaged, it provides very few derogations from the principle that weekly working time must be limited by specific measures or from the maximum limit of 48 working hours per week on average, including overtime<sup>197</sup>.

Essentially there are only three possible derogations from Article 6 on maximum weekly working time:

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<sup>195</sup> The Court referred here by analogy to a case on victimisation contrary to the Equal Treatment (gender) Directive, Case C-185/97 *Cooté* [1998] ECR I-5199, paragraphs 24 and 27).

<sup>196</sup> *Fuß*, paras 65-67.

<sup>197</sup> See in particular the Court's comments at *Pfeiffer*, paras 96-97, and *Jaeger*, paras 83 and 101.

- Article 17(1): Member States may derogate from Article 6, with due regard to the general principles of the protection of the safety and health of workers, 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' (the 'autonomous workers' derogation).<sup>198</sup>
- Doctors in training<sup>199</sup>: Member States could derogate from Article 6 during a transitional period from August 2004 to July 2009 as regards doctors in training; though at a minimum, working hours had to be reduced to 58 hours per week on average by 1 August 2004 and to 56 hours by 1 August 2007. Since 1 August 2009, the 48-hour limit applies to doctors in training, except for three Member States which applied to use special extended transitional arrangements. In those three Member States (Hungary, the Netherlands, UK) weekly working time of doctors in training may be up to 52 hours on average, over a reference period not exceeding six months, until 31 July 2011.
- Article 22(1)<sup>200</sup>: Member States 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 they take the specified protective measures, including that the employer must have the prior agreement of the worker concerned to exceed 48 hours per week. (the 'individual opt-out').

This chapter concentrates on the application of Article 6, on practices which do not seem to fall within the three possible derogations to Article 6, and on the application of the reference periods allowed by the Directive.

The Directive's other main provisions for derogation - Article 17.3 (specific activities), Article 17(4) (shift work), and Article 18 (collective agreements) – do not allow derogation from Article 6's maximum 48-hour limit to average weekly working time<sup>201</sup>.

The Court of Justice held in *Pfeiffer* that '*Member States cannot unilaterally determine the scope of the provisions of the ... [Working Time Directive] by attaching conditions or restrictions to the implementation of the workers' right under Article 6(2) of the Directive not to work more than 48 hours per week... Any other interpretation would misconstrue the purpose of the directive, which is intended to secure effective protection of the safety and health of workers by allowing them to enjoy minimum periods of rest ...*'<sup>202</sup>

### 4.3. Calculation of weekly working time - reference periods

The rules for calculating average weekly working time, for the maximum limit to weekly working time under Article 6, are contained in several different provisions of the Directive. In summary, the rules are as follows:

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<sup>198</sup> Time constraints prevented a detailed examination in this Report of the application of this derogation, although concerns were expressed in a number of national reports and by different actors that it was being applied too broadly in some contexts. This issue should therefore be borne in mind for a future review.

<sup>199</sup> This derogation is discussed in detail in chapter 2.6.

<sup>200</sup> This derogation is discussed in detail at chapter 5.

<sup>201</sup> *Pfeiffer*, paras 96-97; *Jaeger*, paras 83 and 101.

<sup>202</sup> *Pfeiffer*, para 99; *Fuß*, para 52.

- Weekly working time (for the purposes of the limit in Article 6) is to be calculated by taking the **average over a 'reference period'** : Article 16(b))
- The general rule: Member States may lay down a reference period which shall not be longer than **4 months**: Art. 16(b)
- By way of derogation, a reference period of up to **6 months** may be adopted (by laws, regulations or administrative provisions, collective agreements, agreements between the 2 sides of industry) **in the situations specified at Article 17(3)**<sup>203</sup>.
- By way of derogation, a reference period of **up to 6 months** may be adopted, only by **collective agreement** or agreement of the two sides of industry, outside the situations specified in Article 17(3): Article 18.<sup>204</sup>
- Member States may, subject to compliance with the general principles relating to the safety and health of workers, allow **collective agreements**, or agreements between the two sides of industry, to set reference periods not exceeding **12 months**, 'for objective or technical reasons or reasons concerning the organisation of work': Article 19.
- Any extension of the reference period beyond four months is a derogation, and is **subject to the condition that the workers concerned receive equivalent 'compensatory rest'**<sup>205</sup> for any missed rest periods: Articles 17(2) and 17(3), Article 19.
- The minimum **paid annual leave** (four weeks per year) at Article 7, and periods of **sick leave**, are **not included**, or are neutral, in calculating the average: Article 16(b).

Special derogations apply to particular groups:

- Doctors in training: Member States could derogate to provide a reference period not exceeding 12 months for the period August 2004 – July 2007. From 1 August 2007, the reference period may not exceed 6 months: Article 17(5)<sup>206</sup>.
- Offshore workers: Member States may derogate to provide a reference period not exceeding 12 months, subject to general principles of protecting workers' health and safety and to consultation and social dialogue, for objective or technical reasons or reasons concerning the organisation of work: Article 20.2.
- Workers on board seagoing fishing vessels: special rules on maximum working time, reference period to be fixed by Member States, must not exceed 12 months: Article 21.

The Court of Justice has noted that the Directive 'leaves the Member States a degree of latitude when they adopt rules in order to implement it, particularly as regards the reference

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<sup>203</sup> For the activities covered by Article 17(3), see the box in chapter 1. Such an extension may not exceed 6 months: Article 19.

<sup>204</sup> Such an extension may not exceed 6 months: Article 19.

<sup>205</sup> For the requirement and timing of equivalent compensatory rest, see chapter 4. Article 17(2) allows an exception to this requirement only in '*exceptional cases*', where granting equivalent compensatory rest would be '*not possible for objective reasons*'.

<sup>206</sup> See details at chapter 7.

period to be fixed for the purposes of applying Article 6 of that directive', but that in any event, 'the reference period can never exceed 12 months'.<sup>207</sup>

#### 4.4. maximum weekly working time: application in the Member States

In *Austria*, it is necessary to distinguish between the rules for normal and for total weekly working time. Section 3(1) of the Working Time Law (*Arbeitszeitgesetz*, AZG) provides that *normal* daily working time may not exceed 8 hours, and *normal* weekly working time may not exceed 40 hours. Collective agreements may allow longer hours, provided that on average, normal weekly working time does not exceed 40 hours, over a reference period which may be longer than one year.

Section 9 AZG then provides that *total* weekly working time (including overtime) may not exceed 50 hours in any one week, and 48 hours on average. The average is to be calculated over not more than 17 weeks (section 9(4) AZG), but the reference period may be extended to a maximum of 12 months by collective agreement.

A large variety of different Acts regulate working time in the public sector at federal and provincial levels.

However, national law allows for a number of exceptions to the general rules set out above:

- The concept of 'differently distributed working time': normal weekly working time can be increased by collective agreement to a maximum of 50 hours per week for 8 weeks, and longer than 50 hours, exceptionally, with the employee's agreement. Originally designed for situations of economic crisis, in practice this concept was increasingly used, by collective agreement, to deal with simple workload fluctuations. However, the extra working hours must average out, by providing compensatory time off, within the applicable reference period. Moreover, daily working time may not, on average, exceed 8 hours.
- Special rules apply to the agriculture and forestry sector. Under a federal basic Act (*Landarbeitsgesetz*, LAG) and implementing Orders at provincial levels, the main rules are the same as described above for the AZG, but maximum working time must not exceed an average of 48 hours per week, averaged over 4 months<sup>208</sup>.
- Special rules for the health sector<sup>209</sup> allow up to 60 working hours per week on average for medical staff.<sup>210</sup> These arrangements do not comply with any of the applicable derogations (Austria does not use the opt-out); and an average 60 hour week over a prolonged period is not compatible with Article 6 of the Directive. The national authorities state that the 60-

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<sup>207</sup> Pfeiffer, para 105.

<sup>208</sup> Section 61a(2) *Landarbeitsgesetz* (LAG).

<sup>209</sup> There are similar provisions to this effect both in health sector legislation (sections 3 and 4, KA-AZG) and in the relevant collective agreements.

<sup>210</sup> According to the Austrian Labour Inspectorate, their inspections found systematic breaches of these limits in public hospitals; in March 2008, discussions were reportedly under way between national authorities, the inspectorate and hospitals doctors' unions, to introduce more effective sanctions for such cases (EIRO, 2008). The national authorities indicate that the KA-AZG has since been amended accordingly (BGBl. I No.125/2008), in particular by allowing greater scope for imposing penalties, where employers breach their obligations to record working time.

hour limit includes some periods of 'inactive' on-call time, which they consider relevant to health and safety aspects. They confirm that these provisions do not fully comply with Article 6, in the light of the *SIMAP* judgment.

Following the national social partners' agreement concluded on 3 May 2007, the AZG was amended with effect from 1 January 2008 to allow a new concept of 'maximal working time'<sup>211</sup>. This allows working time of up to 60 hours per week, during limited periods, subject to the following conditions:

- Maximal working time must be provided by agreement of the social partners or by collective agreement (including at workplace level). In such a case, daily working time may be extended up to 12 hours per day, and weekly working time up to 60 hours per week.
- Weekly working time of up to 60 hours can last for at most 8 consecutive weeks; normal 40-hour weeks must then resume for at least 2 weeks, before maximal working time can resume.
- In total, not more than 24 weeks per year may be maximal working time.
- All extended working weeks require approval by the works council and by the workplace doctors
- Total working time (including maximal working time) must still not exceed 48 hours per week, when averaged over a reference period of 17 weeks
- All hours exceeding normal working hours are paid at overtime rates.

In **Belgium**, the Labour Law of 16<sup>th</sup> March 1971 provides that average weekly working time may not, in general, exceed 38 hours. The Labour Law also provides that the normal reference period is 4 months; this can be extended to one year, by a Royal decree on request of the social partners, or by a collective agreement at sectoral or enterprise level. It can also be extended to one year by company working regulations (*règlement de travail*), adopted by the company after the consent of the works council (or, if there is no works council, after consulting the workers.)

There are limited possibilities for extending weekly working time beyond 38 hours:

- normal weekly working time can be extended to 40 hours, provided that the average over the reference period does not exceed 38 hours per week,
- in specific contexts, such as for shift work or the transport sector, working time may be extended to a maximum of 50 hours in any week, provided the average weekly working time over 3 months does not exceed 38 hours.

A law of 14<sup>th</sup> December 2000 regulates working time separately for the public service (including the armed forces and police), with effect from 1<sup>st</sup> July 2001. Article 8 sets a weekly maximum of 38 hours on average, over a reference period of four months. The maximum for

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<sup>211</sup> See BGBl I No. 61/2007.

any one week is normally 50 hours; in cases of urgent repairs, accident or imminent risk of accident, situations specified by the competent authority, and in the residential and pedagogical care sector, working time may exceed 50 hours (it is not clear whether any specified maximum applies in these situations under national law). In any event, any periods of excessive hours must be balanced out by providing compensatory leave, so that within a 4-month reference period, average weekly working time does not exceed 38 hours.

In general, therefore, Belgian law complies with, or is more protective than, the Directive. Doctors, dentists and vets working under contracts of employment are specifically excluded from these limits, but transposing legislation is currently before the legislature.<sup>212</sup>

In **Bulgaria**, the Labour Code provides at Article 136 that the normal duration of the working week is up to 40 hours. The reference period for calculating weekly working time is 6 months for all activities (Article 142), although the Working Time Directive would only permit this (by way of derogation) in the activities listed at Article 17(3).

Normal weekly working time may be extended in 4 ways under the Labour Code:

- ‘*Extended working hours*’ (Article 136a). These are extra hours imposed by the employer for reasons relevant to the production process. The employer must consult in advance with workers’ representatives and notify the labour inspectorate. It must also record extra hours worked. The extra hours must be either paid, or compensated with equivalent extra rests within a 4-month reference period. However, weekly working time including extended working hours may not exceed 48 hours per week, and extended hours may not be worked more than 60 days per year or more than 20 consecutive days.
- ‘*Supplementary work*’ (Articles 110 – 113). A worker may conclude a supplementary contract of employment with his main employer or with a second employer, which may provide for work outside the working hours specified under the main contract. Maximum working hours under the main and any supplementary contract may still not total more than 48 hours per week.
- *Opt-out* (Article 113) A worker may agree to opt out (see chapter 5).
- ‘*Overtime*’ (Article 143). This term is used in a specialised sense to mean compulsory excess hours which are not compensated within a reference period. In this sense ‘overtime’ is generally prohibited under Article 143 and is permitted only in certain specified situations (Article 144). These special situations include national defence, emergencies, urgent restoration of public utilities or transport, providing medical assistance, emergency repairs, intensive seasonal work, and also a more general category, the ‘completion of work which cannot be completed within regular working hours.’ The worker may only refuse if the ‘overtime’ required is contrary to the Labour Code, a law or a collective agreement. ‘Overtime’ must be accounted for to the labour inspectorate every 6 months.

Limits apply to some categories of ‘overtime’, but not to others. Article 146 provides that ‘overtime’ may not exceed 150 hours per calendar year, and that monthly and weekly limits also apply. However, this rule applies only to the three last categories of overtime mentioned above (emergency repairs, intensive seasonal work and work which cannot be completed

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<sup>212</sup> See chapter 2.

within regular hours.) The other categories mentioned above are expressly excluded, and no other limits apply.

In *Cyprus*, the Organisation of Working Time Law of 2002 provides at section 7 that weekly working time, including overtime, may not exceed 48 hours when averaged over 4 months (in general: Cyprus provides for use of the opt-out in any sector, subject to general principles of the health and safety of workers.) The reference period may be extended to 6 months in the situations envisaged by Article 17(3) of the Directive, and to 12 months by collective agreements as envisaged by Article 19 of the Directive. The national authorities indicate that about 75% of employees in Cyprus are covered by collective agreements, which generally fix a weekly working time not exceeding 38-40 hours.

The trade union comments attached to Cyprus's national report stated that the 48-hour limit to average weekly working time was systematically breached in both the construction and the hotel/restaurant sectors. The national authorities disagree with this assessment.

The Law states that it does not apply to the armed forces or police, and no other limits appear to apply to working time for these workers.

In the *Czech Republic*, the new Labour Code (262/2006, with effect from 1 January 2007) provides at Art. 79 that maximum weekly working time is normally 40 hours, excluding 30-minute pause breaks.<sup>213</sup> (Formerly it was 42.50 hours, including the pause breaks). Shorter limits apply to workers in mining, or those working a three-shift or continuous pattern; for these groups the maximum weekly working time is 37.5 hours. Working time for workers on a two-shift pattern is limited to 38.75 hours per week.

There is a distinction between *compulsory overtime*, which is required by the employer and may only occur in exceptional situations for serious operational reasons, and *voluntary overtime* agreed by the employee, which is not restricted to particular situations. Compulsory overtime may not exceed a total of 150 hours in the calendar year. Total overtime work may not exceed 8 hours per week on average, although overtime which is balanced by equivalent compensatory leave does not need to be counted in this average.

A recent amendment (Law no. 294/2008 with effect from 1 October 2008) allows for longer overtime in the case of certain health service professionals working in certain 24-hour health services. (See chapter 5 on use of the 'opt-out'). The additional overtime must be agreed by the employee, and may not exceed 8 additional hours per week (12 hours in the case of rescue service healthcare employees) when averaged over a period not exceeding 26 weeks (or up to 52 weeks, if a collective agreement so provides.)

The former Labour Code (as amended in 2000) allowed a 12-month reference period by legislation, which was not compatible with the Working Time Directive. Under Articles 83(1) and 93(4) of the new Labour Code, a 12-month reference period is only permitted by collective agreement. The national authorities state that since coverage of collective agreements is relatively low in the Czech Republic, a possibility to extend the reference period to 12 months by legislation to address fluctuations in demand and provide more

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<sup>213</sup> The Czech Government indicates that the 40-hour maximum weekly working time has been in effect since 2001.

flexibility for employers, is urgently needed. Trade unions at national level do not agree with this point.

In *Denmark*, maximum weekly working time is normally regulated by collective agreements, which cover almost all of the public sector and about 70% of private sector employees. Denmark has introduced national laws which seek to provide the minimum rights guaranteed under the Directive to any workers who are not entitled to the same (or a higher) level of protection under a collective agreement<sup>214</sup>. However, there is no comprehensive analysis of how collective agreements in the private sector implement these provisions of the Working Time Directive in practice. In such a situation, the Member State remains responsible, under the EC Treaty, for ensuring that Community law is respected.

As regards workers who are not covered by collective agreements, or who are covered by collective agreements that do not transpose the minimum levels of protection required by the Directive, legislation<sup>215</sup> provides since 2002 for a maximum weekly working time of 48 hours, calculated over a period of 4 months.

The public sector is regulated with effect from 31 July 2003 by a collective agreement, which provides that average weekly working time (including overtime) must not exceed 48 hours. The reference period is normally 4 months but may be up to 12 months where so agreed.

In *Estonia*, the relevant law has changed with the entry into force on 1 July 2009 of the Employment Contracts Act 2009, which repeals the Working and Rest Time Act 2001 (TPS.)

Section 4 of the Working and Rest Time Act formerly provided that normal working time is 40 hours per week. Section 9 provided that total working time (including normal time and overtime) must not exceed 48 hours per week, on average over a reference period of 4 months. Stand-by time was limited, by section 10, to a maximum of 30 hours per month.

The TPS also substantially restricted the legal possibilities of working excessive hours under multiple contracts of employment. Before transposition of the Directive, national law allowed a worker to work 40 hours per week in their main job, as well as a maximum of 20 hours per week in a supplementary job. Following transposition, the 40 hour and 48-hour limits mentioned above also apply to the total working hours of a worker who has more than one contract of employment.

In underground work, work which poses particular health hazards or other specific work, section 5 of the Act provided for a lower limit to working time, of 35 hours per week.

By way of exception to the 48-hour limit, section 9(4) TPS allowed up to 200 hours' additional overtime per employee per calendar year, provided this does not result in exhaustion or damage to the worker's health. This was permitted before transposition, but the TPS required that the worker must consent (a refusal may not have direct or indirect adverse consequences for the worker) and the employer must keep records of the excess hours and submit them to the labour inspectorate. (It is understood that employers did not use this option

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<sup>214</sup> Act no 896 implementing parts of the Working Time Directive, 24 August 2004 (consolidating earlier measures of 2002 and 2003).

<sup>215</sup> Consolidated Act no. 896/2004 of 24th August 2004, section 4.

frequently in practice, because it required either compensatory rest, or overtime rates of 150%, but that the required records were often not kept.) (See chapter 5 on the opt-out.)

The four-month reference period for weekly working time could be extended to 6 months (section 9 TPS) as regards guards and security guards, healthcare professionals, welfare workers, and fire and rescue workers. It seems that this was often used. However, the legislation did not refer to the requirement of compensatory rest under Article 17(3) of the Directive before this can be done. (There was a requirement to obtain the consent of the local labour inspectorate, which in practice would check as a condition that minimum rest periods are observed.)

Section 14(4) TPS allowed the employer in any area of activity to apply to the labour inspectorate to extend the reference period. There was no limit to the possible extension. The national authorities indicated that in practice such applications were few, and extensions had never been granted to more than 12 months. However, such a provision was to be considered contrary to the Directive, both because of the absence of any limit and because the Directive does not allow for extension to 12 months except by collective agreement.

Under the Employment Contracts Act 2009, normal working time is 8 hours per day and 40 hours per week unless otherwise agreed (Article 43). Overtime work can be performed by agreement, or in specified circumstances, may be required by the employer: but is unlawful in hazardous work (Article 44). Overtime is to be compensated by equivalent time off, unless compensation in money (1.5 times normal rates) has been agreed (Article 44). Weekly working time is limited to 48 hours per week on average (Article 46). However, under Article 46(3), this may be increased to an average not exceeding 52 hours per week by agreement of the employee (see chapter 5 on the opt-out). There is no specific limit for on-call time (see chapter 3).

The reference period is 4 months unless otherwise specified by law (Article 46), 6 months in the case of security guards (Article 171). It may be extended to a maximum of 12 months by collective agreement as regards health professionals, agricultural workers or tourism workers (Article 46(2)).

In *Finland*, the Working Hours Act 1996 applies to both the public and private sectors and provides that normal working hours are restricted to a maximum of 40 hours per week, while overtime hours must not exceed 138 hours over four months, or 250 hours in a calendar year.

Collective agreements, and local agreements between the employer and the elected workers' representatives, may derogate from the limits laid down by the legislation. However, such derogations may not provide for weekly working time of more than 40 hours (averaged over not more than 52 weeks), or for overtime which exceeds 80 hours in a calendar year. In practice, collective agreements often provide for more favourable terms, normally using a 12-month reference period. Thus, the national law is more favourable to workers, as permitted by the Directive.

In *France*, the law of 1998 on the reduction of working time lays down a *normative* weekly working time of 35 hours. Under amendments made in the period 2000-2003, it was possible to exceed 35 hours; but excess hours could only be rewarded by compensatory rest or leave. Amendments passed in July and October 2007 have allowed payment for excess hours, as well as their exemption from social insurance contributions. Further changes in 2008 have

made it easier for companies to increase total working hours (including overtime) to between 35 and 48 hours per week, and to pay extra remuneration for overtime hours, in place of the former rule that overtime must be compensated with paid free time from the 41<sup>st</sup> hour per week onwards<sup>216</sup>.

Article L.3121-36 of the re-codified Labour Code provides that *average* weekly working time, calculated over any period of 12 consecutive weeks, may not exceed 44 hours<sup>217</sup>. In any *single week*, there is an absolute limit to working time of 48 hours. Thus, national law is (in general) more favourable to workers, as permitted by the Directive.

Derogations may be applied by way of exception, in certain sectors, regions or undertakings. For example, average weekly working times may be increased to a maximum of 46 hours, if this is done under a Decree giving effect to a collective agreement.

In very exceptional situations, working time within a particular enterprise may be temporarily increased for a brief period to a maximum of 60 hours per week (Articles L.3121-35 and R.3121-23 of the re-codified Labour Code). Such an employer must make an individual application, showing the exceptional circumstances which require derogation; in view of the norms which usually apply, derogations are strictly limited and may not result in average working time exceeding 48 hours over a 4-month reference period.

Under the changes introduced to the *système d'équivalence* following the *Dellas* case, work which includes inactive on-call time at the workplace must not exceed 48 hours per week on average, when counted on an hour-for-hour basis.<sup>218</sup>

Five decrees of 2002 applicable to the health sector allow for certain medical and pharmaceutical staff in the public healthcare sector to work extra hours on a voluntary basis<sup>219</sup>, which could exceed the maximum limit provided by Article 6 of the Working Time Directive.

A Décret of 14 May 2007 appears to set maximum limits which ensure that no worker in hospital services may carry out more than 18 hours' extra work per month (a Ministerial decision may authorise a temporary and limited exception to this rule for essential staff in the event of a health crisis.)

In the health sector, there nevertheless appears to be a difficulty about working time limits. Hospital doctors are required to complete ten 'half-days' work per week, which may not, in total, exceed 48 hours a week on average over 4 months<sup>220</sup>. Doctors in training are required to complete eleven 'half-days' work per week, of which two are devoted to academic training.

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<sup>216</sup> Law 2008-789 of 20 August 2008 (*Loi portant rénovation de la démocratie sociale et réforme du temps de travail*)

<sup>217</sup> As amended by the Ordonnance of 16.01.1982. The limit has gradually reduced from 50 hours per week in 1975, to 48 hours in 1979 and 44 hours in 1982.

<sup>218</sup> Décret 2002/1421; Décrets 2007-106 on residential social care establishments and 2007-826 on hospitals; see chapter 3.

<sup>219</sup> It seems that this may be done either on a planned, or on an unstructured, basis. An *Arrêté* of 30 April 2003 provides for signing a formal contract (consent) to provide extra hours over a one-year period. It also provides for health professionals to voluntarily work unstructured overtime, but without any formal consent being required (the national authorities state that this is being amended). See chapter 5.

<sup>220</sup> Décret no 2002-1421, article 5.

However, there is no legislative definition of a 'half-day'; and under the calculation used by public hospitals in practice<sup>221</sup>, the *regular* working time of a hospital doctor (ten half-days) would amount to a minimum of 50 hours per week and a maximum of 70 hours per week, but would always exceed the limit of 48 hours per week, before any voluntary extra hours were added.

In *Germany*, national law does not refer to weekly working time. Instead, the Working Time Act (AZG), which covers the private sector and public-sector employees, provides at Art. 3 that daily working time must not exceed 8 hours. (As Sundays and public holidays are not considered as working days, this effectively means that weekly working time cannot exceed 48 hours.) Collective agreements take precedence over the AZG, and often provide for weekly working time of 37.5 to 40 hours per week.

Daily working time can be temporarily extended to 10 hours per day (Art. 3.2 AZG), if it is balanced by compensating leave on other days to ensure that over a 6 month reference period, average daily working time does not exceed 8 hours.

The AZG also allows at Art. 7 for collective agreements to extend daily working time without compensatory leave, in jobs which involve significant on-call work, but only on condition that the worker concerned must consent in writing (opt-out: see chapter 5).

The AZG does not provide a clear general norm for calculating weekly working time. Under Article 3, the reference period for calculating daily working time is 6 months generally, which does not comply with the Working Time Directive<sup>222</sup>. Various derogations allow for working time to be calculated over a longer period, if a collective agreement so provides<sup>223</sup>; or, in certain cases, by religious bodies, approval of the labour inspectorate or by federal ordinance<sup>224</sup>. Article 7(8) AZG states that in some of these cases, the reference period for calculating weekly working time may not exceed 12 months<sup>225</sup>. However, this limit does not apply to derogations by collective agreement to which the workers concerned have agreed under the opt-out clause. Nor does it apply to an extension by federal ordinance. However, the national authorities state that the federal Government has not made use of the ordinance provision.

Working time of civil servants (federal, Länder and municipal) is governed by separate legislation. In the federal civil service, the AZV provides for normal working hours not exceeding 41 hours per week (s. 3.1), and an overall working time limit of 48 hours per week.

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<sup>221</sup> The 10-hour period from 8h30 to 18h30 is counted as two half-days while the 14-hour period from 18h30 to 8h30 is also counted as two half-days. Thus, a half-day is 5 hours if worked during the day, and 7 hours if worked during the night.

<sup>222</sup> The national authorities consider that since Germany applies more favourable provisions to workers than the Directive requires, by adding a limit to daily working time, a six-month reference period for weekly working time would not contravene the Directive's requirements. However, the Commission is doubtful that these two distinct points can appropriately be considered together, as amounting cumulatively to more favourable treatment.

<sup>223</sup> Articles 7(1)1(b), 7(1)4(b) (night workers), 7(2)2-4 (agriculture, health and care, public services), 7(2A) (opt-out), AZG.

<sup>224</sup> Articles 7(4), 7(5) and 7(6) AZG respectively.

<sup>225</sup> Where derogations are approved by the labour inspectorate, the reference period may not exceed 6 months (Art. 7(8) AZG).

The AZV provides at section 13.2 for a 12-month reference period (by legislation) which also seems incompatible with the provisions of the Directive. (It appears that this is intended to cater for major fluctuations in overtime work, and for on-call time, such as by federal police or firefighters.) The national authorities argue that constitutional law prevents federal authorities from using the means allowed by the Working Time Directive to extend the reference period from the normal 4 months (a collective agreement). Therefore, some alternative method for fixing a 12-month reference period must be presumed to be available to public employers, even if the Directive does not explicitly provide one. The national authorities point out that this provision followed a concertation process with public service unions. However, this approach seems difficult to reconcile with the Court of Justice's decisions that derogations to the Working Time Directive must be interpreted restrictively, and limited to those expressly provided.

Following the *Pfeiffer* case, the main public sector collective agreement governing working time of emergency and rescue services<sup>226</sup> limits working time (including on-call time at the workplace) to a maximum 48 hours per week, averaged over 12 months. The agreement expressly excludes any opt-out under Art. 7(2A) AZG.

In the health sector, standard conditions are set by a series of sectoral collective agreements negotiated between September 2005 and August 2007<sup>227</sup>: though, importantly, many hospitals are not covered by any of these agreements, and may set their own rules within the limits fixed by the AZG.

Under the main collective agreements for doctors, (the *TV-Ärzte/VKA* and the *TV-Ärzte/TdL*) regular working time is limited to a maximum of 40 hours per week. A works agreement may provide for a 'working time corridor' (*Arbeitszeitkorridor*) of 45 hours per week on average; working hours exceeding this limit are possible, but must be compensated by extra rest time within 12 months (in principle, this would appear to comply with Article 6). However, doctors who agree to opt-out under these collective agreements may work an average between 54 and 58 hours per week, including on-call time; two collective agreements allow doctors to work an average of 66 hours per week in certain cases. (See details in chapter 5.3.b.)

Under the *TVoED*, the main collective agreement for the public services, similar limits apply to regular working time.

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<sup>226</sup> *DRK-Reformtarifvertrag*, effective from 01.01.2007.

<sup>227</sup> The *TV-Aerzte/TdL* of 30.10.2006 and the *TV-Aerzte/VKA* of 17.08.2006 cover doctors who are members of the Marburger Bund (doctors' union) and who work respectively in university hospitals, or in municipal or Länder hospitals. The *TVoED* (Collective Agreement for the Public Services) of 13.09.2005 covers members of the *Ver.di* and *Dbb* Tarifunion unions who are employed by the federal government, or by Länder or municipalities which are members of the *VKA* public employers' association. It covers, inter alia, health services (including some employed doctors), police, and environmental services. The *TVoED-BTK*, also of 13.09.2005, adds special provisions to the *TVoED* regarding hospitals.

In addition to the collective agreements listed above, the national authorities indicate that the Länder have their own collective agreement, the *TV-L* of 12 October 2006 made between the Länder and the *Ver.di* and *Dbb* Tarifunion trade unions.

<sup>229</sup> *TV-Aerzte/VKA* Article 7(2), *TV-Aerzte/TDL* Article 6(2)); or up to one year (*TvoED*, Art. 6(2)).

The reference period for calculating average regular weekly working time under the main collective agreements for the public health sector is one year (or up to one year, under the *TVoED*) (*fuer die Berechnung des Durchschnitts der regelmäßigen wöchentlichen Arbeitszeit ist ein Zeitraum von [bis zu, TVoED] einem Jahr ... zugrunde zu legen*)<sup>229</sup>. All three collective agreements also provide that a reference period of one year (up to one year, under the *TVoED*) must be applied to doctors who undertake regular on-call duty<sup>230</sup>.

Some reports stated that recognition of inactive on-call time as working time is widely viewed as extremely problematic, and that as a result, applicable working time limits, whether under the AZG or collective agreements, were not being observed in practice. The national authorities do not agree with these reports.

In **Greece**, Presidential Decree 88/99 provides at Article 6 that the maximum weekly working time, including overtime, may not exceed an average of 48 hours over a 4-month reference period. Derogations are allowed in the cases referred to in Article 17 of the Directive. Collective agreements may provide for an extended reference period not exceeding 12 months.

The main problem arises in the public health sector, for which transposition of relevant provisions of the Working Time Directive has remained suspended under successive legal measures (see chapter 2). It is common for hospital and dispensary medical staff to work long and frequent periods on-call at the workplace in addition to normal working time. There are many reports of regular weekly working time for hospital doctors exceeding 70 hours per week. This is partly because inactive on-call time is not regarded as working time under national law; and partly because under the applicable national law, public hospital doctors are legally required to undertake on-call time according to the needs of the service, and without any specific limit, in addition to 40 hours per week of regular working time. The national report notes the criticism of the labour inspectorates that such practices do not comply with the Working Time Directive.

There are also some reports from other sectors (airports, supermarkets, ports) of limits to weekly working time being infringed, due to the fact that national law does not recognise inactive on-call time at the workplace as working time.

In **Hungary**, the Labour Code provides at section 117/B that normal weekly working time is 40 hours. Section 119 adds that total weekly working time including extraordinary work (overtime, on-call time (*Ügyelet*), etc.) shall not exceed 48 hours. Extraordinary work ordered by the employer must not exceed 200 hours per year, or 300 if a collective agreement so provides or in limited circumstances, by direct agreement with the employee<sup>231</sup>. There are some important exceptions to these general rules, although their scope has been considerably reduced by successive amendments to national law.

One important exception is so-called 'stand-by jobs' (*Készenléti jellegű munkakör*)<sup>232</sup>. These are defined by Section 117(1)k. of the Labour Code<sup>233</sup> as jobs where due to the nature of the

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<sup>230</sup> TV-Aerzte/VKA, Article 10(6); TV-Aerzte/TDL, Article 7(5); TVoED-BTK, Article 45(5).

<sup>231</sup> Section 127A as amended by Act LXXIII/2007 and Act 2009/XXXVIII.

<sup>232</sup> Despite the name 'stand-by job', it cannot be assumed in these cases that any inactive time will be 'stand-by' rather than 'on-call' as the terms are used in this Report (that is, spent at a place selected by the worker, such as at home, rather than by the employer).

tasks involved and the working conditions, at least one-third of total working time is effectively inactive and the employee can rest during those periods, *or* the work performance is considered to involve a significantly lower burden for the employee, compared to the average. (Security staff, concierges, private-car drivers and repair workers are often employed on stand-by contracts. The national authorities estimate that about 20,000 workers are concerned).

Section 117 Labour Code formerly allowed stand-by employment contracts to define a normal working time up to 12 hours per day and 72 hours per week, with additional hours by agreement of the worker. Following amendment in 2007<sup>234</sup>, Section 117/B Labour Code now allows stand-by job contracts to define a normal working time of up to 12 hours per day, and 60 hours per week (72 hours, if on-call time is included), by the agreement of the parties. (The national authorities consider that this uses the opt-out provided by Article 22 of the Directive: see discussion in chapter 5.)

It is not clear that similar changes have been made in various sectoral Acts, which provide for stand-by jobs, for instance in the public sector, civil service, judiciary and prosecution services.

Another important exception is in the health services<sup>235</sup>. Ordinary working time in health services is 40 hours per week, and total working time (including overtime and on-call time) may not exceed 48 hours per week, on average. According to the Health Services Act<sup>236</sup>, extraordinary work ordered by the employer in healthcare services may not exceed 416 hours per year. However, under Section 13 of the Health Services Act, workers, who are not working in stand-by jobs, may by agreement with the employer<sup>237</sup> work an average of up to 60 hours per week in total, or 72 hours per week if on-call duty is included.

In the Defence Forces, specific legislation<sup>238</sup> provides for a standard 40 hours per week for professional soldiers. However, the maximum weekly working time for soldiers working in 'stand-by jobs' is 54 hours. The maximum limits already described can be increased to 60 hours per week in two situations<sup>239</sup>: during basic military training for new recruits (over a period not exceeding 14 weeks), and in the case of voluntary reserve forces. In extraordinary

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<sup>233</sup> Before 2007 there was no formal definition of 'stand-by jobs' in national law, but the concept was used with a similar meaning. The definition was inserted by Act LXXIII of 2007, with effect from 1 July 2007.

<sup>234</sup> Act LXXIII of 2007

<sup>235</sup> Hungary amended the Labour Code in 2007 to fully recognise inactive on-call time as working time with effect from 1 January 2008; so these rules now take account of on-call hours. Under the Health Services Act (LXXXIV of 2003, *Eütev.tv*), inactive on call-time at the workplace has been recognised as working time since 1 July 2007 (with an opt-out in the health sector); so these rules now include active and inactive periods of on-call time at the workplace.

<sup>236</sup> Section 117/A.2 of the Labour Code authorises the Health Services Act, to set down special rules for on-call time of employees in the health sector. Section 13 *Eütev* contains the provisions relevant to working time.

<sup>237</sup> Previously, under Government Decree 233/2000, a worker in health services could be required to perform on-call duty six times in each month, in addition to the normal overtime obligations. However, the Constitutional Court held in 2006 (Decision ABH 72/2006) that this requirement was unconstitutional, and annulled it.

<sup>238</sup> Act XCV of 2001 on soldiers in the Hungarian Army (HJT)

<sup>239</sup> Section 91(5), HJT.

circumstances, and if the interest of the service so requires, overtime can be ordered for all these groups: up to 300 hours per year (or 450 hours per year by ministerial order).

Working time limits for law enforcement services (police, prisons...) and emergency services (firefighters ...) are governed by the Armed Services Act<sup>240</sup>. In general, working time is up to 40 hours per week. There are two exceptions. For workers in (full or partial) 'stand-by jobs' the maximum weekly working time is 48 hours<sup>241</sup>. Furthermore, in extraordinary circumstances, and if the interest of the service so requires, both groups may be required to work additional overtime (up to 300 hours per year, or 450 hours per year by ministerial order), as for the defence forces.

As regards the reference period for weekly working time, section 118/A of the Labour Code<sup>242</sup> provides for a normal reference period of up to four months. Where a reference period is provided by collective agreement, it may be up to six months; or twelve months, in the case of shift work or seasonal work. (Formerly, collective agreements could also extend the reference period to 12 months for stand-by jobs, but this provision has been removed with effect from 1 January 2008.)

The same rules are applied to the various Acts governing different parts of the public sector, except for the health sector, the army and armed services. In the health sector, the standard reference period may be fixed at up to 4 months, by legislation or by collective agreement<sup>243</sup>. (In institutions providing 24-hour health care, the maximum reference period can be increased to 6 months, by legislation.) Legislation<sup>244</sup> allows a reference period of up to 12 months for the working time of professional soldiers. The latter provision does not seem to be in line with the relevant provisions of the Directive. (The national authorities state that in this situation a 12-month reference period is considered necessary for objective reasons relating to the organisation of work, but that it cannot be extended by collective agreement in the case of soldiers.) For armed services<sup>245</sup>, the reference period for weekly working time is normally up to 4 months; this can be increased to 6 months, in cases where the work is made up entirely of on-call or stand-by service.

Legislation which previously allowed a reference period equivalent to the academic year in the public education sector, was repealed in 2007.

In *Ireland*, section 15 of the Organisation of Working Time Act 1997 lays down that an employer 'shall not permit' an employee to work more than 48 hours on average, in any seven-day period. (There is no specific reference to overtime being included.)

The reference period for calculating average weekly working time may not be longer than four months, generally; six months, in the activities envisaged by Article 17(3) of the Directive; or 12 months, (by collective agreement only; in seasonal activities, for technical reasons, for reasons arising from the organisation of the work, or on other objective grounds).

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<sup>240</sup> Act XLIII of 1996 on working conditions of the armed services (Hszt.)

<sup>241</sup> In 2005 this limit was 54 hours; it has been progressively reduced by 2 hours each year, to reach 48 hours with effect from 1 January 2008.

<sup>242</sup> As amended by Act LXXIII of 2007, with effect from 1 January 2008, and by Act no XXXVII of 2009.

<sup>243</sup> Article 117A.2g Labour Code, as amended 1 July 2007.

<sup>244</sup> Act XCV of 2001 on soldiers in the Hungarian Army (HJT), section 91.

<sup>245</sup> Act XLIII of 1996 on professional members of the armed services (Hszt), section 84.

In *Italy*, the maximum duration of working time is defined by collective agreements. Article 4 of Legislative Decree no 66/2003 provides that normal weekly working time, is limited to 40 hours per week, while total working time (including overtime) may not exceed 48 hours per week on average. But collective agreements may provide arrangements which are more favourable to workers: in practice, collective agreements tend to lay down a maximum weekly working time of 38 to 40 hours in the private sector, and 36 hours in the public sector.

The Decree sets down rules about overtime, which apply unless there are more specific provisions in a collective agreement. Overtime must be agreed between the parties, and it is permitted up to a maximum limit of 250 hours per year (a previous quarterly limit, of 80 hours overtime in any three months, no longer applies).

Previously the legislation also imposed limits to daily working time (8 hours) and to daily and weekly overtime, but these have been removed by more recent amendments.

Article 4 of 66/2003 provides that the reference period for calculating average weekly working time is not to exceed four months, although collective agreements may provide for a reference period up to 6 months, or up to 12 months for objective or technical reasons or reasons relating to the organisation of work.

Under new rules introduced in 2008<sup>246</sup>, Italy has provided that the national measures transposing key provisions of the Directive (the limit to weekly working time, and minimum daily rest periods) do not apply to 'managers' operating within the National Health Service. This appears to raise problems of compliance with the Directive, since doctors working in public health services in Italy are formally classified as 'managers' under sectoral laws and collective agreements, without necessarily enjoying managerial prerogatives or autonomy over their own working time.

In *Latvia*, the Labour Law (2001, as amended in 2004) applies three different limits - to regular working time, overtime, and aggregated working time.

*Regular working time*, under Section 131, may not exceed 40 hours per week (35 hours, for occupations or workplaces which involve exposure to harmful factors.)

*Overtime* work is limited by section 136, which provides that it may not exceed 144 hours within a four-month period. This would be equivalent to 9 hours per week (taking account that four weeks' paid annual leave are not included in the average weekly working time) - slightly more than the Directive's limit.

Normally overtime requires the worker's written consent; but in specified circumstances, overtime may be imposed, including for completion of urgent, unexpected work within a specified period of time. After overtime has been imposed for longer than six consecutive days, the employer must request a permit from the labour inspectorate for any further overtime.

Section 140(1) of the Labour Law (amended in 2010<sup>247</sup>) allows for carrying over the previous concept of '*aggregated working time*'. The employer may apply this, after consultation with

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<sup>246</sup> Act 133/2008, Article 41(13)

<sup>247</sup> Law on amendments to the Labour Code, OG no. 47, 24 March 2010.

workers' representatives, where the nature of the work makes it impossible to comply with the limit to regular weekly working time. Under Article 140(3), aggregated working time may not exceed 56 hours in any one week, and must not exceed normal working time over a reference period which may be up to 3 months (by agreement with the employee) or 12 months (by collective agreement).

However, the element of aggregated working time which exceeds normal working time limits (of 40 hours per week, or 35 hours for hazardous work) must be considered as overtime (Article 140(4)); and is therefore subject to the overtime limit of 144 hours in total, over a 4-month period, under Article 136 (mentioned above).

It seems therefore that whether a worker is doing regular, aggregated, or extended aggregated work, total weekly working hours including overtime may not exceed 49 hours per week on average; the exact figure needs adjusting to comply with the Directive.

In practice, it appears that some employers are reluctant to use extra hours, since the set rate for overtime (double the normal hourly rate) is considered too expensive. However, reports suggest that in practice, unpaid and involuntary overtime is widespread; one survey found that at least 15% of workers in all sectors systematically work 50 or more hours per week, mostly without payment for the overtime hours, and 40% of these reported that the overtime had been imposed on them reluctantly and under coercion. The trade and construction sectors were reported as the most affected, with 40% working over 50 hours per week for extended periods.<sup>248</sup>

In *Lithuania*, Article 144 of the Labour Code provides that normal working time may not exceed 40 hours per week, though exceptions may be established by laws, Government resolutions and collective agreements. Neither laws nor collective agreements may set out provisions which are less favourable to workers than those of the Labour Code (Article 4 Labour Code).

Overtime is permitted only in exceptional situations which are specified at Article 151 of the Labour Code, by collective agreement, or with the written consent of the worker concerned.<sup>249</sup> Total overtime may not exceed 120 hours per year: a collective agreement may specify a different number of annual overtime hours, but these must not exceed 180 hours per year.

In any event, total working time, including overtime, may not exceed 48 hours in any 7-day period, so the Labour Code does not set a reference period for averaging weekly working time. There is an exception for 'summary recording of working time', which before 2010 applied only to continuously functioning enterprises or services, but is now available to all enterprises and services (either under collective agreements, or where considered necessary and after consulting workers' representatives)<sup>250</sup>. 'Summary recording' allows employers to introduce shifts and working weeks of different lengths; however, over a reference period not longer than four months, the average working week must still not exceed normal working

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<sup>248</sup> *Conditions of work and employment in the new Member States: interaction and socio-economic influence*, M. Hazans, 2005.

<sup>249</sup> [www.lm.gov.lv/doc\\_upl/Latvia\\_trends\\_and\\_cases\\_MHazana\\_petijums.doc](http://www.lm.gov.lv/doc_upl/Latvia_trends_and_cases_MHazana_petijums.doc).  
Law X-188 of 12 May 2005, amending Article 151 of the Labour Code; Article 150(2) Labour Code (as amended by the Law of 23 July 2009)..

<sup>250</sup> Article 149 Labour Code, as amended by Law XI-927 of 22 June 2010 with effect from 1 August 2010.

time. Moreover, average weekly working time must still not exceed 48 hours per week and 12 hours per day, and uninterrupted minimum daily and weekly rest periods must be respected.<sup>251</sup>

However, it should be noted that Article 150(5) Labour Code provides that work of administrative officials which exceeds normal working time is deemed not to be overtime. Thus, it is not clear that any effective limit to working time applies for these workers.

The Interior Service statute<sup>252</sup> regulates the working time of certain statutory public servants (firefighters, police). It provides for a normal 40-hour week: overtime may not exceed 8 continuous hours, or 250 hours per year in total, while the total length of any shift (normal working time followed by overtime) may not exceed 24 hours (26 hours for specified activities and officials). On-call time shall not exceed 96 hours per month, counted in the same way as under the Labour Code.

Article 148 of the Labour Code allows the Government to fix specific working time rules in the sectors of health<sup>253</sup> and residential care establishments, agriculture, post, energy, transport, telecommunication and fishing.

The Government Resolution on derogations and exceptions (no 587/2003 of 14 May 2003) provides for a reference period not exceeding one year in the sectors mentioned in Article 148. However, to the extent that these sectors are covered by the Working Time Directive, the latter does not allow for a reference period exceeding 4 months to be fixed by legislation, unless the requirements of Article 17(3) are satisfied, or for a period exceeding 6 months to be fixed by legislation in any circumstances.

In **Luxembourg**, national law provides that normal working time may not exceed 8 hours a day and 40 hours per week. The total working time may not exceed 10 hours a day and 48 hours per week. Therefore, the standard upper limit is 40 hours, which may be increased exceptionally to 44 hours and, in some cases, to 48 hours a week. The reference period for calculating average weekly working time is four weeks.

There is an exception to this general approach. Luxembourg has laid down specific legislation limited to the hotel and restaurant sector, which provides that in certain, clearly specified, types of enterprises, the normal limit to weekly working time may be exceeded. However, this option is strictly limited to specified days, during short periods of the year which are expressly defined by law<sup>254</sup>. In any event, the average weekly working time may not exceed 40 hours, when calculated over a reference period (of between four weeks and six months, depending on the size of the enterprise.) Thus, overall, the provision seems more favourable than the requirements of the Directive.

In **Malta**, the Organisation of Working Time Regulations 2003 provide at reg. 7 that average working time, including overtime, for each seven-day period shall not exceed 48 hours. It is the employer's duty to ensure that this limit is observed, in the interests of workers' health and safety. The reference period is normally 17 weeks, although collective agreements may

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<sup>251</sup> Article 149 Labour Code, as amended by the Law of 23 July 2009..

<sup>252</sup> Statute of the Interior Service, 29 April 2003 (*Vidaus tarnybos statutas*)

<sup>253</sup> Government Resolution No 411 of 29 April 2009 provides that normal working time of medical specialists and of other staff who work directly with such specialists or with patients, is 38 hours per week.

<sup>254</sup> Article L.212-4 Code du travail.

provide for a longer period not exceeding 52 weeks. For the manufacturing sector and the tourist sector, including travel and catering establishments, reg. 7(3)(a) provides a reference period of 52 weeks (by legislation, but the national authorities state that this reflects the provisions of an agreement by the national social partners in 2002).

In the *Netherlands*, the Working Hours Act fixes a maximum of 60 working hours per week, and an average of 48 working hours per week, calculated over a period of 16 weeks.

The employer is also entitled to ask the employee to work overtime on an occasional basis. However, overtime may not result in working more than 60 hours in any one week, or an average of 48 hours per week over the 16 -week reference period.

In practice, working hours are extensively regulated by collective agreement within this framework. (The Netherlands also uses a limited and temporary opt-out, under which workers in services using extensive on-call time may agree to work up to 60 hours per week including on-call time, averaged over 6 months: see chapter 5.)

In *Poland*, Article 131 of the Labour Code was amended in 2003 to provide that the basic working time may not (on average) exceed 40 hours per 5-day working week. Overtime may be worked up to a total of 416 hours per year. When overtime is included, maximum total weekly working time may not exceed 48 hours on average.

The maximum reference period is four months (Article 129), as against three months prior to transposition. Under an amendment in 2007, reference periods up to 6 months may be fixed in specified activities which are consistent with Article 17(3) of the Directive (agriculture, animal husbandry, security services.)

Article 129(2) of the Labour Code allows reference periods not exceeding one year to be adopted where justified by atypical organisational or technical conditions – but by legislation, not by collective agreement or agreement of the social partners as Art. 19 WTD stipulates. (The national authorities state that in the absence of any tradition of collective agreement or agreement of the social partners, this provision was introduced by legislation and reflects consultation with both sides of industry.) The national authorities have published amending proposals, but indicate that work on these changes has been temporarily halted.<sup>255</sup>

In cultural institutions, sectoral regulations provide for a reference period not exceeding 12 months, where so provided by a collective agreement at the workplace or an agreement between employer and workers which has been notified to the labour inspectorate.

Health sector legislation has been amended<sup>256</sup> so that the working time of doctors, including overtime and on-call time at the workplace, may not exceed an average 48 hours per week.

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<sup>255</sup> Government proposals to amend the Labour Code, published 28<sup>th</sup> February 2008: the national authorities later stated that work on these changes had been halted, following the EPSCCO Council's agreement in June 2008 on the first reading of the 2004-2009 proposal to amend the Directive. The published amendments provided that a reference period between 6 and 12 months may be introduced by a collective agreement, or by an agreement between employer and worker representatives; in exceptional cases such an agreement may exceed twelve months. (The latter possibility would exceed what the Directive allows.)

<sup>256</sup> Act of 27 August 2007, amending the Act on Health Care Establishments ('ZOZ') with effect from 1<sup>st</sup> January 2008.

However, an opt-out has been introduced for this sector by the same legislation (see chapter 5.)

The national authorities indicate that specific legislation covering the civil and public service provides limits to working time equal or lower than the Labour Code, with the exception of the health sector opt-out. This relates to teachers and third-level education, civil and public servants, judges, prosecutors, border guards, firefighters, police and defence forces. Normal working time does not exceed 40 hours per week on average. Excess hours are set off against compensatory rest, to ensure that working time (including overtime) does not exceed 48 hours, when averaged over reference periods not exceeding 4 months (or 6 months, where the derogation under Article 17(3) WTD applies).

In **Portugal**, the Labour Code provides at Article 169 that the average duration of the working week, including overtime, may not exceed 48 hours. The reference period for calculating average working time is 4 months, or six months in various situations permitted by Articles 17.1 or 17.3 of the Working Time Directive. Reference periods not exceeding 12 months may be established by collective agreement.

Until 2009, a difficulty arose regarding working time of doctors, who are governed by specific sectoral legislation and not by the Labour Code. The sectoral legislation formerly<sup>257</sup> provided for a normal working week of 42 hours, but with an obligation to work 12 hours' additional overtime per week, resulting in total average working time of 54 hours per week. Amending rules in 2009<sup>258</sup> provide instead for regular working time of 35 hours per week and up to 12 hours' overtime per week, but with a maximum total overtime of 200 hours per year, leading to an overall average of some 39 hours per week.

In **Romania**, Article 109 of the Labour Code provides that normal working time amounts to 8 hours per day and 40 hours per week. Article 111, as amended in 2005, states that maximum legal working time shall not exceed 48 hours per week, including overtime, on average.

Article 111 also provides that the reference period for calculating average weekly working time is normally 3 months; longer reference periods, which do not exceed 12 months, may be negotiated by branch level collective agreement, in activities or sectors set out in the single collective labour agreement at national level. It seems that this has been done in sectors such as public utilities, health and construction. However, the collective agreement governing, for example, the health sector sets limits to weekly working time which are more favourable to workers than those mentioned above: maximum weekly working time of 48 hours including overtime, when averaged over a reference period of one month<sup>259</sup>.

The national authorities indicate that the Labour Code has not availed of any of the derogations provided at Article 17(1), 17(3) or 17(5) WTD, and that there are no opt-out provisions in national legislation.

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<sup>257</sup> Decree-Law no 73/90 of 6 March 1990 (as amended by Decree-Law 412/99 of 15 October 1999).

<sup>258</sup> Amending law 45/2009 of 13 February 2009: Article 13.3 (applying the overtime limits contained in Art. 161 (1)(a) of the Regime Jurídico do Contrato de Trabalho em Funções Públicas, September 2008, published as Annex I to Law 59/2008) and Article 16 of the consolidated text.

<sup>259</sup> Collective Labour Contract at health branch level, 2005-2007, article 107(1).

In the *Slovak Republic*, the Labour Code provides at Article 85 that weekly working time (excluding overtime) shall not exceed 40 hours (lower limits apply to shift workers, adolescent employees, and workers with hazardous materials). Under Art. 85(9), maximum weekly working time (including overtime) shall not exceed 48 hours. Overtime may not exceed 8 hours per week, on average, over 4 months (Article 97). Mandatory overtime is limited to a maximum 150 hours per year; total overtime may be extended to 250 hours per year where there are serious reasons and the worker agrees (Article 97). In high risk occupations, compulsory overtime is prohibited; voluntary overtime in high-risk occupations may be worked in specified circumstances (including to ensure safety or continuity of production, as well as urgent need for repairs, and extraordinary accidents threatening major economic damage or damage to life or health). It may also be worked if compensatory rest is provided. (Article 97(11)). On-call time at the workplace must not exceed 8 hours per week and at most, 100 hours in total during the calendar year, unless the worker agrees otherwise (Article 96(7) Labour Code.)

The reference period for calculating maximum weekly working time is normally four months, but may be extended to a maximum of 12 months, in any activity with a fluctuating need for work during the year, by agreement between the employer and the employees' representatives (Article 97).

The above limits take account of inactive on-call time, which is recognized as working time since September 2007, but an opt-out applies in the health sector. The national authorities indicate that taking account of on-call time in the context of the 48-hour maximum presents challenges for the provision of adequate continuous medical care, as overtime in this sector was generally already at the maximum limit. More doctors would have to be employed, but this would be difficult, due to the lack of qualified specialist personnel (see chapter 5.)

Special sectoral legislation generally applies the same rules, also to the civil and public servants, but with the following exceptions:

- Working time of professional soldiers is regulated separately: it is not clear what rules apply.
- For drivers, maximum weekly working time is limited to 60 hours in any week (no averaging) and is specified to apply even if the driver is working for different employers.
- For railway workers, maximum weekly working time is limited to 60 hours.
- For workers maintaining roads and traffic signs, maximum weekly working time is limited to 60 hours per week during the winter months.

Whether these rules are compatible with the Directive (regarding maintenance workers, and drivers or railway workers to the extent that they fall within the scope of the Working Time Directive<sup>260</sup>), would seem to depend on the arrangements for the reference period, and on any health and safety guarantees which apply.

In *Slovenia*, there is no express limit to weekly working time (including overtime), but a number of different limits to regular working time, and to overtime, combine to prevent

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<sup>260</sup> See chapter 2 regarding transport sectors.

average working time exceeding 48 hours. The Employment Rights Act 2002 (ZDR) provides at Article 142.1 that 'full', or regular, working time shall not exceed 40 hours per week. Article 143 stipulates that total working time may not exceed 10 hours per day, and that overtime work may not exceed 8 hours per week (20 hours per month, or 180 hours per year, in total). As a result, the national authorities indicate that total working time cannot in practice exceed the limits fixed by the Directive; it seems that the limits would prevent total working time from exceeding 48 hours in any one week, or an average of approximately 45 hours per month.

Under Article 143.3, the reference period for calculating working time limits may be fixed at up to 6 months by legislation, which would seem to exceed what the Directive allows. However, the national authorities indicate that in practice, weekly working time cannot in any event exceed 48 hours when averaged over 4 months, because overtime still cannot exceed 20 hours in any one month.

Working time in the civil service and in the various activities of the public service is governed by specific legislation. It is not clear exactly what limits apply to maximum weekly working time in this context.

In the health sector, the Medical Services Act 2002 provides a maximum weekly working time of 48 hours, but allows at article 52 for use of the opt-out (see chapter 5.).

In *Spain*, the Statute of Workers' Rights (*Estatuto de los Trabajadores*) of 1994 sets out the generally-applicable rules on working time. Article 34 provides that the maximum length of the normal working week is 40 hours, averaged over one year. This time may be distributed unevenly over the year by collective agreement, or failing collective agreement, by an agreement between the company and workers' representatives, provided that minimum daily and weekly rests required by the Statute are respected.

Article 35 provides that overtime may not exceed 80 hours in any year, and may generally only be undertaken by agreement of the worker or where a collective agreement so provides. However, involuntary overtime may be undertaken where the employment contract provides for it, or where urgently needed to prevent or repair extraordinary damage or loss.

The national legislation thus provides for a maximum weekly working time (including overtime) not exceeding 42 hours per week, when averaged over the year. This is lower than the maximum 48 hours per week allowed by the Directive.

Working time for the civil service and public sector is not governed by the Workers' Statute and is regulated by different provisions of administrative law. The rules applicable here, particularly in the context of on-call time for security, prison and emergency services, are not always clear. Rules on maximum weekly working time for the Guardia Civil do not comply with the requirements of the Directive. There are also some reports of long working hours for public service firefighters, which may not be compatible with the provisions of the Directive.

In the public health sector, working time of doctors and nurses is now regulated by Law 55/2003 of 16 December 2003, which provides that maximum weekly working time shall not exceed 48 hours per week, averaged over 6 months. In addition, up to 150 hours of further overtime per year may be worked under a temporary opt-out (see chapter 5.)

The national authorities indicate that weekly working time for the armed forces is regulated by Ministerial Order 121/2006 of 4<sup>th</sup> October 2006, and may not exceed 37.5 hours per week.

In *Sweden*, section 10a of the Working Hours Act (as amended in 2005) provides that average working time for each seven-day period, including overtime, may not exceed 48 hours. The reference period for calculating the average is 4 months.

Collective agreements may derogate from these general rules, provided that they are not inconsistent with the requirements of the Directive. The Working Hours Act also seeks to provide the minimum rights guaranteed under the Directive to any worker who is not entitled to the same (or a higher) level of protection under a collective agreement<sup>261</sup>. For sectors governed by collective agreements, these revised rules came into effect on 1<sup>st</sup> January 2007.

Public sector workers, including doctors, are covered by the rules in the Working Hours Act, whose commentaries state the need to take account of the *SIMAP* and *Jaeger* cases concerning on-call work, but there is no explicit provision to this effect. In practice, these areas are largely covered by collective agreements (see chapter 3). In such a situation, the Member State remains responsible, under the EC Treaty, for ensuring that Community law is respected.

In the *United Kingdom*, reg. 4 of the Working Time Regulations 1998 provides that average working time, including overtime, shall not exceed 48 hours for each seven-day period. An employer must take all reasonable steps to ensure that the limit is observed regarding each of his or her employees.

Reg. 4 also provides that the standard reference period for calculating average working time is 17 weeks, equalling the 4 months laid down by the Directive. In the situations listed in Article 17(3) of the Directive, the reference period may be extended to 26 weeks (6 months), under Reg. 21. Workers and employers may also agree under a workforce or collective agreement to extend the reference period to a period up to 52 weeks.

The Regulations apply to the health services and to the public services generally, including the armed forces and emergency services (see chapter 2). Active and inactive on-call time at the workplace are included in the limits set out above. However, reg. 5 of the regulations provides for use of the opt-out, which is not limited by sector (see chapter 5.)

#### **4.5. Conclusions**

In general, the requirement that weekly working time (including overtime) must not exceed an average of 48 hours per week seems to have been satisfactorily transposed. In some Member States, significant amendments have been made to improve compliance. And many Member States provide for a limit to normal weekly working time (excluding overtime), which is more protective than the requirements of the Directive, and which ranges between 35 and 40 hours per week.

However, this must be seen in the context that some Member States still do not count on-call time as working time in accordance with the *SIMAP* and *Jaeger* judgments, either overall or

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<sup>261</sup> Working Hours Act 1982 as amended in 2005 (SFS 2005: 165.)

for certain sectors. Thus, the working time which is being counted is not always defined in accordance with the *acquis*. This is discussed in chapter 3.

Moreover, a relatively large number of Member States (16 Member States) make use of the 'opt-out', which permits longer average working hours if the worker so consents, either for specific sectors (11 Member States) or generally (5 Member States). This is discussed in detail in chapter 5.

Account also needs to be taken of whether a Member State applies the working time limits per-worker or per-contract. This issue is discussed in chapter 1.

Beyond the points made above, questions still arise about the compatibility of national laws with the Directive's provisions<sup>262</sup> in the Member States listed below:

***Weekly working time limits can be exceeded under specific provisions for the health sector:***

Austria (up to 60 hours per week on average without requiring the worker's consent);  
Bulgaria (no limit to compulsory overtime for those providing medical assistance);  
France (unclear limits to working time for doctors employed in public health services)  
Greece (application suspended for doctors in public health services; average working hours in practice can exceed 70 per week)  
Italy: (unclear application of working time limits to doctors in health services)  
(Belgium has not yet transposed the limits for employed doctors, dentists and vets, but a draft law is currently completing the legislative process: see chapter 2.)

***Weekly working time limits can be exceeded for other sectors, or generally:***

Bulgaria (no limit to compulsory overtime in national defence, emergencies, urgent restoration of public utilities or transport)  
Cyprus (application to armed forces and police)  
Greece (due to non-recognition of on-call time in the private sector)  
Hungary (certain so-called '*stand-by jobs*' in the public sector allow 60-72 hours' average weekly working time; '*stand-by jobs*' in defence forces allow 54-60 hours on average)  
Slovakia (not clear what limits apply to professional soldiers; clarification needed about the limits for drivers, railway workers and road maintenance workers)  
Slovenia (not clear what limits apply to civil and public service)  
Spain (civil and public services, particularly emergency services, firefighters, police, prison and security)

***Reference periods can be extended to 6 months, outside the Directive's provisions:***

Bulgaria, (six months by law for all activities)  
Germany (six months by law for all activities)

***Reference periods can be extended to 12 months, outside the Directive's provisions:***

Germany (12 months by law, for federal civil service)  
Hungary (12 months by law for professional soldiers)  
Poland (12 months by law, where justified by atypical organisation or technical conditions)  
Spain: (12 months by law, for all activities)

***Reference periods can be extended without limit:***

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<sup>262</sup> Taking account of all available derogations, including the 'opt-out' where applicable (see chapter 5).

Poland (proposed amendment would allow reference periods exceeding 12 months).

***Application of reference periods is insufficiently clear:***

Denmark (insufficient information available about approach of collective agreements)

Sweden (insufficient information available about approach of collective agreements)

## 5. THE 'OPT-OUT'

### 5.1. The legal provisions

Article 22(1) of the Working Time Directive (commonly known as the '*opt-out*') provides that:

(1) A Member State shall have the option not to apply Article 6 [limit to average weekly working time], 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 point 2 of 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).

Article 22(3) adds that Member States wishing to allow for use of the opt-out should so inform the Commission 'forthwith'.

### 5.2. Analysis and jurisprudence

Effectively, Article 22.1 allows a Member State to make provision for workers who so agree, to work more than the maximum of 48 hours/week (on average) fixed by the Directive. This is a derogation to the Working Time Directive, and thus is to be interpreted restrictively, bearing in mind the health and safety objectives of the Directive. Moreover, its availability is subject to a number of important protective conditions.

It would appear, firstly, that an employer may not validly ask a worker to work more than the 48-hour limit under the Directive, unless the Member State has decided to make use of this derogation and has enacted all the necessary transposing measures.

For example, in *Fuß*<sup>263</sup>, national laws at regional (*Land*) level required public service firefighters to work a standard 54-hour working week, including on-call time. This case concerned a firefighter who formally asked in December 2006 to have the 48-hour limit under

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<sup>263</sup> *Fuß (I)*, Case C-243/09.

the Directive applied to his working time, and who considered that he was subjected to reprisals by his employer for making that request.

The national court referred to the Court of Justice for advice on whether the protection against detriment contained in Article 22(1) should be applied in the circumstances of this case. The Court held, however, that Article 22 had no relevance, since during the period in question, the Land had not passed any measure transposing the use of the opt-out:

*'It follows that, in the absence of measures of national law giving effect to the derogation available to Member States under [Article 22(1) of the Directive], that provision is irrelevant to the resolution of the dispute in the main proceedings and, consequently, only Article 6(b) of that directive, in so far as it lays down the principle that Member States must ensure that the average working time for each seven-day period, including overtime, does not exceed 48 hours, must be taken into consideration.'*<sup>264</sup>

Thus, if a Member State or relevant public authority has not made legal provision for allowing use of the opt-out, the 48-hour weekly average limit under Article 6 of the Directive remains applicable, even if the worker consents to work longer hours:

*'...from [the 48-hour limit under Article 6], in the absence of the implementation into national law of the option provided for in Article 22(1) of the Directive, no derogation whatsoever may be made concerning activities such as those of the firefighters in issue in the main proceedings, even with the consent of the worker concerned...'*<sup>265</sup>,

The only decision of the Court of Justice to have considered the opt-out in detail is *Pfeiffer*.<sup>266</sup> In this case, several emergency workers with a German ambulance service challenged work rosters based on a collective agreement, which allowed weekly working time up to 49 hours per week on average, if on-call time at the workplace ('*Arbeitsbereitschaft*') accounted on average for at least 3 hours per day. The workers argued that this was incompatible with the Working Time Directive's limit to maximum weekly working time, and the question arose whether the collective agreement could amount to an opt-out under Article 22.

In an important passage, the Court of Justice held that national legislation was incompatible with the Directive, in allowing a provision such as that in the collective agreement to apply:

*".... The objective of Directive 93/104 ... seeks to guarantee the effective protection of the safety and health of workers by ensuring that they actually have the benefit of, inter alia, an upper limit on weekly working time and minimum rest periods. Any derogation from those minimum requirements must therefore be accompanied by all the safeguards necessary to ensure 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. 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*

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<sup>264</sup> *Fuß*, para 38. (Germany had in fact passed legislation in December 2002 allowing for use of the opt-out (see details below), but it appears from paras 37-38 of the ruling that the Land whose regulations governed Mr Fuß's working time, Land Sachsen-Anhalt, did not do so at Land level until January 2008, well after the acts disputed between Mr Fuß and his employer.) See also *Jaeger*, para 85; and *Pfeiffer*, para 98, where the Court noted that the Member State concerned had not chosen to make use of the opt-out.

<sup>265</sup> *Fuß II*, case C-429/09, para 33.

<sup>266</sup> Joined cases C-397/01 to C-403/01, *Pfeiffer*. See also the briefer consideration in *SIMAP*.

*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....*

*It follows that, for a derogation from the maximum period of weekly working time laid down in Article 6 .... (48 hours) to be valid, the worker's consent must be given not only individually, but also expressly and freely.*

*These 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.<sup>267</sup> ... [Hence, the condition now contained in Article 22.1(a)] is to be construed as requiring consent to be expressly and freely given by each worker individually, if the 48-hour maximum period of weekly working time, as laid down in Article 6 of the Directive, is to be validly extended. ...<sup>268</sup>*

Taking the Court's comments in *Pfeiffer* and *Fuß I* in conjunction with the requirements expressly laid down at Article 22.1, it appears that the following conditions must, as a minimum, be satisfied for a valid opt-out:

- The Member State concerned must first have clearly transposed the use of the opt-out under Article 22 of the Directive,
- The opt-out by the individual worker concerned must be an explicit, free, and informed advance consent.
- A worker may not be penalised by the employer in any way for not agreeing to opt out or for asking to have the 48-hour average limit applied to him or her.
- The decision to opt out must be taken by the individual worker, and may not be made by others (even their trade union) on their behalf.
- The employer is to keep records of all opted-out workers, which must be available for inspection on request by the health and safety surveillance authorities.

It should also be emphasised that the opt-out under Article 22 applies *only* to the maximum limit to weekly working time under Article 6, not from any other provisions of the Directive. Thus, an opted-out worker is still entitled to benefit from daily and weekly minimum rests, paid annual leave, limitation of night work, etc. The Directive does not allow for any opt-out from those provisions.

The Directive does not explicitly specify any limit to the hours which an opted-out worker may agree to work. However, it contains two *implicit* limits.

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<sup>267</sup> The Court had already stated in *SIMAP*, Case C-303/98, at para 74, and repeated in *Pfeiffer* at paras 80-81, 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*” [to opt-out under the equivalent provision in Directive 93/104/EC].

<sup>268</sup> *Pfeiffer*, paras 82 – 86.

Firstly, it is pointed out that, out of the total 168 hours (24 hours x 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. Accordingly, working hours could not exceed an average of 78 hours per week.

Secondly, and more importantly, it should be recalled that Article 22 specifies that use of the opt-out is subject to '*respecting the general principles 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 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: clearly, the safe limit to working time may be lower for jobs which involve operating heavy machinery, or making decisions which affect others' immediate safety, than for routine desk work. But even in general terms, it may be questioned, for example, whether allowing opted-out workers to work up to 78 hours per week, on average, for a prolonged period could be compatible with the health and safety principles underlying the Directive.

It is worth recalling that a number of studies<sup>269</sup> show a link between long working hours, particularly over prolonged periods, and negative effects such as increased rates of accidents and mistakes (also affecting colleagues and customers), falling productivity, increased difficulties in reconciling work and family commitments, stress and fatigue levels, and short-term and long-term health impact.

### **5.3. The use of the opt-out among the Member States**

The picture regarding use of the opt-out under Article 22.1 has changed considerably over recent years.

In 2000, the UK was the only Member State to make use of the opt-out<sup>270</sup>. However, by 2003, other Member States (France, Germany, the Netherlands and Spain), had introduced, or were

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<sup>269</sup> See for example: *Working Time/Work intensity*, European Foundation for Living and Working Conditions/ Paris School of Economics (forthcoming); *Long working hours and cognitive function*, M. Virtanen et al, *American Journal of Epidemiology*, January 2009; *Working Time Around the World*, ILO, 2007; *Extended work periods*, P. Knauth, *Ind. Health* 2007 Jan;45(1): 125-136; *Long working hours, safety and health*, National Institute for Safety & Health (USA), (2006); J. Johnston & J Lipscomb, '*Long working hours, occupational health & the changing nature of work organisation*', *American Journal of Industrial Medicine* 2006;49(11):921-929; M. Harma, '*Work hours in relation to work stress, recovery and health*', *Scand. J. Work Environ Health* 2006 Dec; 32(6): 502-14; Dembe et al, '*The impact of overtime and long work hours on occupational injuries and illnesses: new evidence from the US*', *Occupational and Environmental Medicine* 2005, vol. 62, p. 588-597; Landrigan et al, '*Effect of Reducing Interns' Work Hours on Serious Medical Errors in Intensive Care units*', *New England Journal of Medicine* 2004; 351: 1838-48; Lockley et al, '*Effect of reducing interns' weekly work hours on sleep and attentional failures*', *New England Journal of Medicine* 2004; 351(18) 1829-1837; National Institute for Occupational Safety & Health (USA), *Overtime and Extended Work Shifts: Recent Findings on Illness, Injuries and Health Behaviours*, 2004; A. Spurgeon, *Working Time: its impact on safety and health* (ILO, 2003); M. van der Hulst, '*Long work hours and health*', *Scand. J. Work Environ Health* 2003; 29(3): 171-188; *Working long hours: a review of the evidence*, Institute for Employment Studies/ Dept of Trade and Industry, UK, 2003; Reason J, *British Medical Journal* 2000; 320: 768-770; Shepherd & Clifton, '*Are long hours reducing productivity in manufacturing?*', *International Journal of Manpower* 2000, vol 21, no 7, p. 540-552.

<sup>270</sup> Commission Report on implementation of Directive 93/104/EC, COM(2000) 787, p. 14 -17.

introducing, opt-outs<sup>271</sup>. These were limited to workers who performed extensive on-call work, and were thus intended to alleviate in the short term the problems posed for health systems seeking to absorb the implications of the Court of Justice's rulings regarding on-call time in *SIMAP* and subsequent cases.

Following recent enlargements, the use of the opt-out within the EU has expanded further, and *a total of sixteen Member States now explicitly provide for use of the opt-out (including one which is currently legislating to allow its use)*.

*Bulgaria, Cyprus, Estonia, Malta, and the United Kingdom allow use of the opt-out, irrespective of sector.*

*The Czech Republic, France<sup>272</sup>, Germany, Hungary, Latvia, the Netherlands, Poland, Slovakia, Slovenia, and Spain allow for use of the opt-out in certain jobs which use extensive on-call time. Belgium is currently legislating to allow use of the opt-out by doctors and some other health professionals.*

It is important to emphasise that due to the rapid and widespread introduction of opt-out clauses in different Member States, the Commission services do not have full information on their application in practice in different Member States. Accordingly, nothing in this chapter should be taken as expressing an assessment of the conformity of practice in a Member State with the requirements of the Directive.

#### *a) Member States allowing generalised use of the opt-out*

Five Member States (Bulgaria, Cyprus, Estonia, Malta, and the UK) allow use of the opt-out, irrespective of sector.

In *Bulgaria*, Article 113 of the Labour Code provides for use of the opt-out. An employee aged over 18 may work for more than 48 hours per week, if he or she gives an express written agreement to do so to their immediate employer. Opt-outs are not permitted where the working conditions involve risks to health or life which cannot be eliminated or reduced, or in other areas to be laid down by law. The validity of an opt-out is limited to 4 months, and it is expressly provided that the opt-out does not interfere with the required minimum weekly and daily rests. There is an explicit provision against any employee being penalised for refusing to opt out. An employer must keep registers of opted-out workers for inspection by the labour inspectorate, and provide the inspectorate with any further information requested (but it is not clear whether this includes keeping records of the hours actually worked).

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<sup>271</sup> Commission Report on re-examination of Directive 93/104/EC, COM (2003) 843, p. 15-17. Luxembourg was also included in this 2003 Report as using the opt-out for the hotel and restaurant sector. However, more detailed information which was subsequently provided by the national authorities indicates that this is not the case. National law provides a limited exception for this sector, whereby working hours may temporarily exceed 48 per week if the individual worker so agrees in advance; nevertheless, the average working hours may still not exceed 40 hours per week, over a reference period which appears compatible with the Directive. Such a situation seems to fall within (and indeed appears more favourable than) the limit set by Article 6 of the Directive. See chapter 4 for further details.

<sup>272</sup> France is difficult to classify, since it allows excess hours to be worked on a voluntary basis by doctors and pharmacists in public health services, but there is not always a legal requirement of advance individual consent. This situation is therefore covered both in chapter 4 (limits to working time) and chapter 5 (use of the opt-out).

In *Cyprus*, Article 7(4) of the Organisation of Working Time Law (2002) allows for use of the opt-out, mentioning that it is subject to the general principles of the protection of health and safety of workers. A worker may work for more than the average 48 hours in any week, provided that she or he consents to do so. It is not specified that consent must be given in advance, and no particular form of consent is prescribed. However, the national authorities state that the provision is to be understood as requiring advance consent, and that established practice and case law requires the employer to be able to produce a written consent signed by the worker, in order to prove the consent in the event of any dispute. Otherwise the provision follows the wording of Article 22.1 (b) to (e), except that the information which must be provided to health and safety authorities on request is limited to ‘information regarding the consent of the workers’, making it unclear whether the employer is required to record the hours actually worked by opted-out workers. The national authorities state that in practice, it is understood that the employer must record and keep on file the total number of weekly working hours worked by opted-out workers. However, it seems that no statistical data is available on the use of the “opt-out” in Cyprus, making its impact difficult to assess. This situation needs to be clarified.

The employers’ organisations in Cyprus tend to favour the opt-out as allowing more flexibility in the workplace concerning working time of employees. The trade unions in Cyprus are concerned that it allows scope for potential abuse and excessive hours.

In *Estonia*, Article 9(4) of the Working and Rest Time Act 2001 and its successor, Article 46 of the Employment Contracts Act 2009, allow an employer to require an employee to work longer than the limit of 48 hours/week on average, provided the employee consents.

The 2001 Act formerly provided that the hours which are worked by an opted-out employee could not exceed a total of 200 supplementary hours per year or cause exhaustion or damage to the employee's health. The 2009 Act now provides that total working time of an employee who agrees to opt-out may not exceed 52 hours per week on average over a reference period of 4 months, and that the agreement may not be unfair to the employee. The employee may withdraw consent at any time on two weeks' advance notice, and has the right to refuse to perform the overtime if the employer does not observe the 52-hour average limit, or if there are health and safety concerns. The employer must keep separate records of workers who have agreed to opt out, which must be made available on request to workers' representatives, as well as to labour inspectors. The protective conditions contained in Article 22.1 appear to be transposed, though it is not clear that the employee's consent must be a prior consent. (It is understood that the opt-out is not used frequently in practice, because it requires either compensatory rest, or overtime rates of 150%.)

In *Malta*, Regulation 20 of the Organisation of Working Time Regulations 2003 allows for use of the opt-out. A worker may work for more than the 48-hour weekly average, if he or she first so agrees in writing with the employer. The protective conditions exactly follow the text of Article 22.1(a) to (e), and also state that the employer must record the specific number of hours to be worked by an opted-out worker in a particular reference period; an employer who fails to keep the required records carries the burden of proving in any court proceedings that s/he has complied with the Regulations. The Regulations also add that the worker may withdraw consent to opt-out, but must give at least 7 days’ written notice to the employer (or up to 3 months’ notice, if the opt-out agreement so provides.)

In practice, it is understood that opt-outs are used regularly, particularly in the health, tourism and police sectors. Normally, unions negotiate the content of such opt outs on behalf of the

workers, who then sign the agreements individually. However, in some cases opt-out clauses are contained within a worker's contract of employment.

In the *United Kingdom*, Regulation 5 of the Working Time Regulations 1998 (as amended in 1999) allows a worker to opt out of the 48-hour limit by a prior agreement in writing with the employer. The employer must, in return, keep up to date records of all workers who have agreed to opt-out, and of any terms on which a worker has agreed to opt-out, and must allow inspection of the records on request by health and safety inspectors, and provide any further information the inspectors request. Following a 1999 amendment, however, there is no requirement to keep any records of the hours actually worked by opted-out workers: normally, the only records kept are the opt-out agreements signed by each worker.

The opt-out may be for a fixed period or may be indefinite. The worker may terminate his/her agreement to opt-out, but up to 3 months' notice may be required, if the opt-out agreement so provides. (If there is no express provision about notice in the agreement, only a minimum 7 days' written notice is required.) UK law also provides protection against employees being penalised for refusing to opt-out, although this is not very visible, being contained in the rather generally-worded Regulation 31 of the Working Time Regulations and more particularly in the separate Employment Rights Act 1996 (at section 45A).<sup>273</sup>

Both the national authorities, and the national trade union federation (TUC) state that the opt-out is not widely used in hospitals in the UK. Health service policy, and national sectoral agreements, focus instead on moving away from long-hours working in hospitals, by changing the organisation of work. The national authorities indicate that the opt-out is more frequently used in the residential social care sector.

UK employers strongly argue for retaining the opt-out, which they regard as essential to maintaining flexibility and competitiveness. UK trade unions argue that the UK does not adequately transpose the protective conditions required by the Directive, and that workers often feel pressurised to opt out. They point in particular to the absence of any limit to working hours of opted-out workers, the lack of any requirement for employers to monitor or record such hours, the length of notice periods for withdrawing consent to opt-out, and the practice of asking job candidates to sign an 'opt-out' before their contract of employment is concluded.

The Commission has previously expressed its concern as to whether the UK transposition complies with the guarantees laid down by the Directive<sup>274</sup>. It considered that the practice of asking a candidate for employment to sign an opt-out at the same time as (and even before) the contract of employment appeared to undermine the concept of a free consent, and also to threaten the effectiveness of protection against workers being penalised for not agreeing to opt-out. The lack of any obligation to monitor or record hours worked under opt-out seemed inconsistent with Article 22.1's requirements, and led to a paradoxical situation where there might be records on hours actually worked by workers subject to the 48-hour limit but not for those who have opted to work longer hours, who were significantly more exposed to risks to their health and safety. Moreover, it would make it impossible for health and safety authorities

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<sup>273</sup> The national authorities state that their published Guidance on the Working Time Regulations mentions that workers cannot be subject to detriment for refusing to sign an opt-out.

<sup>274</sup> COM(2003) 843.

to see whether opted-out employees were receiving other entitlements under the Directive, such as daily or weekly minimum rest breaks or compensatory rest.

***b) Member States allowing use of the opt-out only in jobs with heavy on-call time***

Eleven Member States (Belgium, the Czech Republic, France, Germany, Hungary, Latvia, the Netherlands, Poland, Slovakia, Slovenia and Spain) apply (or are currently introducing) the opt-out, but limited to jobs which make extensive use of on-call time, such as in health services or emergency services.

In *Belgium*, a draft legislative proposal was approved by both Chambers of Parliament on 13 December 2010 and is currently awaiting royal signature<sup>275</sup>. It transposes the Directive regarding working time of doctors, vets and dentists, and provides for use of the opt-out.

Under the draft law, workers may agree to work up to 12 hours per week in excess of the usual limits (of 48 hours per week on average and 60 hours in any one week), thus allowing up to 60 hours per week on average and up to 72 hours in a single week. The draft mentions that this relates in particular to ensuring availability for on-call time at the workplace. The worker concerned must give an individual written consent in advance, which cannot be included in the contract of employment; the excess hours must be paid at special rates; the worker is entitled to a minimum 12-hour rest after each 12 hours of continuous work and no worker may spend longer than 24 consecutive hours on duty at the workplace; consent may be withdrawn on one month's notice and the worker may not be treated adversely for refusing consent; actual hours worked under opt-out must be recorded, and the operation of the opt-out in practice is to be subject to inspection by the labour inspectorate (*inspecteurs des lois sociales*). The draft legislation is not yet enacted, and therefore no information is yet available on its application in practice.

In the *Czech Republic*, a limited opt-out has been introduced for certain staff in 24-hour health services, under law no 294/2008, which amends the Labour Code with effect from 1<sup>st</sup> October 2008.

The new provision applies to certain medical and non-medical professionals working in certain health services which operate on a 24-hour basis. Such employees may agree to work more than 48 average hours per week; however, the additional overtime is limited to a maximum of 8 additional hours per week (or 12 additional hours, for rescue service health care), averaged over a period of not more than 26 weeks (or up to 52 weeks, if a collective agreement so provides.)

A number of protective conditions apply. The employee's consent must be given individually and in writing, and must be voluntary. Employers must inform the labour inspection authorities, and must keep up to date lists of all employees who so agree. An employee may not validly agree to opt out within the first 12 weeks of employment, and the agreement lapses after 52 weeks, though it may be renewed. An employee may withdraw consent with immediate effect during the first 12 weeks after signing, (as may also the employer), and may do so after that period subject to two months' notice.

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<sup>275</sup> *Projet de loi fixant la durée du travail des médecins, dentistes, vétérinaires, des candidats ... en formation et étudiants stagiaires...*, February 2010.

In *France*, the opt-out clause has been implemented only to a limited extent, and in the context of legislation which affords a higher level of overall protection than the Directive.

Five decrees applicable to the health sector, which came into force on 1 January 2003, allow certain medical and pharmaceutical staff in the public healthcare sector to work extra hours.

Decrees Nos 2002-1421, 1422, 1423, 1424 and 1425 of 6 December 2002 amend the law on respectively, practitioners in hospitals, practitioners working part-time in public hospital establishments, assistants in hospitals, contracted practitioners in public health care establishments and doctors and pharmacists recruited by public health care establishments. All these decrees contain a provision stipulating that these persons can carry out, on a voluntary basis beyond their weekly duties, additional work which gives rise either to time off in lieu or to compensation. However, they do not appear to require express individual consent from the worker concerned in case of working more than the 48-hour average limit.

Décret 2007-879 of 14 May 2007 appears to set a maximum limit of 18 additional hours per month for such work, but it is not clear from the Décret what limits are fixed to *total* working time, for example if on-call time at the workplace is also included. Given the *de facto* organisation of rosters for hospital doctors, for example, it seems that such workers may already exceed the 48-hour average limit set by the Directive<sup>276</sup>, before the extra 18 hours are worked.

An *Arrêté* of 30 April 2003<sup>277</sup> provides that a health service manager may ask a health service professional to voluntarily sign a supplementary contract to provide a specified number of overtime hours over a period of one year, renewable, on a planned and scheduled basis. In such cases, minimum daily rest must be provided. However, the protective conditions contained in Article 22 do not appear to be transposed.

The same Article of the *Arrêté* also provides for health professionals to voluntarily work overtime hours on a less structured basis: in such cases the hours may be (at the choice of the worker) either paid or compensated by time off. There does not appear to be a formal procedure to seek individual consent, though the national authorities indicate that the *Arrêté* is currently being amended to require one. The protective conditions mentioned in Article 22 are not transposed.

*Germany* introduced the possibility of using the opt-out on 24<sup>th</sup> December 2003, with effect from 1<sup>st</sup> January 2004<sup>278</sup>. Its availability is limited in scope:

- to jobs which regularly and to a significant extent include on-call time
- the opt-out requires a collective agreement, as well as an express and freely given written individual consent
- there must be special provisions to safeguard the health and safety of opted-out employees.

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<sup>276</sup> See details from France in chapter 4 (limits to working time).

<sup>277</sup> Article 4, *Arrêté du 30 avril 2003 relatif à l'organisation et à l'indemnisation de la continuité des soins et de la permanence pharmaceutique dans les établissements publics de santé et dans les établissements publics d'hébergement pour les personnes âgées dépendantes*, (version consolidée au 17 mars 2010), <http://legifrance.gouv.fr>.

<sup>278</sup> *Gesetz zur Reform am Arbeitsmarkt*: Article 7(2A) *Arbeitszeitsgesetz*, as amended.

Under this provision, working time may be extended, without time compensation, beyond eight hours per day (*'In einem Tarifvertrag... kann abweichend ... zugelassen werden, die Werktägliche Arbeitszeit auch ohne Ausgleich ueber 8 Stunden zu verlängern'*) The *Arbeitszeitgesetz* obliges employers to keep records of any working time exceeding 8 hours per day, and Article 7(7) protects a worker from being subjected to any detriment for refusing to opt-out or withdrawing consent. The Federal Labour Court has held in 2003 that the Works Council of the enterprise, as well as the safety and health authorities, is entitled to demand and receive details of cases where working hours exceed 8 hours per day.

The form of the German opt-out appears problematic, however, because it is expressly stated to allow derogations from the national rules on minimum daily rest periods<sup>279</sup>, as well as on limits to working time, but does not contain any clear requirement of equivalent compensatory rest. There is no provision in the Working Time Directive which would permit an opt-out from the right to equivalent compensatory rest.

It is true that under a protective clause in national law, where daily working time is extended to over 12 hours, the worker will still be entitled to a rest period of at least eleven hours 'immediately following the end of the working time'<sup>280</sup>. However, this provision does not appear to guarantee *equivalent* compensatory rest for all missed or shortened minimum daily rest periods<sup>281</sup>. For example, a worker who has completed 24 continuous hours on duty, including on-call time at the workplace, should be entitled to a minimum 22 hours' immediately following rest period, rather than the 11 hours' rest which is mentioned here.

Article 7(7) AZG states that a worker who has given an individual written agreement to opt-out can withdraw it in writing 'by giving six months' notice'. The national authorities state that this minimum notice period was proposed by the social partners. In the Commission's view, six months seems long as a minimum notice period in all cases; although the Directive does not provide explicitly for a right to withdraw consent within an accessible period, this would appear to follow from Article 22, in the light of the Court's comments in *Pfeiffer*. It appears that German trade unions have also expressed strong concerns on this point.

It is understood that the opt-out under Article 7(2A) AZG has not been widely used in practice. However, it is implemented in three important collective agreements in public health services<sup>282</sup>. In each case, the agreement provides that before the opt-out may be used, alternatives must be examined, a workload assessment must be performed, and resulting appropriate measures must be introduced to guarantee health and safety. The TV-Ärzte/VKA allows doctors who opt-out to work up to 60 hours per week on average (up to 66 hours on average, if a further collective agreement at Land level so provides and in 'justified individual cases'.)<sup>283</sup> The TV-Ärzte/TdL allows doctors who opt-out to work up to 54 -58 hours per week

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<sup>279</sup> The opt-out provision does not, however, allow for derogations to national rules on minimum weekly rest periods.

<sup>280</sup> Article 7(9) AZG.

<sup>281</sup> In contrast to derogations under Art 7(2) AZG, which are explicitly subject to the condition of equivalent compensatory rest.

<sup>282</sup> The TV-Ärzte/TdL of 30.10.2006 and the TV-Ärzte/VKA of 17.08.2006 cover doctors who are members of the Marburger Bund (doctors' union) and who work respectively in university hospitals of the Länder, or in municipal or Länder hospitals. The TVoED/BTK of 13.09.2005 covers members of the Ver.di union employed in hospitals by the federal government, or by Länder or municipalities which are members of the VKA public employers' association. (The main TVoED (Collective Agreement for the Public Services), also of 13.09.2005, does not seem to provide for use of the opt-out.)

<sup>283</sup> TV-Ärzte/VKA, article 10(5).

on average, and up to 66 hours per week on average if a further collective agreement at Land level so provides and in 'justified individual cases'.<sup>284</sup> The TVoED/BT-K provisions are similar to the TV-Ärzte/TdL, but without the provision for extending opted-out time beyond 58 hours per week<sup>285</sup>.

The opt-out also is also reported to have been used by some Länder in making working time agreements with public service firefighters or police forces.

Germany indicates that it has also introduced an opt-out for federal public servants, by an amendment to the *Arbeitszeitverordnung* in August 2008<sup>286</sup>.

In *Hungary*, Section 13 of the Health Care Act 2003 (as amended in 2004 and 2007) provides that an employee of a health services provider which is providing 24-hour care may agree, by separate prior written consent, to work more than the normal limit of 48 average hours per week. Excess hours may be up to 12 hours of regular time, or up to 24 hours of on-call time, per week, calculated as an average over a reference period of up to 6 months; so that total average working hours for employees using the opt-out may amount to 60 or 72 hours per week. The protective conditions contained in Article 22.1(a) to (e) appear to have been correctly transposed. The national authorities indicate that Section 13 of the Health Services Act provides that health sector employees may not be compelled to perform extra work, and may not be treated less favourably for refusing to do so. In addition, the health care service provider is obliged to keep up to date records of workers who agree to opt out. Section 140A of the Labour Code requires employers to keep records of normal and overtime hours worked, on-call time and leave taken by each employee. Act LXXV on labour inspection requires employers to provide the relevant information on opted-out workers to the labour inspectors.

National law also provides for a concept of 'stand-by jobs', in which workers may agree to exceed the Directive's limits to average working time (see chapter 4.) The national authorities indicate that they also consider employees working in 'stand-by jobs'<sup>287</sup> to be subject to the opt-out. They state that the protective conditions required by the Directive are generally observed in this context, but that some are not explicitly required by law.

In *Latvia*, the Medical Treatment Law<sup>288</sup> was amended in 2009 to provide that in order to ensure accessible medical services, medical personnel may agree to work hours which exceed normal working time limits, on condition that the general principles of health and safety protection are observed.

Extended working time may not exceed 60 hours per week and 240 hours per month. The medical institution must request the written consent of the worker concerned, at least each 4 months. The worker may not be subjected to any negative consequences for refusing to work extended hours. The medical institution must record the working hours of each worker who is working extended working time, and must provide the State Labour Inspectorate with access to the records.

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<sup>284</sup> TV-Ärzte/TdL, article 7(5).

<sup>285</sup> TVoED/BT-K, article 45.

<sup>286</sup> Order amending the rules on working time and leave, dated 13<sup>th</sup> August 2008.

<sup>287</sup> See details in chapter 4.

<sup>288</sup> Medical Treatment Law, OG no 167/168, 1 July 1997, as amended by Article 53, OG no 66, 29 April 2009

In the *Netherlands*, the law was amended in 2005 to allow excess hours to be worked by using the opt-out in jobs which make use of on-call time, such as health service workers and firefighters. The change is subject to a number of protective conditions, and the Government indicated to Parliament that it would be repealed, should the Working Time Directive be amended regarding on-call time according to the Commission's 2004-2009 amending proposal. In the meantime the use of the opt-out is limited:

- - to workers whose jobs involve on-call time
- - where required for continuity and quality of service provision
- - where it cannot be avoided by a different organisation of work
- - it requires a collective agreement as well as individual consent of the worker concerned
- - only where immediate compensatory rest is provided for any missed daily or weekly rests
- - maximum 60 hours per week including on-call time, averaged over 26 weeks.

However, the introduction of the opt-out has been controversial; trade unions complain that it amounts to a regression from the levels of protection and co-determination which applied previously, while employers disagree.

It appears that municipal authorities and public service unions reached agreement in May 2010 on allowing use of the opt-out during the period 2009-2011 (for example in municipal fire services), subject to approval by union members. The agreement would allow working time of up to 50 hours per week, and maximum daily working time would not exceed 11 hours.

*Poland* has not previously allowed use of the opt-out, but has introduced one, limited to medical workers performing on-call time in the health sector, by an Act of 27 August 2007, which amends the Health Care Institutions Act 1991, with effect from 1 January 2008.

The new opt-out only applies to doctors and other workers with higher education who are pursuing a medical profession, and who are working in health care establishments intended for persons whose state of health requires 24-hour care. Such a worker may, if they have given a voluntary prior written consent, be required to undertake medical on-call time which brings total working time over 48 hours per week, when averaged over 4 months. There is no explicit limit to the hours which may be worked by an opted-out worker.

The protective conditions in Article 22.1 (b) to (e) appear to be correctly transposed. The notice period for withdrawing consent to opt-out is one month<sup>289</sup>: the national authorities explain that this period reflects the one-month duty roster used in health care services and the need to ensure continuity in provision of health care.

*Slovakia* did not previously allow use of the opt-out, but has introduced one limited to the health sector by an amendment of the Labour Code (with effect from 1<sup>st</sup> September 2007.) It accompanies the recognition of on-call time as working time, in accordance with the Court of Justice's decisions. New Article 85a states that a medical worker may agree with the employer

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<sup>289</sup> Article 32ja(6), Health-care Institutions Act 1991 as amended.

to work hours which exceed the maximum 48 hours' weekly working time. However, total working time for an opted-out worker may not exceed 56 hours per week, when averaged over 4 months. The Code explicitly prohibits subjecting a worker to any detriment for refusing to opt out. An employer is also obliged to keep written records on workers using the opt-out, as well as notify the relevant public authorities of the use of the opt-out and provide it with the relevant records if so requested.

In *Slovenia*, the opt-out is only used in the health sector. Article 41b of the Medical Services Act and Article 52 of the Health Services Act 2004 provide that a worker (including medical workers in hospitals or health centres) may work longer than the usual limit (48 hours per week, averaged over a reference period), if the employer has first obtained the worker's agreement to do so. The protective conditions from Article 22.1 (a) to (e) appear to have been correctly transposed. The Health Services Act also specifies that the opt-out agreement should indicate the number of weekly overtime hours, and the period for which the opt-out remains valid. The opt-out is understood to be widely used within the Slovenian health sector, although no statistics are available.

In *Spain*, Article 49.1 of Law no. 55/2003 introduced a limited opt-out, which applies only to doctors and nurses in public health services, and only where necessary in order to ensure that on-call services can be provided. It establishes that on a prior request by a health centre, a worker may agree to work hours which exceed the maximum 48 hours weekly working time. The agreement must be a freely given individual consent in writing of the worker concerned. An opted-out worker may not exceed the normal 48-hour limit by more than 150 hours in total per year (equivalent to a total working time of slightly over 51 hours per week, if averaged over 12 months.) A Spanish trade union contribution criticised the fact that the limit applied per-year rather than to any shorter period, commenting that this could allow an opted-out worker to work more than 60 hours in one week.

The measure is a transitional provision, which is due to expire in 2013. However, the employer may lay down in advance some requirements about the opt-out, including a minimum duration during which the opt-out may not be rescinded. There does not appear to be any limit to the minimum notice period which may thus be imposed by the employer, and it may be questioned whether this last-mentioned restriction is in keeping with the strictly voluntary character of the opt-out or the prohibition of detriment for withdrawing consent to opt-out.

### *c) Member States not allowing use of the opt-out*

The following eleven Member States indicate that they have not allowed use of the opt-out in their transposing legislation: Austria, Denmark, Finland, Greece, Ireland, Italy, Lithuania, Luxembourg, Portugal, Romania, and Sweden.

## **5.4. Conclusions**

The picture regarding use of the opt-out has changed considerably over recent years. In 2000, the UK was the only Member State to make use of the opt-out. The picture is quite different now. In all, fifteen Member States now provide for the use of the opt-out, and a sixteenth is in the process of introducing it.

Five of these Member States (Bulgaria, Cyprus, Estonia, Malta, and the United Kingdom) allow use of the opt-out, irrespective of sector.

Eleven further Member States (the Czech Republic, France, Germany, Hungary, Latvia, the Netherlands, Poland, Slovakia, Slovenia, and Spain) already allow a more limited use of the opt-out, restricted to certain jobs which make extensive use of on-call time, or are currently enacting an opt-out of this type (Belgium).

Eleven other Member States indicate that they have not allowed use of the opt-out in their transposing legislation: Austria, Denmark, Finland, Greece, Ireland, Italy, Lithuania, Luxembourg, Portugal, Romania, and Sweden.

Given the very recent introduction of opt-outs in many Member States, there has been insufficient time to make a conclusive overall evaluation of their operation in practice. Indeed, national reports provided almost no information on how the opt-outs available under national law were used in practice (how many workers have agreed to opt-out, in which sectors the opt-out is used (in Member States which allow opt-out in any sector), the average and maximum number of hours worked by opted-out workers, or the outcome of monitoring and enforcement. These issues will therefore require further examination.

Broadly speaking, employers' organisations are neutral or favour the opt-out as providing necessary flexibility and allowing workers the chance to boost their earnings, while workers' organisations generally oppose the opt-out as involving extra risks to health and safety and to reconciliation of work and family life, as well as presenting unacceptable risks of abuse. They argue that decent wages should ensure that workers were not obliged to work excessive hours in order to earn a sufficient living.

However, a serious shortcoming is the apparent absence, in many of the Member States concerned, of any requirement to monitor or record the hours actually worked by opted out workers, the sectors and types of jobs in which the opt-out is used, and for how long such workers continue to work hours exceeding 48 hours per week.

The Directive's objective is to guarantee the effective protection of workers' health and safety<sup>290</sup>; moreover, according to Article 22 the use of the opt-out is explicitly subjected to 'respect for the general principles of protecting workers' health and safety, and taking the necessary measures to ensure that the protective conditions listed at Article 22.1 a-e are enforced. Member States should, accordingly, be able to demonstrate how they are complying with these conditions.

Reference is already made in this chapter to a number of studies which demonstrate a link between long working hours, particularly over prolonged periods, and negative effects for health and safety of workers (as well as for safety of customers and others). Therefore, it would seem appropriate, at a minimum, to measure such indicators carefully, in order to monitor the effects of long-hours working on health and safety as well as on factors such as productivity and innovation.

In view of the analysis above, the compatibility of the following practices with Article 22.1 and the general health and safety goals of the Directive can be seriously questioned:

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<sup>290</sup> Joined cases nos C-397/01 to C-403/01 *Pfeiffer*, para 82.

- Permitting a worker to agree to opt-out before or during the signature of the employment contract, during the probationary period, or in circumstances where the worker's position is not conducive to giving a genuinely free consent
- Imposing long notice periods before a worker's withdrawal of consent to opt-out can become effective (particularly, without any need to relate the length of notice proportionately to justifying reasons, such as the time objectively needed to adjust work patterns to the withdrawal)
- Allowing for opt-out without any conditions designed to ensure respect for the general principles of protecting workers' health and safety
- Allowing for opt-out without providing for appropriate upper limits, in the interests of health and safety, to the hours which may be worked, especially over protracted periods
- Failure to clearly transpose all the protective conditions set out in the Directive, or required by the Court of Justice's interpretation in *Pfeiffer*,
- Failure to explicitly require employers to keep records of the hours actually worked by opted-out workers, which seem to be necessitated by the functions assigned to health and safety authorities under Article 22.1, as well as for demonstrating compliance with other provisions such as minimum rests.

## 6. REST PERIODS

### 6.1. Rest periods under the Directive

The Working Time Directive provides<sup>291</sup> for three types of minimum rest (as well as paid annual leave, discussed in chapter 7.) The Court of Justice has emphasised that these minimum rest requirements '*constitute rules of Community social law of particular importance from which every worker must benefit as a minimum requirement necessary to ensure protection of his safety and health....*'<sup>292</sup>

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

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

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

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

Article 5 then provides for an **additional minimum weekly rest** of 35 hours (which may be reduced to 24 hours if objectively justified):

*'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.'*

#### 6.1.1. The concept and objectives of rest periods

The Court of Justice held in *Jaeger*<sup>293</sup> that rest periods must be seen as essential to protecting workers' health and wellbeing. Periods of work must, as a general rule, alternate regularly with rest periods, which have both recuperative and protective functions. Rest periods must, therefore, provide a fixed and consecutive number of hours, away from the work environment, when the worker can relax:

*'... each employee must in particular enjoy adequate rest periods which must not only be effective in enabling the persons concerned to recover from the fatigue engendered by their work but are also preventive in nature so as to reduce as much as possible the risk of affecting*

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<sup>291</sup> Different rules apply for two specified groups of workers: mobile workers (Article 20) and workers on seagoing fishing vessels (Article 21).

<sup>292</sup> *Commission v UK*, C-484/04, para 38; *Isère*, C-428/09, para 36.

<sup>293</sup> *Jaeger*, C-151/02

*the safety or health of employees which successive periods of work without the necessary rest are likely to produce.'*<sup>294</sup>

In this context, '*the concepts of safety and health ... should be interpreted widely as embracing all factors, physical or otherwise, capable of affecting the health and safety of the worker in his working environment, including in particular certain aspects of the organisation of working time.*' (The Court also referred here to the concept of health in the Constitution of the World Health Organisation, as '*a state of complete physical, mental and social well-being that does not consist only in the absence of illness or infirmity.*')<sup>295</sup>

In practical terms, the Court indicated 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. In order to be able to rest effectively, the worker must be able to remove himself from his working environment for a specific number of hours which must not only be consecutive but must also directly follow a period of work in order to enable him to relax and dispel the fatigue caused by the performance of his duties. That requirement appears all the more necessary where, by way of exception to the general rule, normal daily working time is extended by completion of a period of on-call duty.*'<sup>296</sup>

In the *Jaeger* case, the Court was considering national rules (legislation and a collective agreement) on working time of doctors employed in public hospitals, which allowed doctors to work an on-call shift immediately following their normal working day, with the minimum daily rest being postponed. The Court noted that the national rules effectively allowed for '*periods of work which may last for around 30 hours at a stretch where a period of on-call duty precedes or immediately follows a period of normal service...*'<sup>297</sup>

The Court held that such rules were contrary to Article 3's requirements of minimum daily rest periods, and that they also excluded what could be allowed under permitted derogations, since taking the minimum rest period after such a long delay would not provide '*adequate rest*' and it was '*only in entirely exceptional circumstances that Article 17 [of the Directive, allowing for derogations conditional on equivalent compensatory rest] enables appropriate [alternative] protection to be accorded to the worker where the grant of equivalent periods of compensatory rest is not possible on objective grounds.*'<sup>298</sup>

#### 6.1.2. *The concept of 'adequate rest'*

The Directive also defines a concept of '*adequate rest*' as meaning '*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.*'<sup>299</sup>

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<sup>294</sup> *Jaeger* para 92; similarly *Dellas*, para 41; *Isère*, para 37.

<sup>295</sup> *Jaeger*, para 93.

<sup>296</sup> *Jaeger*, para 95; *Isère*, para 51.

<sup>297</sup> *Jaeger*, para 79.

<sup>298</sup> *Jaeger*, paras 79 – 98 (quotation is from para 98.) See below for discussion of '*adequate rest*' (section 6.1.2 of this chapter) and '*compensatory rest*' (section 6.2.2 of this chapter).'

<sup>299</sup> Article 2(9).

The Directive's main provisions only use this term in relation to workers who are not covered by the Directive's specific rest provisions at Articles 3-5, stating that such workers are entitled to 'adequate rest' as a residual level of protection<sup>300</sup>.

However, it is worth noting that recital 5 of the Directive states that '*All workers should have adequate rest periods.*', and the Court of Justice has referred to '*adequate rest*' when considering the correct application of derogations from the rest provisions of Articles 3-5, as for example in the passages from *Jaeger* and *Dellas* cited above.<sup>301</sup>

### 6.1.3. *The definition of rest periods*

The Court has held in several cases that the notion of 'rest period' under the Working Time Directive is a concept of Community law, which may not be unilaterally defined, or subjected to conditions or limits, by a Member State:

*'... the concepts of working time and rest period within the meaning of [the Directive] ... 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 .... Only such an autonomous interpretation is capable of securing for that directive full efficacy and uniform application of those concepts in all the Member States. ... Member States ... may not make subject to any condition the right of employees to have working periods and corresponding rest periods duly taken into account, since that right stems directly from the provisions of that directive. ....'*<sup>302</sup>.

### 6.1.4. *On-call time and rest time*

The Directive defines a '*rest period*' at Article 2 as '*any period which is not working time*'.

The Court of Justice has interpreted this definition as indicating that the concepts of work and of rest are '*mutually exclusive*', and that the Working Time Directive '*does not provide for any intermediate category between working time and rest periods*'<sup>303</sup>.

The Court held accordingly that 'inactive' periods of on-call time, when a worker was required to remain present at the workplace in order to intervene when called, but could rest or sleep in a room provided by the employer for that purpose until a call came, must be considered as working time and could not be counted towards the minimum rest periods required by the Directive.<sup>304</sup> (This aspect is covered in more detail in chapter 3.)

### 6.1.5. *Timing of weekly rest periods*

Article 5 originally contained a sentence stating that the weekly rest period should in principle include Sunday. But in *UK v Council*, the Court recalled that the Working Time Directive is a health and safety directive, and held that the Council had acted outside its proper powers in

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<sup>300</sup> 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*'.

<sup>301</sup> *Jaeger* para 92; similarly *Dellas*, para 41.

<sup>302</sup> *Jaeger*, Case C-151/02, paras 58 – 59; *Dellas*, paras 44-45.

<sup>303</sup> *Simap* para 47 ; *Jaeger* para 48 ; *Dellas*, para 42 – 43.

<sup>304</sup> *Jaeger*, Case C-151/02, paras 65 and 69.

including this sentence since it had *'failed to explain why Sunday, as a weekly rest day, is more closely connected with the health and safety of workers than any other day of the week.'*<sup>305</sup> The Court annulled the sentence in question, since it was easily severed from the Directive's other provisions. As a result, the Working Time Directive does not require the weekly rest to be taken on any particular day of the week.

This does not prevent Member States from legislating on this point. In practice, many Member States<sup>306</sup> do provide in their national legislation that the weekly rest is in principle to be taken on a Sunday, though exceptions may be permitted to that principle.

Article 16(a) of the Directive states that Member States may lay down a reference period not longer than 14 days for applying Article 5 (weekly rest periods). It is possible to derogate from this provision under Articles 17 or 18, but only<sup>307</sup> if equivalent compensatory rest is provided. The Court of Justice's comments in *Jaeger*, on the need for compensatory rest to be afforded within the immediately following period, were made in the context of daily rest; however, the Court's reasoning also seems relevant to the case of weekly rest.

These factors would suggest that in general, the weekly rest should be provided within each 7 day period, and at the outside, within a 14 day period.

#### 6.1.6. *Obligations on Member States and employers*

The judgment of *Commission v UK* examined the obligations of Member States and employers under the Working Time Directive. The question at issue was whether the Directive permitted a situation where the minimum rest periods had been transposed correctly into national law, but the Government had published guidance on implementing those rules which stated that employers were not required to ensure that their workers actually exercised these rights.

In the Court's view, it was clear from the objectives and wording of the Working Time Directive that *'workers must actually benefit from the daily and weekly periods of rest provided for by the directive.'*<sup>308</sup>

Of course, the Directive did not *'as a general rule, extend to requiring the employer to force his workers to claim the rest periods due to them. The employer's responsibility concerning observance of the rest periods provided for by that directive cannot be without limits.'*<sup>309</sup>

However, *'Member States are under an obligation to guarantee that each of the minimum requirements laid down by the directive is observed, including the right to benefit from effective rest.'*<sup>310</sup> The guidance which was in question here did not comply with that obligation. By limiting employers' obligations and by *'letting it be understood that, while they*

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<sup>305</sup> Case C-84/94 *United Kingdom v Council of the European Union*. ECR 1996 I-5755, para 37.

<sup>306</sup> For example Belgium, Bulgaria, Denmark, Estonia, Finland, France, Germany, Greece, Ireland, Italy, Luxembourg, Netherlands, Portugal, Slovak Republic, Spain. See for instance L.3132-3 Labour Code and Act 974/2009 (France).

<sup>307</sup> Unless the derogation is under Article 17(1) (duration of working time is not measured or predetermined, or can be determined by the workers themselves). This derogation does not state that compensatory rest is required.

<sup>308</sup> *Commission v UK*, para 39.

<sup>309</sup> *Commission v UK*, para 43.

<sup>310</sup> *Commission v UK*, para 40.

cannot prevent those rest periods from being taken by the workers, they are under no obligation to ensure that the latter are actually able to exercise such a right', the guidelines were 'clearly liable to render the rights enshrined in Articles 3 and 5 of [the Directive] meaningless and [were] incompatible with the objective of that directive, in which minimum rest periods are considered to be essential for the protection of workers' health and safety... ?'<sup>311</sup>

## 6.2. Derogations from rest periods

The Directive allows for four *limited derogations* from the minimum rests under Articles 3, 4 and 5:

- in a range of *specified activities listed in Article 17.3*<sup>312</sup> (by collective agreement, agreement between the two sides of industry, or national laws or regulations)
- in any type of activity or situation, under Article 18, *by collective agreement*, or agreement between the two sides of industry at national or regional level (or, where those actors so rule, by the two sides of industry at lower level)
- for *shift work*<sup>313</sup>, where the worker is changing shift and cannot take daily or weekly rest between the end of one shift and the start of another, under Article 17(4) (a),
- for *work split up over the day*<sup>314</sup>, such as activities of cleaning staff, under Article 17(4)(b).

In addition, Article 17(1) allows Member States to derogate from the minimum rest provisions 'where, on account of the specific characteristics of the activity concerned, the duration of working time is not measured and/or predetermined or can be determined by the workers themselves', particularly in cases such as managing executives with autonomous decision-taking powers.

It should be emphasised that the 'opt-out' at Article 22 of the Working Time Directive only allows a worker to 'opt out' of the limit to average weekly working time<sup>315</sup>. It does not offer a derogation from minimum rest entitlements under Articles 3, 4 and 5. A worker who has opted-out, therefore, is still entitled to receive the minimum daily and weekly rests guaranteed by the Directive, within the necessary time frame.

The Court has underlined that '*since they are exceptions to the Community system for the organisation of working time put in place by [the Working Time Directive], the derogations provided for in Article 17 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.*'<sup>316</sup>

For example, in *Isère*, the Court held that the derogation under Article 17(1) did not, on the information available to the Court, refer to workers employed on casual fixed-term contracts

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<sup>311</sup> *Commission v UK*, para 44.

<sup>312</sup> For the list of activities, see the box in chapter 1.

<sup>313</sup> Derogation from Articles 3 and 5 only, not from the rest break during the working day under Article 4.

<sup>314</sup> Derogation from Articles 3 and 5 only, not from the rest break during the working day under Article 4.

<sup>315</sup> Article 22.1: '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...'

<sup>316</sup> *Jaeger*, para 89; *Isère*, para 40.

not exceeding 80 days per year to help in residential holiday and leisure centres for children. There was *'nothing in the documents submitted to the Court to indicate that [these workers] are able to decide the number of hours which they are to work.'* On the contrary, the descriptions of the operation of the centres and the activities of the workers which had been provided to the Court *'... suggests that they are not. Nor do the documents submitted to the Court contain any material to indicate that those workers are not obliged to be present at their place of work at fixed times.'*<sup>317</sup>

#### 6.2.1. Derogations are only possible if compensatory rest is assured

It is important to note that with the exception of Article 17(1) which applies to relatively few situations, all of these derogations are expressly subject to the condition that the workers concerned:

*'are afforded equivalent periods of compensatory rest or that, in exceptional cases in which it is not possible for objective reasons to grant such equivalent periods of compensatory rest, the workers concerned are afforded appropriate protection.'*<sup>318</sup>

Effectively, therefore, a minimum rest may be *postponed* (where the Directive allows for a derogation), so that the worker receives an extra rest period of equivalent length at another time to compensate for the missed rest. However, the limited derogations do not allow minimum rests to be *missed* altogether, except perhaps in the exceptional cases where it is objectively impossible to provide equivalent compensatory rest and where the workers have received appropriate alternative protection (see section 6.2.3 below).

The Court of Justice emphasised in *Jaeger* that the same rules apply where derogations are made in a collective agreement.<sup>319</sup>

#### 6.2.2. Nature and timing of compensatory rest

In the *Jaeger* case, the Court emphasised the health and safety implications of missing minimum rest periods:

*'... 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.'*<sup>320</sup>

Therefore, the Court held, compensatory rest must follow immediately after the working time it is supposed to counteract, and must consist of time where the worker is free to pursue his or her own interests:

*'.. ' It follows ...that equivalent compensating rest periods within the meaning of Article 17(2) and (3) of [the Directive] must be 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*

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<sup>317</sup> *Isère*, para 42.

<sup>318</sup> Articles 17(2) and 18 of the Directive; the Court has insisted on this condition in *Jaeger*, para 90.

<sup>319</sup> *Jaeger*, para. 90.

<sup>320</sup> *Jaeger*, para 96.

*pursuing freely and without interruption his own interests in order to neutralise the effects of work on his safety or health. Such rest periods must therefore follow on immediately from the working time which they are supposed to counteract in order to prevent the worker from experiencing a state of fatigue or overload owing to the accumulation of consecutive periods of work.*<sup>321</sup>

*... [T]he increase in daily working time which the Member States or social partners may effect under Article 17 ... by reducing the rest period accorded to the worker during the course of a given working day, in particular in hospitals and similar establishments, must in principle be offset by the grant of equivalent periods of compensatory rest made up of a number of consecutive hours corresponding to the reduction applied and from which the worker must benefit before commencing the following period of work. As a general rule, to accord such periods of rest only at other times not directly linked with the period of work extended owing to the completion of overtime does not adequately take into account the need to observe the general principles of protection of the safety and health of workers which constitute the foundation of the Community regime for organisation of working time.*<sup>322</sup>”

Derogations from rest periods should not, in any circumstances, result in a worker being required to exceed the average maximum weekly working time.<sup>323</sup>

### 6.2.3. 'Alternative' protection to equivalent compensatory rest

In *Jaeger*<sup>324</sup>, the Court commented that it was only in 'entirely exceptional' circumstances, where granting equivalent compensatory rest is 'impossible for objective reasons' that appropriate protection could be permissible as an alternative.

In *Isère*, the Court considered the argument that such exceptional circumstances might exist in the case of staff who were directly involved in providing day and night supervision to children staying at residential holiday and leisure centres:

*'The French Government submits ... that the exceptional nature of the activities of the staff at holiday and leisure centres does not allow provision of equivalent periods of compensatory rest. The persons accommodated there are children who, for the several days they spend there, are subject to day and night supervision by the same members of staff. If compensatory rest, as defined by the Court in paragraph 94 of Jaeger, were granted to casual and seasonal members of staff at those centres, the result would be that they would take that rest during the stay of the children under their care and consequently those children would be temporarily deprived, also during the night, of the presence of their leaders, the very persons who, in the absence of the children's parents, are the adults who know the children best and whom the children trust.'*<sup>325</sup>

The Court noted that it had received 'little specific information on how the activities of the staff at the holiday and leisure centres are conducted, how those activities are organised and what staff are needed at those centres.' Nevertheless, it was 'certainly not inconceivable, in the light of the description of those activities and the responsibilities of the staff at the centres

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<sup>321</sup> *Jaeger*, para 94; *Isère*, para 50.

<sup>322</sup> *Jaeger*, para 97.

<sup>323</sup> *Jaeger*, para 100.

<sup>324</sup> *Jaeger*, para 98; *Isère*, para 55.

<sup>325</sup> *Isère*, para 54.

*concerned for the children accommodated there, that, exceptionally, for objective reasons, it may not be possible to ensure the regular alternation of a period of work and a period of rest, as required by Article 3 of Directive 2003/88, in accordance with Jaeger, cited above.*<sup>326</sup>

In the *Isère* case, rather than providing for equivalent compensatory rest, national law had provided for an annual ceiling to the number of days which could be worked in such activity (not more than 80 days per year.) However, the workers concerned did not enjoy any rights under national law to minimum daily rest or to compensatory rest during the duration of the employment contract. The Court held that such a provision '*cannot in any circumstances be regarded as appropriate protection within the meaning of Article 17(2) of Directive 2003/88. As is clear from Recital (15) of that directive, while a degree of flexibility is allowed to Member States in the application of certain provisions of that directive, they must nevertheless ensure compliance with the principles of protecting the health and safety of workers. ... the objective of that [alternative] 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.*'<sup>327</sup>

Merely fixing a maximum duration of 80 days for the employment contract did not meet this requirement and indeed, '*national legislation which does not allow workers to enjoy the right to a daily rest period for the entire duration of the employment contract, even if the contract concerned has a maximum duration of 80 days per annum, not only nullifies an individual right expressly granted by that directive but is also contrary to its objective*'<sup>328</sup>

### **6.3. Application of minimum rest periods in national laws**

#### *6.3.1. Application of minimum daily rest*

Article 3 of the Directive lays down a minimum daily rest period of 11 consecutive hours per 24-hour period.

It appears that this core requirement has been satisfactorily transposed into national law by all Member States<sup>329</sup>. All of the EU-10 Member States, together with Romania and Bulgaria, specifically provide in their general labour laws for the minimum daily rest required by the Directive. Of the three Member States mentioned in the Commission's 2000 Report as having no explicit national provisions on the minimum daily rest:

- **Italy** has introduced an explicit entitlement at Art. 7 of Legislative Decree 66/2003;
- **Luxembourg** has introduced an explicit entitlement at Article L. 211-16 of the consolidated Labour Code 2007

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<sup>326</sup> *Isère*, paras 56-57.

<sup>327</sup> *Isère*, para 58.

<sup>328</sup> *Isère*, para 60.

<sup>329</sup> In Hungary, the Labour Code formerly did not specify that the 11 hours' daily rest must be consecutive. However, Section 123.1 of the Code was amended by Act LXXIII of 2007 with effect from 1<sup>st</sup> July 2007, and now explicitly mentions this point.

- **Sweden** has introduced an explicit entitlement by Law no 2005/165, amending Section 13(1) of the Working Hours Act 1982 with effect from 1<sup>st</sup> July 2005.

A number of Member States go further, and require a minimum rest of 12 consecutive hours (Bulgaria, Czech Republic, Greece, Latvia, Romania, Slovak Republic, Slovenia, Spain.)

However, some doubts about the use of derogations and exclusions in certain Member States are considered at part 6.4 of this chapter.

In some national laws, the 24-hour period for the working day is specified to run from midnight to midnight; it is considered that this makes it difficult in practice to enforce the uninterrupted daily rest period of 11 hours, which normally starts before midnight and ends before 11 am<sup>330</sup>.

### 6.3.2. *Application of minimum weekly rest*

Article 5 requires, as a general rule, an uninterrupted rest period of 24 hours for each seven-day period, plus the 11 hours' daily rest referred to in Article 3. (In other words, Article 5 provides for a minimum 35 hour continuous rest period for every period of seven days.)

However, if objective, technical or work organisation conditions so justify, Article 5 allows a weekly rest period of only 24 hours.

Article 5 has been transposed into national law by the vast majority of Member States.

A number of Member States go further than the requirements of Article 5, and set a longer minimum weekly rest; as do collective agreements in many Member States such as Cyprus, Denmark or Germany. For example, Bulgaria, Estonia, Romania and the Slovak Republic provide for a standard weekly rest of at least 2 consecutive days or 48 continuous hours. Hungary provides for at least two rest days each week, though they need not be consecutive. Luxembourg provides for a minimum weekly rest of 44 uninterrupted hours, Latvia provides for a standard weekly rest of 42 consecutive hours within each seven-day period while Austria, Slovenia and Sweden provide for a minimum weekly rest of 36 hours.

Conversely, a small number of Member States appear to have transposed this requirement incorrectly in some respects. As well, some doubts about the use of derogations and exclusions in certain Member States are considered at part 6.4 of this chapter.

In **Cyprus**, article 6(3) of the Organisation of Working Time Law 2002 allows an employer to replace the weekly rest period with a single continuous rest period of 48 hours per 14 days; this is a derogation from the weekly rest required by the Directive, and could only be made in the limited situations listed in Articles 17(3) and 18(3), while the national provision applies to all activities and sectors. (The national authorities indicate that it is proposed to repeal article 6(3)).

Moreover, article 6(2) of the Law states that the minimum weekly rest period may be reduced to *less* than 24 hours if objective, technical or work organisation conditions so justify. However, the Directive would only allow such a reduction by way of derogation, in the

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<sup>330</sup> For example, in Greece (Article 3 of Presidential Decree 88/1999).

limited situations listed in its Articles 17(3) and 18(3), and subject to compensatory rest; neither condition applies under the national provision.

In *Latvia*, the general requirement that weekly rest should be provided within a 14-day reference period (under Article 16 of the Directive) does not seem to have been transposed.

### 6.3.3. *Application of rest breaks during the working day*

This provision appears in general to have been satisfactorily transposed. In accordance with Article 4, Member States generally set out minimum provisions for the length and timing of a rest break during the working day, in default of a different or more detailed provision under a collective agreement or between employers and workers' representatives.

Legislative provisions fix the break at a minimum length between 10 minutes and one hour, and a maximum length up to 2 hours. The most common length is 30 minutes.

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

- whether the break is designated for taking food as well as rest,
- whether it is to be counted as working time or as rest time,
- whether it is specified that the employee is free to leave the workstation or the workplace during the rest
- the timing (most commonly, after a maximum of 4 hours, and not at the beginning or end of working time)
- whether exceptions are provided (some Member States allow a shorter minimal break, which must still be long enough to allow the worker to eat, in limited circumstances.)

In general, the derogations allowed under national legislation seem consistent with the requirements of the Directive, although it is not always clear that equivalent compensatory rest is provided for missed rest breaks.

### 6.3.4. *Use of derogations*

Member States have, in general, made wide use of the derogations to rest periods permitted by the Directive.

Some Member States have set important limits to derogations. For example, in *France*, the *Code du travail* provides that derogations to daily rest may not result in it becoming shorter than 9 hours, with equivalent compensatory rest. In hospitals, a worker who completes on-call duty at night must immediately receive an 11-hour '*repos de sécurité*' (safety rest); a worker who completes the maximum on-call duty of 24 hours must immediately receive a '*repos de sécurité*' the same length as the completed on-call time. In *Germany*, daily rest may not normally be reduced to less than 10 hours; even that is possible only in specified activities, and on condition that the lost hour is compensated by equivalent additional rest time

within 4 weeks<sup>331</sup>. In *Poland*, the Labour Code does not provide for any derogation from the minimum weekly rest, which may be reduced from 35 to 24 hours for objective, technical or work organisation reasons (following Article 5 of the Directive) only for managers running a business, rescue operations, or a change to a different shift roster. In the *Slovak Republic*, derogations to minimum rests may only be made in limited circumstances, and may not reduce the minimum daily rest below 8 hours per day<sup>332</sup>, or the minimum weekly rest below 24 continuous hours per week, with equivalent compensatory rest. In *Austria*, daily rest may, normally, only be shorter than 10 hours by collective agreement, and subject to further measures to protect workers' health and safety: even in such cases, it may not normally be shorter than 8 hours.<sup>333</sup> In *Romania*, the national authorities state that the Labour Code requires all overtime hours exceeding 8 hours per day (or 40 hours per week) to be matched by equivalent compensatory rest, while any worker who works for 12 hours is entitled to an immediately following 24-hour rest. Derogations from the principle of equivalent compensatory rest are only permitted in exceptional circumstances.<sup>334</sup>

Similarly, in the *Netherlands*, collective agreements can make detailed arrangements regarding working and rest times; however, in all cases other than on-call time, a minimum daily rest of 11 hours and a minimum weekly rest of 36 hours must be observed. The daily rest may be reduced to 8 hours once a week. The weekly rest may be reduced from 36 to 32 hours, but only if provided that total weekly rest still averages 72 hours over two weeks during the relevant period.<sup>335</sup>

In the case of on-call time, the rules have been changed. The Working Time Decree 2005 provided for a minimum 11 hour daily rest before and after each period of on-call duty at the workplace. However, a shorter rest could be applied for 'objective reasons', or a collective agreement could provide for the worker to take extra remuneration instead of the 11-hour immediate rest.

A national court held in January 2007 that these rules failed to respect the minimum daily rest required under the Directive.<sup>336</sup> An amendment<sup>337</sup> provides that there must be an obligatory rest period of at least 11 consecutive hours immediately after an on-call duty at the workplace. In exceptional cases where this is objectively impossible, this may once a week be reduced to 10 hours and once a week to 8 hours, on condition that the next rest is extended by a corresponding number of hours. Such a reduction must be agreed under a collective agreement, or between the employer and the works council. In any event, each week must

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<sup>331</sup> Art. 5 *Arbeitszeitgesetz*. Reduction to 9 hours is possible by collective agreement, if the job regularly includes substantial periods of on-call time, and the reduction is compensated by equivalent extra rest within a fixed period (art. 7(1) AZG).

<sup>332</sup> Daily rests for police and customs officials may, exceptionally, be reduced to 6 hours in the urgent interest of the state.

<sup>333</sup> Section 12, *Arbeitszeitgesetz*.

<sup>334</sup> The national authorities state that under the Labour Code, the only situations in which equivalent compensatory rest is not legally required for a minimum daily or weekly rest are in cases of force majeure, or urgent works to prevent accidents or to remove the consequences of an accident. In such cases, money compensation must be paid in lieu. (However, special rules apply to the health sector; see below.)

<sup>335</sup> Simplification of Working Hours Act 2006 (with effect from 1 April 2007).

<sup>336</sup> Working Time Decree (*Arbeidstijdenbesluit*) 2005, with effect from June 2006, at Article 4.8.1; Decision of the Court of Appeal, 16 January 2007.

<sup>337</sup> Regulations *in het Arbeidstijdenbesluit*, Staatsblad 2007 nr 396 (25th October 2007), with effect from 1st February 2008.

contain a minimum of 90 hours' rest (consisting of 6 daily rest periods of at least 11 hours, and one weekly rest period of at least 24 hours).

Most Member States expressly provide that if a worker misses all or part of a minimum daily or weekly rest, s/he must be provided with an extra compensatory rest period, equivalent in length to the missed rest period. Some national laws require compensatory rest to be longer than equivalent: for example, in **Belgium** a worker who is required to work more than four hours on a Sunday (the main weekly rest day) must be given a full day's compensatory rest<sup>338</sup>.

Most Member States also stipulate a period within which the compensatory rest must be taken; most frequently, within the following week (as regards a missed weekly rest)<sup>339</sup>.

Since the range of derogations allowed under Article 17 of the Directive is fairly wide, the Commission services cannot provide a detailed account of all the various derogations available in each Member State. Therefore, this chapter omits derogations in national law which appear to comply with the Directive's requirements, and concentrates (at point 6.4) on those provisions whose compatibility with the Directive seems more doubtful.

#### **6.4. Use of derogations which may not comply with the Directive**

The main doubts about compliance concern provisions in national law:

- which exclude from minimum rest periods workers who are covered by the Directive,
- which allow derogations without requiring equivalent compensatory rest, or
- where the timing of compensatory rest does not accord with the Court of Justice's judgment in *Jaeger* (C-151/02).
- In some cases, of course, national law on rest periods does not comply with the Working Time Directive because inactive (or even active) on-call time at the workplace is counted as rest time. (This is already discussed in chapter 3.)

##### *6.4.1. Excluding workers from entitlement to minimum rest periods*

In **Austria**, § 20 and § 23 of the *Arbeitsruhegesetz* (ARG) allow for derogations to minimum rest periods in a very wide range of situations, which seems to go beyond those provided in the Directive (or those provided under the *force majeure* provisions at Article 5(4) of the Health and Safety Directive.) They include:

- work to resolve disruption to business caused by unexpected and unavoidable reasons, or prevent an economically disproportionate damage to property
- maintenance and repair work, which cannot be carried out otherwise, or
- where such a derogation is in the public interest due to severe circumstances.

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<sup>338</sup> Chapter III section 1, *Loi sur le travail* du 16 avril 1971, (consolidated version).

<sup>339</sup> For example: Belgium, Bulgaria.

A recent amendment to § 20.1 ARG also appears to allow wide-ranging derogations by means of collective agreement, agreement with staff representatives or with works councils, regarding weekly rest periods of workers in health institutions and convalescent homes.

In **Belgium**, employed doctors, dentists and vets are currently excluded from minimum rest periods<sup>340</sup>. However, a draft law currently awaiting the legislative process<sup>341</sup> would transpose the Directive for these workers, including regarding minimum rest periods. Workers in educational establishments are excluded from the minimum weekly rest<sup>342</sup>. There is no transposition of the Directive's requirements on rest periods as concerns the army.

In **Bulgaria**, Article 154a of the Labour Code provides that if general principles of health and safety are observed, the Council of Ministers may establish a different duration of rest periods for workers who perform activities needing a different organisation of the work. This seems to go beyond the derogations allowed by the Directive, and there is also no requirement of compensatory rest.

**Greece** has transposed the Directive's provisions regarding minimum daily and weekly rests<sup>343</sup>. However, successive legal measures<sup>344</sup> have suspended the application of certain provisions of the relevant Presidential Decree to doctors working in the public health sector. Thus, doctors working in public hospitals or dispensaries, and doctors in training, are effectively excluded from the minimum rests required by the Directive. Many reports indicate that in practice, doctors at all levels in public hospitals are routinely required to work long and frequent on-call shifts at the workplace, often reaching 32 continuous hours. Any such on-call time is in effect considered as rest time, so that the doctors do not receive any compensatory rest for the missed minimum daily and weekly rests.<sup>345</sup> The position is similar for doctors in training: see chapter 2.

Act 3574/2009<sup>346</sup>, following a collective agreement between the sectoral social partners, now provides that if a doctor in public health services works a period of active on-call duty as well as the regular working time, s/he is then entitled to a compensatory 24-hour rest period. However, there is no provision that the rest period must be equivalent to any missed minimum rest hours, and it may be delayed by up to one week.

In **Hungary**, occasional workers are excluded from minimum rest periods. In some situations, the minimum daily rest is not ensured for teachers in public schools (after performing on-call duty in boarding schools, when accompanying school excursions, or if the whole period of on-

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<sup>340</sup> Art 3ter, Loi sur le travail du 16 mars 1971 as amended by the loi-programme of 2 August 2002 (version consolidée): see chapter 2.

<sup>341</sup> *Projet de loi fixant la durée du travail des médecins, dentistes, vétérinaires, des candidats ... en formation et étudiants stagiaires...*, 12 February 2010.

<sup>342</sup> Article 3(2)(2), Loi sur le travail du 16 mars 1971, (version consolidée).

<sup>343</sup> Presidential Decree 88/1999 provides at Article 3 for a minimum daily rest of 12 consecutive hours in each 24-hour period, and at Article 5 for a minimum uninterrupted weekly rest of 24 hours, to which the 12 hours' daily rest are to be added. Derogations are permitted in the activities listed in Article 17(3) of the Directive, or by collective agreement, both subject to equivalent compensatory rest (Articles 14(2) and 14(3) of the Presidential Decree.) However, there is no generally-applicable legal norm about the timing of compensatory rest.

<sup>344</sup> Article 6 of Act 3527/2007 and successive joint Ministerial decisions of the Ministers of Health and Finance made under that Act; Law no 3654/2008 of 3 April 2008, with retroactive effect from 01.01.2008.

<sup>345</sup> See also under Greece in chapter 3 (on-call time and working time.)

<sup>346</sup> Act 3574/2009, entry into force 11 March 2009.

call duty was inactive<sup>347</sup>.) Daily rest periods for the Army and armed forces are 8 hours, rather than the 11 hours specified by the Directive<sup>348</sup>, and there is no apparent provision for equivalent compensatory rest.

Under new rules introduced in 2008<sup>349</sup>, Italy has provided that the national measures transposing key provisions of the Directive (the limit to weekly working time, and minimum daily rest periods) do not apply to 'managers' operating within the National Health Service. This appears to raise problems of compliance with the Directive, since doctors working in public health services in Italy are formally classified as 'managers' under sectoral laws and collective agreements, without necessarily enjoying managerial prerogatives or autonomy over their own rest periods.

**Latvia** provides for a very wide derogation, which seems to exceed what the Directive permits. Under section 140 of the Labour Law, (amended in 2010<sup>350</sup>), '*aggregated working time*' may be applied by the employer, after consulting employee representatives, in any situation where '*due to the nature of the work it is not possible to comply with regular daily or weekly working time*'. This is a very broad exception, which does not appear to come within the situations envisaged by Article 17 of the Directive.

'*Aggregated working time*' allows working up to 56 hours in any one week, though it may not exceed normal limits to average weekly working time over a reference period, which may be up to 3 months (by agreement with the employee) or 12 months (by collective agreement). Aggregated working hours are also expressly subject to the overtime limit (not more than 144 overtime hours in total, over a 4-month period) under Article 136.

Formerly, where an employer had applied aggregated working time, the provisions for minimum daily and weekly rest '*need not apply*'<sup>351</sup> and the employee would be *granted rest time in accordance with a work schedule*.<sup>352</sup> There was no requirement that the work-schedule rests should be equivalent compensatory rests, and no norm about their timing.

Following amendments in 2010, Article 140 now provides that a worker on aggregated working time may not work longer than 24 consecutive hours, and must be provided with a rest period immediately after work. This improves compliance; but it is still not specified that compensatory daily rest must be equivalent to the missed minimum rest hours. Moreover, the minimum weekly rest period is still not applied for workers on aggregated working time.

In **Poland**, the special Acts governing prison officers, customs officers and anti-corruption officers provide that working and rest hours are defined by their duties. There is no provision for the minimum rests required by the Directive, or for compensatory rests where minimum rests are reduced or missed.

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<sup>347</sup> Government Decree 138/1992, section 11A.

<sup>348</sup> Act XCV/2001 on professional and contracted soldiers in the Hungarian Army (Hjt) Section 93(4); Act XLIII/1996 on professional members of the Armed Forces (Hzt) Section 86.3.

<sup>349</sup> Act 133/2008, Article 41(13)

<sup>350</sup> Law on amendments to the Labour Code, OG no. 47, 24 March 2010.

<sup>351</sup> Labour Law 2001 (consolidated version as amended in 2004); section 142 (daily rest); section 143 (weekly rest.)

<sup>352</sup> Labour Law 2001 (consolidated version as amended in 2004), section 140(4).

However, the national authorities state that legislative amendments are planned to increase minimum daily rest periods for prison officers<sup>353</sup>, customs officers<sup>354</sup>, and border guards<sup>355</sup> under the relevant specific Acts, to the 11 continuous hours required by the Directive.

The legislation governing professional soldiers has already been amended to provide for a minimum eleven-hour daily rest and a maximum weekly working time of 48 hours (averaged over not more than 4 months). Proposed further amendments will clearly provide for a minimum weekly rest of 24 hours<sup>356</sup>. The situation regarding the health services in Poland is covered later in this chapter.

#### 6.4.2. *No requirement of equivalent compensatory rest*

In **Belgium**, the law applicable to the private sector generally requires a longer daily rest period than the Directive requires; but it also allows for derogations where the rest period may be less than the Directive's 11 hours' rest per 24 hour period, *either* in various emergencies or urgent situations to avoid accidents or serious impact on commercial functioning<sup>357</sup>. There is no requirement of equivalent compensatory daily rest in these cases.

The law applicable to the public sector also allows for derogations to the normal requirement of 11 hours' rest per 24 hour period, in a range of specified situations. Normally, such a derogation requires equivalent compensatory rest. However, this condition is stated *not* to apply in seven different situations, which include on-call time (*'des activités de garde, de surveillance et de permanence'*) needed to protect goods or persons; boarding and educational care; urgent work on machinery or equipment; services related to civil, public or military security; and other activities, if a Royal decree so authorises.<sup>358</sup>

In **Estonia**, the Working and Rest Time Act 2001 formerly allowed derogations from the minimum daily and weekly rests without any requirement of equivalent compensatory rest. For example, a worker could be allowed to work on weekly rest days with his/her consent (and could be required to do so without consent in cases of urgent and temporary need resulting from *force majeure*), without any provision for compensatory rest.<sup>359</sup>

Compensatory rest was specified in one case, but with no requirement about its timing. The 2001 Act allowed for certain groups of workers to work continuous shifts lasting up to 24 hours (thus missing a minimum daily rest) with the agreement of the labour inspector and on condition of compensatory rest time. However, there was no provision about the timing of the

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<sup>353</sup> Draft legislation of 27 June 2008 on prison officers: proposed Article 125 provides for a minimum daily rest of 11 consecutive hours, and a minimum weekly rest of 35 consecutive hours, with compensatory rest immediately following the duty concerned, or at latest within 14 days.

<sup>354</sup> Draft Act of 24 June 2008 amending the Act on the Customs Service: proposed Article 119 provides for a minimum daily rest of 11 consecutive hours, and a minimum weekly rest of 35 consecutive hours.

<sup>355</sup> The national authorities state that detailed regulations on duty time of border guards will be included in a forthcoming Ordinance of the Minister of Interior and Administration.

<sup>356</sup> Article 1(33) of the Act of 24 August 2007, amending Art. 60 of the Act on professional soldiers' military service with effect from 1 January 2008; draft Act to further amend the Act on professional soldiers' military service, proposed Articles 60(3a) and 60 (3b).

<sup>357</sup> Chapter III section VI, Loi sur le Travail of 16 March 1971, (version consolidée), Article 26 combined with Article 27.2 and Article 38ter.2.

<sup>358</sup> Loi du 14 décembre 2000 sur l'aménagement du temps de travail dans le secteur publique, Articles. 5.2 et 5.4.

<sup>359</sup> Working and Rest Time Act 2001 (TPS), section 20(3) (daily rest) and section 22(1) (weekly rest).

compensatory rest.<sup>360</sup> (The provision applied to guards and security guards; health care professionals and welfare workers; fire and rescue workers; and any employees covered by a collective agreement which so provided.)

Equivalent compensatory rest for all missed daily rests has since been introduced. The 2001 Act has been repealed with effect from 1 July 2009 by the Employment Contracts Act 2009. Article 51 of the 2009 Act allows derogations from minimum daily rest periods to be made by collective agreement (in the activities specified in Article 17(3) of the Directive, and provided the work does not harm employees' health and safety), or by law. Derogations may also be made by an employment contract, provided that a minimum rest period of six hours in each 24 is preserved and the work does not harm the employee's health and safety. However, Article 51(5) now appears to provide for equivalent compensatory rest in all such cases. It states that where an employee works more than 13 hours during a 24-hour period, the employer must provide them with additional time off immediately after the end of the working day, equal to the number of hours by which the 13 working hours were exceeded. An agreement to compensate such additional working hours in money is void.

Under Article 51(4), health care professionals and welfare workers are now excluded from the requirement of minimum daily rest at Article 51(1) of the Act, unless the work harms their health and safety: but they appear to be covered by the requirement of equivalent compensatory rest at Article 51(5).

The position is less clear regarding minimum weekly rests. Article 52 of the 2009 Act allows for derogations to be made by law from the requirement of minimum weekly rests at Article 52(1), but the requirement of equivalent compensatory rest is not mentioned.

In **Finland**, the Working Hours Act 1996 (as amended) allows for derogations to weekly rest in caring for livestock and in urgent sowing and harvesting work, without a requirement of compensatory rest; other derogations require compensatory rest, but section 32 allows this to be exchanged for a cash payment if the worker consents.<sup>361</sup> Derogations from the Act's provisions on rest periods may be made by collective agreement, but there is no requirement that compensatory rest is assured<sup>362</sup>.

In **Germany**, the opt-out introduced for on-call sectors in 2004 also appears to permit the extension of daily working time without compensatory rest<sup>363</sup>. The *Arbeitszeitgesetz* provides that by way of derogation from its provision for minimum daily rest periods, daily working time may be extended 'without time compensation', if it regularly or to a significant extent includes on-call time at the workplace (either *Arbeitsbereitschaft* or *Bereitschaftsdienst*). Such provisions are contained, for example, in public sector collective agreements, such as the TV-Aerzte/TdL and TV-Aerzte/VKA for many hospital doctors<sup>364</sup>.

This may be done by either a collective agreement, or a workplace agreement where a governing collective agreement so permits. It also requires the express and free written consent of the individual worker, and 'other measures' must be taken to protect the worker's health and safety (but these are not specified).

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<sup>360</sup> Working and Rest Time Act 2001 (TPS), section 15(3).

<sup>361</sup> Working Hours Act 1996 (as amended, most recently in 2005), sections 31 and 32 respectively.

<sup>362</sup> Working Hours Act 1996 (as amended, most recently in 2005), section 40.

<sup>363</sup> Art. 7(2a) *Arbeitszeitgesetz* (AZG).

<sup>364</sup> Article 7 TV-Aerzte/TdL, Article 10 TV-Aerzte/VKA

However, the Directive does not provide for any such opt-out from minimum daily rest requirements. It is true that under a protective clause in national law, where daily working time is extended to over 12 hours, the worker will still be entitled to a rest period of at least eleven hours 'immediately following the end of the working time'<sup>365</sup>. However, this provision does not appear to guarantee *equivalent* compensatory rest for all missed or shortened minimum daily rest periods<sup>366</sup>. For example, a worker who has completed 24 continuous hours on duty, including on-call time at the workplace, should be entitled to a minimum 22 hours' immediately following rest period, rather than the 11 hours' rest which is mentioned here.

In *Hungary*, any derogation from the minimum weekly rest period under national law must ensure a minimum 24 hours' uninterrupted rest in each seven-day period, including in the health sector<sup>367</sup>. Therefore, the minimum weekly rest seems to be assured.

The position about compensatory daily rest is much more complicated. There are several possibilities for derogating from the minimum daily rest of 11 hours, but it is not clear that equivalent compensatory rest is always ensured.

Firstly, in the health sector, minimum daily rest may be reduced to 8 consecutive hours, either by collective agreement, or (in institutions providing 24-hour healthcare and with the prior written consent of the worker) by legislation<sup>368</sup>, but there is no express provision for equivalent compensatory rest after a minimum daily rest has been reduced from 11 hours to 8 hours.

In this sector, there have been extensive changes to the law. It seems that formerly, workers could be required to work on-call shifts at the workplace of up to 24 hours (on weekly rest days, holidays or in exceptional circumstances), and up to 18 hours (between two periods of normal working time), without equivalent compensatory rest<sup>369</sup>. Under legislative changes which took effect from 1 January 2008, it appears that any derogation from the minimum daily rest, whether by collective agreement or by legislation<sup>370</sup>, must ensure a minimum daily rest of at least eight hours within each 24-hour period. However, there is no express provision for *equivalent* compensatory rest in respect of shortened daily rest periods.

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<sup>365</sup> Article 7(9) AZG.

<sup>366</sup> In contrast to derogations under Art 7(2) AZG, which are explicitly subject to the condition of equivalent compensatory rest.

<sup>367</sup> Article 117/A.2.g Labour Code, as amended 1 July 2007.

<sup>368</sup> Section 117.A.2 Labour Code as amended 1 July 2007; section 13.6 of Act LXXXIV of 2003 on the Health Services (Eütev).

<sup>369</sup> Government Decree 233/2000 XII/23 on application of the Public Employee Act XXXIII/1992 in the health sector, section 10(1). If the shift was longer than 18 hours and was worked in one of the more pressurised departments ('*classified duties*'), then the worker could take a reduced rest period of 6 hours immediately after the on-call shift. If the shift was in a less highly-pressurised department ('*non-classified duties*') and/or was less than 18 hours, then a reduced rest period of 4 hours could be provided, but this was discretionary.

<sup>370</sup> Section 117/A.2 of the Labour Code (as amended by Act LXXIII of 2007 with effect from 1 July 2007 (generally) and 1 January 2008 (for certain rules relating to on-call time)) allows for derogations, either by legislation or by collective agreement, from the provisions of the Code which transpose the minimum daily and weekly rests and the maximum weekly working time. Such derogations are subject to specific limits: the minimum daily rest may not be reduced to less than eight consecutive hours, the minimum weekly rest may not be less than one full day per week, and maximum weekly working time may not exceed 60 hours per week (or 72 hours where on-call duty is included).

The national authorities state that in their view, equivalent compensatory daily rest in the health sector is ensured in practice by the joint effect of various provisions of the Health Services Act, including section 13.6 which states that in case of on-call duty, any missed rest periods shall start immediately after the worker finishes his/her duty.<sup>371</sup>

Secondly, the minimum daily rest may be reduced to at least 8 hours by collective agreement only, in cases of stand-by jobs<sup>372</sup>, shift work, continuous shifts, or seasonal work (all under section 123.2 of the Labour Code). There is no express condition of equivalent compensatory rest: the national authorities consider that this would necessarily result from other provisions of the Labour Code, such as the 12-hour limit to daily working time. (Timing of compensatory rests may still be problematic: see part 6.4.3, below.)

Thirdly, collective agreements may also provide that no minimum daily rest is required following stand-by duty<sup>373</sup>.

Fourthly, minimum daily rest periods for the Army<sup>374</sup> and armed services<sup>375</sup> (including law enforcement services and firefighters) are 8 hours, rather than the 11 hours specified by the Directive; but there is no condition of equivalent compensatory rest.

The national authorities consider that although there is no express condition of equivalent compensatory rest in the case of stand-by jobs, shift work, continuous shifts, seasonal work, the army, law enforcement services and firefighters, nevertheless the condition is fulfilled through the operation of the reference period for calculating average working time.

In principle, this could be the case for stand-by jobs governed by the Labour Code, where normal working time is up to 12 hours per day (thus providing a minimum 12 hour rest in each 24 hour period); but the limit to daily working time in such cases is fixed by agreement of the parties, and it does not seem clear that they are precluded by law from fixing any longer working hours (and therefore, shorter minimum rests) on certain days, which could not then be compensated equally afterwards.

It is difficult to see how equivalent compensatory daily rest could be effectively guaranteed through the reference periods fixed by national law in Hungary for the sectors (other than health) which are mentioned above.<sup>376</sup>

**Latvia** allows an employer to compel a worker to work during the weekly rest under section 143(4) of the Labour Law:

- where the most urgent public needs so require;

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<sup>371</sup> Section 13.6 of Act LXXXIV of 2003 on the Health Services (Eütev.tv).

<sup>372</sup> Stand-by jobs (*Készenléti jellegű munkakör*) are defined by section 117.1.k of the Labour Code (with effect from 1 July 2007) as *either* jobs where due to the nature of the tasks, work is not performed during one-third of the ordinary working time and the employee can rest during those periods, *or* jobs where the overall nature of the job and the working conditions result in a significantly lower burden on the employee, compared to the average. (See details in chapter 4.)

<sup>373</sup> Section 123.3 Labour Code. This could cause problems if work was performed during stand-by in response to a call, as it seems unclear whether or not national law requires compensatory rest for the period spent working in response to the call.

<sup>374</sup> Act XCV of 2001 on professional and contracted soldiers in the Hungarian Army (Hjt) Section 93(4).

<sup>375</sup> Act XLIII of 1996 on professional members of the Armed Forces (Hszt) Section 86.3.

<sup>376</sup> See chapter 4.5 under Hungary for a description of the applicable national law on reference periods.

- to prevent consequences caused by force majeure, an unexpected event, or other exceptional circumstances which may adversely affect the undertaking's usual course of activities;
- in order to complete urgent, unforeseen work within a specified period of time.

In such cases, the employer must '*grant [the worker] rest at another time*', but it is not specified that the compensatory rest must be equivalent in length, and there is no norm about its timing.

In *Portugal*, the rules governing working time of public servants appear to provide that only 25% of missed minimum rest hours is to qualify for equivalent compensatory rest<sup>377</sup>.

In *Romania*, special rules apply to public health units<sup>378</sup> under which continuity of care is ensured by continuous shifts over nights and weekends. During weekly rest days and public holidays, the shift is a continuous 24 hours. It seems that such a shift can follow immediately after a normal working period, another night shift or another 24-hour shift. There does not appear to be any provision for equivalent compensatory rest, nor for its immediate timing as required by the Court's decisions. The regulation on working time of police forces<sup>379</sup> requires that any overtime hours are to be compensated with equivalent compensatory rest: this is to be taken as soon as possible, and at the latest, within the following 60 days.

#### 6.4.3. *Delays in affording compensatory rest*

In *Austria*, the main national laws governing the private and public sector do require compensatory rest if a minimum daily or weekly rest is not fully taken; and under the *Arbeitszeitgesetz*, daily rests may not normally be reduced below 8 hours. However, compensatory rest for missed hours of daily rest may be taken within the following 10 calendar days, under the *Arbeitszeitgesetz*.

The main law governing civil servants provides that where a daily rest is missed, compensatory rest must be provided within 14 days. The law regulating working time in hospitals provides that the 11-hour minimum daily rest in hospitals may be reduced to 8 hours by collective agreement, provided that compensatory daily rest is taken within 10 days<sup>380</sup>. There does not seem to be any generally applicable norm about the timing of compensatory weekly rest.

The national authorities agree that this situation does not fully comply with the Directive, as interpreted by the *Jaeger* judgment.

In *Belgium*, the law of 14 December 2000 which governs working time for much of the public service provides that compensatory rest for a missed daily or weekly minimum rest must be taken within the following 14 days; but the section also provides that this rule may be varied by royal decree, without mentioning any conditions as regards immediate compensatory rest. In the private sector, the *Loi sur le Travail* of 16 March 1971 requires that where a weekly

<sup>377</sup> Article 163(1), Regime Jurídico do Contrato de Trabalho em Funções Públicas, September 2008, published as Annex I to Law 59/2008.

<sup>378</sup> Order from the Ministry of Health no. 870/2004, amended by Order 556/2009 of May 2009.

<sup>379</sup> Ministerial Order no. 5772008, Official Gazette 618, 22 August 2008.

<sup>380</sup> Section 7, KA-AZG (*Krankenanstalten-Arbeitszeitgesetz* 1997).

minimum rest is missed, compensatory rest must be given within the 6 following days<sup>381</sup>. However, there is no rule about the timing of compensatory daily rest.

As regards doctors, vets and dentists, a draft transposing law<sup>382</sup> requires that as a minimum, any worker who has completed a shift of between 12 and 24 hours (including on-call time at the workplace) must receive an immediate minimum rest period of 12 consecutive hours.

In *Cyprus*, Article 16(2) of the Act on the Organisation of Working Time allows for derogations from daily and weekly minimum rest to be made by collective agreement, on condition of equivalent compensatory rest; but there are no legal provisions about its timing.

In *Denmark*, there does not appear to be any legally binding norm about the timing of compensatory rest, and some collective agreements allow for derogations from minimum daily and weekly rest periods, without complying with the Court's decisions on the timing of compensatory rest.<sup>383</sup>

In *Finland*, the Working Hours Act 1996 (as amended) allows for various derogations to minimum daily rest; for example, it may be reduced from 11 hours to 9 hours in hospitals, accommodation and catering establishments, police, customs, postal services, the media, prisons, residential care, and loading and unloading work<sup>384</sup>. These derogations are subject to compensatory rest 'as soon as possible', but the Act provides that it may be taken up to a month after the missed minimum daily rest (rather than in the immediately following period.) Similarly, the Act allows for various derogations to weekly rest; some of these are subject to compensatory rest, but it may be taken within the three months following the missed minimum rest period<sup>385</sup>.

In *France*, the *Code du travail* requires equivalent compensatory rest for missed periods of minimum daily or weekly rest, including those arising under a collective agreement or workplace agreement; but there is no requirement about its timing.<sup>386</sup>

In *Germany*, compensatory rest for missed weekly rests (for working on Sunday) must normally be provided within the two following weeks<sup>387</sup>. However, the *Arbeitszeitgesetz* does not provide any clear norm about the timing of compensatory daily rest. Article 7(9) AZG stipulates that if daily working time exceeds 12 hours in a day, then a rest period of at least 11 hours must be granted immediately following the end of the working time. Subject to this condition, different derogations allow for all other compensatory daily rest to be provided within the following four weeks: or at other times (with no specified limits)<sup>388</sup> to be fixed by

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<sup>381</sup> Chapter III, section 1.

<sup>382</sup> *Projet de loi fixant la durée du travail des médecins, dentistes, vétérinaires, des candidats ... en formation et étudiants stagiaires...*, 12 February 2010.

<sup>383</sup> Working Environment Act 2005; section 12, Statutory Instrument no 324/2002, as amended by SI 611/2003.

<sup>384</sup> Working Hours Act 605/1996 (as amended 2005), Section 29 combined with section 7; the daily rest period may be temporarily reduced to 7 hours for most activities, if the employer and the employees' representative so agree and the worker consents.

<sup>385</sup> Working Hours Act 1996 (as amended, most recently in 2005), section 29(3) (daily rest) and section 32(2) (weekly rest).

<sup>386</sup> Article L.221-12 *Code du travail* (weekly rest); Article D.220-7 *Code du travail* (daily rest).

<sup>387</sup> Article 11(3) *Arbeitszeitgesetz* (AZG).

<sup>388</sup> Article 5(2) AZG; Articles 5(3), 7(1)1(b), 7(1)3, 7(2)1, 7(2a) AZG (referring to on-call time or to active periods of standby work); Articles 7(2)2-4 AZG (agricultural work, health or care services, public services).

collective agreements<sup>389</sup>. For example, the collective agreements for the public health sector do not seem to specify clear time limits in this regard.

**Greece** allows derogations to minimum daily and weekly rests, subject to equivalent compensatory rest, but there is no legal norm about the timing of compensatory rest<sup>390</sup>.

In **Hungary**, the Labour Code allows derogations from the minimum daily and weekly rests (see details at chapter 6.4.2), but only requires any compensatory rest to be provided within the reference period which is used for calculating weekly working time<sup>391</sup>.

This reference period may be up to three months (basic norm), four months (for seasonal work or in healthcare), six months (armed services: by collective agreement; in 24-hour healthcare services, by legislation) or twelve months (shift work, seasonal work, the army)<sup>392</sup>.

As a general rule, the minimum daily rest under the Labour Code, in the health sector, in the Army and armed services, may not be reduced to less than eight consecutive hours; so compensatory rest will relate to minimum daily rest which has been reduced, rather than missed completely (see details at 6.4.2). Such compensatory daily rest may be provided within the reference periods set out above. There is a specific exception for workers performing on-call duties in the health sector, where the Health Services Act states that any missed rest hours are to be taken immediately after the worker finishes his/her duty<sup>393</sup>.

The normal weekly rest entitlement is two days, but the rules on timing are quite flexible. Weekly rest days may be taken together within a two-week period (basic norm), within 1 month (by collective agreement or by agreement of the parties), within 2 months (seasonal work, by agreement of the parties)<sup>394</sup>, and within the 12-month reference period as a whole (seasonal work, shift work, by collective agreement)<sup>395</sup>.

As a general rule, and in the health sector, at least one 24-hour period of weekly rest must be taken every week<sup>396</sup>. However, there is an exception under section 124(7) of the Labour Code: collective agreements may provide otherwise as regards seasonal workers, or employees who work alternating or continuous shifts. (This provision appears effectively to allow such workers to go without any weekly rest for some five months.) Other compensatory weekly rest may be provided within the reference periods set out above.

In **Ireland**, the Organisation of Working Time Act 1997 allows derogations from minimum daily or weekly rests, subject to equivalent compensatory rest, but there is no legal norm about the timing of compensatory rest. A Code of Practice, which is not legally binding, provides that compensatory rest should be given '*as soon as possible, and generally in an adjacent time frame*'.<sup>397</sup>

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<sup>389</sup> In certain cases, also by religious bodies, by permission of the labour inspectorate, or by federal government.

<sup>390</sup> Presidential Decree 88/1999, Articles 14(2) and 14(3).

<sup>391</sup> Article 124 Labour Code.

<sup>392</sup> See details in chapter 4.4.

<sup>393</sup> Section 13.6 of Act LXXXIV of 2003 on the Health Services (Eütev.tv.).

<sup>394</sup> Article 124 (5) Labour Code

<sup>395</sup> Article 124(6) Labour Code, as amended 1 July 2007.

<sup>396</sup> Article 117A.2.(b) Labour Code, as amended 1 July 2007

<sup>397</sup> Code of Practice on Compensatory Rest Periods 1998, p. 8. The Code is not legally binding, but may be considered as persuasive by a competent court or tribunal.

Moreover, a collective agreement made in 2010 between public health service employers and doctors in training provides that doctors in training may be rostered for work periods exceeding 13 hours per day (which would involve delaying minimum daily rest periods) provided that equivalent compensatory rest is provided. It is not clear whether any time limit is stipulated for taking these compensatory rest entitlements, although an extended shift may not exceed 24 continuous hours.<sup>398</sup>

In *Italy*<sup>399</sup>, and in *Malta*, national law allows for derogations subject to equivalent compensatory rest, but there is no generally-applicable legal norm about its timing. (Italy states that the time limits for taking compensatory rest are covered in the relevant collective agreements, but in the absence of a generally applicable norm it remains unclear whether the various agreements comply with the Directive.)

In *Luxembourg*, the Law of 19 May 2006 allows derogations from minimum daily and weekly rests in the activities mentioned in Article 17 of the Directive, subject to the condition that this may only be done by collective agreements, workplace agreements or social dialogue agreements which guarantee equivalent compensatory rest. However, there is no explicit legal norm about the timing of the compensatory rest.

In *Poland*, the law governing the police and border guards<sup>400</sup> provides for compensatory equivalent rest for missed minimum rest periods, but allows it to be provided within a three month reference period. (In addition, compensatory rest for police may be exchanged for extra remuneration, which does not seem to be consistent with the Directive.) For professional soldiers, the compensatory rest may be provided over a 4-month reference period; the national authorities indicate that derogations from minimum daily rest are only possible in strictly limited situations (unusual tasks necessary to protect State interests, preventing impact of natural disasters) and that amendments are proposed to clarify rights to weekly rest and equivalent compensatory rest.<sup>401</sup>

The law has been changed regarding rests for health service professionals. Although these workers are entitled to the minimum daily and weekly rests provided under the Labour Code, sectoral legislation formerly provided that on-call time at the workplace (whether active or inactive) was not to be counted as working time, with the effect that doctors did not receive any compensatory rest for on-call work. In 2006, the Polish courts held that in order to comply with the Directive, a doctor who had missed all or part of minimum rests due to on-call time must receive equivalent compensatory rest<sup>402</sup>. With effect from 1 January 2008, the relevant provisions have been amended. Compensatory weekly rest in such cases is to be provided within 14 days<sup>403</sup>. An employee who misses all or part of a minimum daily rest

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<sup>398</sup> Collective agreement dated 22 January 2010, made between HSE (employers) and IMO (representing doctors in training.)

<sup>399</sup> *Decreto Legislativo* no 66/2003 of 8th April 2003.

<sup>400</sup> The national authorities state that detailed amending regulations on duty time of border guards will be included in a forthcoming Ordinance of the Minister of Interior and Administration.

<sup>401</sup> Article 1(33) of the Act of 24 August 2007, amending Art. 60 of the Act on professional soldiers' military service with effect from 1 January 2008; draft Act to further amend the Act on professional soldiers' military service, proposed Articles 60(3a) and 60 (3b).

<sup>402</sup> Regional Court judgment IV Pa 445/06 of 29<sup>th</sup> December 2006, following Supreme Court judgment I PK 265/05 of 06.06.2005.

<sup>403</sup> Act on Health Care Establishments (ZOZ) 1991, article 32j, as amended with effect from 1 January 2008. The Act applies to doctors (and others with third-level qualifications) who work in public health institutions.

through being on medical duty must be given an equivalent 11 hour rest immediately after finishing their duty<sup>404</sup>.

As regards the Labour Code itself, a proposed amendment<sup>405</sup> appears to clarify that an employee is entitled to full equivalent compensatory rest, if the minimum daily rest period of 11 hours in each 24-hour period is missed or shortened. The national authorities state that where working time is extended beyond 13 hours, the worker is entitled to a rest, immediately after finishing work, of at least the number of hours s/he has just worked. The same principle applies where working time runs to 16 or 24 hours (for example, due to on-call work of security guards or fire and rescue services.)<sup>406</sup> It is only in specific contexts (rescue operations and breakdowns where immediate compensatory rest would be objectively impossible) that equivalent compensatory rest need not be given immediately.

In **Portugal**, the Labour Code formerly provided that compensatory rest for a missed daily rest could be taken within the following 90 days<sup>407</sup>; this period considerably exceeds what is permitted by the Court of Justice's interpretation in *Jaeger*. The revised Labour Code now states that in case of missed minimum daily rest, the worker is entitled to take equivalent compensatory rest within the three following days.<sup>408</sup> However, the legal provisions on working time of public service workers still appear to allow compensatory daily rest to be delayed within a 90-day period<sup>409</sup>.

In the **Slovak Republic**, the Labour Code formerly did not provide for compensatory rest where a worker missed minimum daily or weekly rests. This was addressed by amendments in the new Labour Code 2007. Now, the limited derogations to minimum daily rest are conditional on equivalent compensatory rest; however, this can be provided within 30 days of the missed (or reduced) rest<sup>410</sup>. Limited derogations from the minimum weekly rest of 2 days may not reduce it to less than 24 hours: where this is done, equivalent compensatory rest must be provided within an 8-month framework<sup>411</sup>.

In **Slovenia**, national law requires compensatory rest for any missed or reduced minimum rests. However, it allows compensatory daily or weekly rest to be taken within up to 6 months, if a law or collective agreement so provides.<sup>412</sup> In the health services, compensatory daily or

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<sup>404</sup> Act on Health Care Establishments (ZOZ) 1991, article 32, paras 1-2, as amended with effect from 1 January 2008.

<sup>405</sup> Government proposals to amend the Labour Code, published 28<sup>th</sup> February 2008.

<sup>406</sup> Articles 136 and 137 Labour Code.

<sup>407</sup> Labour Code 2003, Article 202(1). (Compensatory weekly rest must be taken within the three working days following the missed rest, which seems consistent with the Directive: Labour Code, Article 202(3).)

<sup>408</sup> Article 223.3, Labour Code (revised version approved by Law no 7/2009).

<sup>409</sup> Article 163(2), Regime Jurídico do Contrato de Trabalho em Funções Públicas, September 2008, published as Annex I to Law 59/2008.

<sup>410</sup> Article 92, Labour Code 2007.

<sup>411</sup> Article 93, Labour Code 2007. This appears consistent with the Directive, since under Article 5, the weekly rest may be reduced to 24 hours if objective technical or work organisation conditions so justify, without a condition of compensatory rest. The law governing firefighters requires compensatory weekly rest to be provided within the following week.

<sup>412</sup> Employment Relationships Act (ZDR) 2002 as amended 2006, article 158.

weekly rest may be taken within up to 2 months, if this is considered necessary to ensure sufficient standards of patient care.<sup>413</sup>

In *Spain*, Royal Decree 1561/1995 allows for derogations from minimum daily and weekly rests for caretakers, security personnel, agricultural workers and hotel staff (during busy seasonal periods) and shop workers. Daily rest may not be reduced to less than 10 hours; and compensatory rest must be provided so that within a four-week period, daily rests average 12 hours per day and weekly rests average 1.5 days per week.

However, under Article 54(2) of the Law 55/2003 on working time for statutory personnel in the health sector, it is sufficient to grant compensatory rest for any missed or shortened daily or weekly minimum rests over a 3 month time frame. This seems very long in view of the Court's caselaw, although the number of rest hours is overall more favourable than the Directive requires (on average, five twelve-hour daily rests plus one 36-hour weekly rest per week.)

In *Sweden*, the Working Hours Act 1982 does not contain any explicit provision about the timing of equivalent compensatory rest; however, the preparatory work and interpretative notes to the Act, which influence its interpretation, refer to the *Jaeger* decision. Derogations from the standard provisions in the Working Hours Act may be made by collective agreement, and section 3 of the Act states that these may not be less favourable to the workers concerned than the provisions of the Directive. In practice, collective agreements generally provide for working time to be regulated by workplace agreements between the social partners. In such a situation, the Member State remains responsible, under the EC Treaty, for ensuring that Community law is respected in practice.

In the *United Kingdom*, the Working Time Regulations provide that if a worker is required to work during a rest period, the employer must allow the worker to take an equivalent period of compensatory rest,<sup>414</sup> but there is no explicit provision as to timing. However, the national authorities indicate that the national courts and tribunals have expressly followed the Court of Justice's decisions, while the Government's published guidance refers specifically to the *Jaeger* judgment on compensatory rest.

## 6.5. Conclusions

*The Directive's core requirements for minimum daily rest periods, a rest break during the working day, and minimum weekly rest periods, have in general been satisfactorily transposed.* Eight Member States also provide a longer minimum daily rest than the Directive's requirements, and eight provide a longer minimum weekly rest.

*The minimum weekly rest, however, does not appear to be correctly transposed in two Member States:* Cyprus and Latvia.

It can be noted that no minimum length is set by the Directive for the rest break during the working day. The interpretation varies widely between Member States, from a 10-minute to a

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<sup>413</sup> ZSdrs (Medical Practitioners Act) 2002, article 53 (doctors); ZZdej (Health Services Act) 2005 (other staff in health services).

<sup>414</sup> 'Wherever possible'; in exceptional cases where it is not objectively possible, appropriate alternative protection may be provided. Working Time Regulations 1998 (consolidated version, January 2007), regulation 24.

2-hour break. In part, this is linked to questions such as whether the rest break is included in working time, and whether it is to include time for eating (this may not be the case, for example, in shift or night work), as well as to differences in working patterns between Member States. However, the health and safety considerations underlying the Directive should be borne in mind when interpreting this provision.

***The main difficulties appear to lie not with transposition of the core provisions, but in the use of derogations.*** The Directive provides for a wide range of derogations, which have been extensively used. In some Member States, overall limits have been applied to derogations in order to protect health and safety considerations. However, in a number of cases the derogations have been used in a way which goes beyond what the Directive permits. Here, there are three main problems:

- exclusion of certain workers covered by the Directive from the right to rest periods,
- use of derogations without respecting the condition of compensatory rest
- timing of compensatory rest which does not accord with the Court of Justice's judgment in *Jaeger* (C-151/02).

***A large number of Member States do not appear to comply with the Directive's requirements in these respects. They are as follows:***

*Exclusion of certain workers from the right to rest periods*

*Belgium* (educational establishments (weekly rests); the defence forces (daily and weekly rests)) (A draft law currently awaiting the legislative process would transpose minimum rest periods for doctors, vets and dentists, who are currently excluded.)

*Greece* (suspension of transposition regarding doctors employed in public health services)

*Hungary* (occasional workers, teachers in public schools, defence forces)

*Italy* (questions on the exception for doctors in public health services)

*Poland* (border guards, customs officers, prison staff, and defence forces (all under amendment); anti-corruption officers).

In addition, *Austria* (generally, and regarding workers in health institutions and residential care) and *Latvia* provide for very general derogations to minimum rest periods, which seem to exceed what the Directive permits.

*No requirement of compensatory rest for missed minimum rests*

*Belgium* (*Private sector*: in commercial emergencies. *Public sector*: compensatory rest for missed minimum daily rest periods is not obligatory in specified situations, including residential education or care, urgent works, services related to civil, public or military security, and other activities if a royal decree so authorises)

*Bulgaria* (derogation by Ministerial order without compensatory rest)

*Estonia* (no requirement of equivalent compensatory rest for derogations to minimum weekly rest)

*Finland* (compensatory rest in some agricultural work may be exchanged for payment, derogated by collective agreement, or derogated)

*Germany* (daily rest may be derogated without equivalent compensatory rest, by collective agreement, in jobs involving significant on-call time)

*Hungary* (doubts about equivalent compensatory daily rest in 'stand-by' jobs in the public and private sectors; in shift work, continuous shifts, seasonal work; in the army, law enforcement and emergency services; or where workers perform work while on 'stand-by' duty at home)

*Latvia* (where minimum weekly rest periods are missed due to workload arising from unexpected events or urgent unforeseen work)

*Portugal* (in public service, only 25% of missed minimum rest qualifies for equivalent compensatory rest)

*Romania* (public health services)

*Delays in providing compensatory rest for missed minimum rests*

- *Appears to be no legally binding general norm about the timing of compensatory rest:*

*Austria* (regarding weekly rest)

*Belgium* (regarding daily rest in private sector),

*Cyprus*,

*Denmark*,

*France*,

*Germany* (in certain activities, (such as hospitals and care institutions, or under public sector collective agreements), part of compensatory daily rest may be taken at a time fixed by collective agreement, but no timeframe is given),

*Greece*,

*Ireland*, (generally, and collective agreement for doctors in public health services)

*Italy*,

*Latvia* (where minimum weekly rest periods are missed due to workload arising from unexpected events or urgent unforeseen work)

*Malta*,

*Luxembourg*.

- *Legal norm applies, but seems inconsistent with the Jaeger judgment*

*Austria* (norms allow compensatory daily rest within 10 – 14 days in public and private sector)

*Belgium* (public sector: the normal requirement of compensatory daily or weekly rest within 14 days may be changed by royal decree, but no time-limit is provided in such cases)

*Denmark* (regarding daily and weekly rest under some collective agreements)

*Finland* (compensatory daily rest within one month, weekly rest within 3 months)

*Germany* (part of compensatory daily rest may be taken within up to 4 weeks)

*Hungary* (compensatory daily rest may effectively be taken within 3 - 12 months, depending on the sector and activity, except following on-call duties in health services, (where compensatory daily rest must be taken immediately after the shift ends). Compensatory weekly rest for seasonal and shift workers may be taken within 5 months.)

*Poland* (3 months for border guards and police; 4 months for defence forces)

*Portugal* (, it appears that compensatory daily rest for public service workers may be delayed by up to 3 months: a similar provision for private sector workers, however, was amended in 2009)

*Slovakia* (within one month, generally, for daily rest; up to 8 months in some circumstances, for weekly rest)

*Slovenia* (within 6 months, for compensatory daily or weekly rest, except in health services where maximum delay is 2 months)

*Spain* (within 4 weeks generally for daily or weekly rest: up to 3 months, for statutory personnel in the health sector).

## 7. PAID ANNUAL LEAVE

The Working Time Directive provides at Article 7 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.*

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

The Article therefore requires two elements: that every worker is entitled to at least four weeks' paid leave per year, and that this leave may not be replaced by a payment, unless the employment relationship is ended.

### 7.1. Interpretation of the right to paid annual leave

#### *An important social right, with no derogations or exceptions*

The important judgment of the Court of Justice in *BECTU*, in 2001, clarified the significance and objectives of the right to paid annual leave. The Court held that *"the entitlement of every worker to paid annual leave must be regarded as a particularly important principle of Community social law from which there can be no derogations and whose implementation by the competent national authorities must be confined within the limits expressly laid down by Directive 93/104"*.<sup>415</sup>

The Court of Justice held that the right to minimum paid annual leave in Article 7 *'constitutes a social right directly conferred by [the Working Time Directive] ...on every worker as the minimum requirement necessary to ensure protection of his health and safety.'*<sup>416</sup>

The Court also referred to the objective of the right to paid annual leave under the Directive, as expressing *'the rule that a worker must normally be entitled to actual rest, with a view to ensuring effective protection of his health and safety'*.<sup>417</sup>

*The Directive does not provide for any derogations or exceptions* to this provision, a point which has been emphasised by the Court of Justice in several decisions<sup>418</sup>.

Therefore, while Article 7 of the Directive *'does not preclude, as a rule, national legislation which lays down conditions for the exercise of the right to paid annual leave expressly conferred by the Directive'*, it does not allow for conditions imposed by national law whose effect would be to deprive the worker of any real opportunity to exercise that right<sup>419</sup>.

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<sup>415</sup> *BECTU* (Case C-173/99), para 43; *Robinson-Steele*, C-131/04, para 48, *Merino-Gomez*, Case C-342/01, para 29.

<sup>416</sup> *BECTU*, para 47

<sup>417</sup> *BECTU*, para 44; *Pereda*, Case C-277/08, para 20. .

<sup>418</sup> See for example *BECTU*, para 41, 43; *FNV*, Case C-124/05, para 34. The Court added in *Robinson-Steele*, para 52, that derogations from this right may not be made by contractual arrangement.

<sup>419</sup> *Schultz-Hoff and Stringer*, paras 43 and 55; *Pereda*, para 19.

The *BECTU* case dealt with a qualifying period imposed by national legislation: workers did not acquire the right to paid annual leave until they had been in continuous employment with the same employer for 13 weeks. It was argued that workers in the theatre sector, who normally worked on successive short fixed-term contracts, were often effectively excluded from annual leave entitlements as a result. The national authorities considered they were entitled to impose such a condition, in view of the reference in Article 7.1 to Member States laying down '*conditions for entitlement to, and granting of*' the minimum paid annual leave.

The Court held that this reference must be narrowly interpreted. It **could not allow Member States to adopt 'legislation ... which imposes a precondition for entitlement to paid annual leave which has the effect of preventing certain workers from any such entitlement...'** Such a precondition '*not only negates an individual right expressly granted by Directive 93/104 but is also contrary to its objective.*'<sup>420</sup>

The reference in Article 7.1 to Member States laying down conditions must, therefore, be understood as referring rather to '*conditions for the exercise and implementation of the right to paid annual leave, by prescribing the specific circumstances in which workers may exercise that right, which is theirs in respect of all the periods of work completed. Member States are not entitled to make the existence of that right, which derives directly from [the Working Time Directive], subject to any preconditions whatsoever.*'<sup>421</sup>

The Court considered that national legislation could not safely assume that workers employed on short-term contracts had been able to take an adequate period of rest before starting the new employment contract: '*On the contrary, such workers often find themselves in a more precarious situation than those employed under longer-term contracts, so that it is all the more important to ensure that their health and safety are protected in a manner consonant with the purpose of [the Working Time Directive].*'<sup>422</sup>

It follows that it is incompatible with the Directive for a Member State to impose a minimum (qualifying) period of employment which a worker must complete before he or she can begin to *acquire* rights to annual leave.

Qualification periods for *exercising* annual leave entitlements (for actually taking the leave due) are a slightly different situation. The Court acknowledged in *BECTU* that Article 7.1 allowed Member States to set some conditions for exercising the rights they had acquired. It added more specifically, later in the judgement, that '*the directive does not prevent the Member States from organising the way in which the right to paid annual leave may be exercised by regulating, for example, the manner in which workers may take the annual leave to which they are entitled during the early weeks of their employment.*'<sup>423</sup> However, the reference to the '*early weeks of employment*' suggests that the Court is limiting Member States to a relatively short qualification period before a worker can exercise their rights to paid annual leave. In view of the Court's other judgments on the importance of paid annual leave, which are considered next in this chapter, it seems unlikely that the Directive would allow measures which imposed long delays before a worker could enjoy the annual rest intended by the Directive.

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<sup>420</sup> *BECTU*, para 48

<sup>421</sup> *BECTU*, para 53.

<sup>422</sup> *BECTU*, para 63.

<sup>423</sup> *BECTU*, para 61.

### Recent judgements

As indicated in Chapter 1, the Court of Justice has interpreted the right to paid annual leave in a number of judgments<sup>424</sup> issued since the Commission's last report on this Directive: *Robinson-Steele* in March 2006, *FNV* in April 2006, joined cases *Schultz-Hoff* and *Stringer* in January 2009, and *Pereda* in September 2009. In addition, the *Merino Gomez* ruling considers, the relationship between maternity leave and annual leave, while *Zentralbetriebsrat der Landeskrankenhäuser Tirols*, in April 2010, looks at rights to annual leave when moving from full-time to part-time work<sup>425</sup>.

These new judgments are discussed thematically below.

### Payment of annual leave

In its judgment in *Robinson-Steele*, the Court considered the right to payment of annual leave. The Court explained that this is required by the Directive in order to ensure that workers have no financial disincentive to take their annual paid leave, and is '*is intended to enable the worker actually to take the leave to which he is entitled*'<sup>426</sup>. '*The directive treats entitlement to annual leave and to a payment on that account as being two aspects of a single right.*'<sup>427</sup>

In practical terms, this meant that '*for the duration of annual leave within the meaning of the directive, remuneration must be maintained. In other words, workers must receive their normal remuneration for that period of rest.*'<sup>428</sup> It added that an agreement which had the effect of reducing the amount payable in respect of paid annual leave, from the normal level of remuneration, would '*run counter to what is required*' by the Directive.

This case dealt with an arrangement called 'rolled-up holiday pay', under which the remuneration for the period of minimum annual leave was not paid at the time of the leave, but instead was distributed over the remuneration paid during the whole year. The Court held that the Directive precluded such an arrangement because it might undermine the objective of Article 7, which was to ensure that the worker could actually take their annual leave entitlements. '*The purpose of the requirement of payment for [minimum annual leave] ... is to put the worker, during such leave, in a position which is, as regards remuneration, comparable to periods of work.*'<sup>429</sup>

Fixing the point at which payment was made for annual leave formed part of the detailed national rules for implementation, which were a matter for Member States. However, in doing so Member States must ensure that those rules took account of the principles of the Directive.<sup>430</sup>

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<sup>424</sup> *Robinson-Steele*, C-131/04, 16 March 2006; *FNV*, Case C-124/05, 2 April 2006; Joined Cases *Schultz-Hoff*, Case C-350/06 and *Stringer*, Case no C-520/06, 20 January 2009; *Pereda*, Case C-277/08, 10 September 2009.

<sup>425</sup> *Merino Gomez*, Case C-342/01, 18 March 2004; *Zentralbetriebsrat der Landeskrankenhäuser Tirols*, Case C-486/08, 22 April 2010.

<sup>426</sup> *Robinson-Steele*, (C-131/04), para 48-51.

<sup>427</sup> *Robinson-Steele*, para 58.

<sup>428</sup> *Robinson-Steele*, para 50; similarly joined cases *Schultz-Hoff* (C-350/06) and *Stringer* (C-520/06), para 61.

<sup>429</sup> *Robinson-Steele*, para 58

<sup>430</sup> *Robinson-Steele*, para 54-57.

### Commuting or carrying forward annual leave

These questions were considered in *FNV*<sup>431</sup>, regarding guidance published by a national authority which indicated that if a worker did not use up all their annual leave entitlements during the year in question, they could be carried into the subsequent year and replaced by a financial payment.

The Court commented that without considering the matter in detail, it ***might be permissible to carry forward minimum annual leave in whole or in part into a different leave year***, where it was not possible to exhaust the entitlement during the leave year concerned. This might be inevitable, since one period of leave guaranteed by Community law could not affect the right to take another (as, for example, with annual leave and maternity or parental leave).

The Court recalled the importance of the right to annual leave for health and safety, but added that:

*'Admittedly, the positive effect which that leave has 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. However, the significance of that rest period in that regard remains if it is taken during a later period. Since leave, within the meaning of the directive, may, when taken during a later year, still contribute, none the less, to the safety and health of the worker, it must be held that it continues to be subject to the directive.'*<sup>432</sup>

However, ***the Directive does not allow annual leave which had to be carried forward to be replaced by a payment*** (other than on termination of employment). Allowing this would *'create an incentive, incompatible with the objectives of the Directive, not to take leave or to encourage employees not to do so.'*<sup>433</sup>

### Annual leave and maternity leave

*Merino Gomez*<sup>434</sup> was a case about the relationship between maternity leave and annual leave. The worker concerned was employed in a factory where, under a collective agreement, all workers took two weeks' annual leave during a specified summer period. However, she was due to be on maternity leave during the period in question, and therefore wanted to take her annual leave at different dates.

The Court of Justice considered the relationship of maternity leave and paid annual leave under Community law. It concluded that the two types of leave were quite different, and served different objectives. In the case of maternity leave, it was settled Community law that the objective was *'first, to protect a woman's biological condition during and after pregnancy and, second, to protect the special relationship between a woman and her child over the period which follows pregnancy and childbirth'*<sup>435</sup>. Conversely, the Court recalled that the Working Time Directive intended annual leave to provide the worker with a period of *'actual rest, with a view to ensuring the effective protection of his safety and health'*<sup>436</sup>. Accordingly,

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<sup>431</sup> *FNV*, Case C-124/05.

<sup>432</sup> *FNV*, para 30-31.

<sup>433</sup> *FNV*, para 32.

<sup>434</sup> *Merino Gomez*, Case C-342/01.

<sup>435</sup> *Merino-Gomez*, para 32.

<sup>436</sup> *Merino-Gomez*, para 30.

*'the purpose of the entitlement to annual leave is different from that of the entitlement to maternity leave', and a worker can not be obliged to take annual leave and maternity leave at the same time.*<sup>437</sup>

### Annual leave and sick leave

In joined cases *Stringer and Schultz-Hoff*<sup>438</sup>, regarding annual leave entitlements of workers on long-term sick leave, the Court was asked to decide:

- whether a worker who is unable to work due to illness for part or all of a leave year, is still entitled to paid annual leave in respect of that period ;
- whether she or he is entitled to take paid annual leave during a period of sick leave;
- whether national law may provide that rights to paid annual leave will be extinguished, if they are not taken during the leave year concerned (or within a limited carry-over period in the following year); and
- whether a worker whose employment is terminated while they are still on long-term sick leave, is still entitled to an allowance in lieu, under Article 7.2, in respect of outstanding annual leave entitlements.

The Court held that ***the relationship between sick leave and paid annual leave is different from that between paid annual leave and maternity leave*** (as discussed in *Merino Gomez*). Certainly, annual leave and sick leave had different objectives: *'the purpose of the entitlement of paid annual leave is to enable the worker to rest and to enjoy a period of relaxation and leisure. The purpose of the entitlement to sick leave is different. It is given to the worker so that he can recover from being ill.'*<sup>439</sup>

However, sick leave was not, unlike maternity leave, a right governed by Community law. Accordingly, ***the Directive does not preclude national law or practices from deciding that a worker may be allowed to take annual leave during a period of sick leave***<sup>440</sup>; provided, however, that if the worker may not take paid annual leave during the sick leave, he or she must first have the opportunity to take the paid annual leave during a different period.

***Conversely, a worker may not be compelled to take annual leave during a period of sick leave.*** In *Pereda*, a collective agreement provided that annual leave dates were allocated for each staff member by the enterprise's works committee. Under this system, Mr Pereda, who was employed by the enterprise, was allocated a period of annual leave from 16 July to 14 August 2007. However, following an accident at work on 3 July, he was on sick leave until 13 August. He asked his employer to allocate him alternative leave dates but was refused. The Court held that: *'... a worker who is on sick leave during a period of previously scheduled annual leave has the right, on his request and in order that he may actually use his annual leave, to take that leave during a period which does not coincide with the period of sick leave.'*<sup>441</sup>

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<sup>437</sup> *Merino-Gomez*, para 32-33.

<sup>438</sup> Joined Cases *Schultz-Hoff*, Case C-350/06 and *Stringer*, Case no C-520/06.

<sup>439</sup> *Schultz-Hoff and Stringer*, para 25.

<sup>440</sup> *Schultz-Hoff and Stringer*, para 31.

<sup>441</sup> *Pereda*, para 22.

The Court added, regarding the practical application of this rule, that *'The scheduling of that new period of annual leave, corresponding to the duration of the overlap between the period of annual leave originally scheduled and the sick leave, is subject to the rules and procedures of national law which are applicable to the scheduling of workers' leave, taking into account the various interests involved, including overriding reasons relating to the interests of the undertaking. If such interests preclude acceptance of the worker's request for a new period of annual leave, the employer is obliged to grant the worker a different period of annual leave proposed by him which is compatible with those interests, without excluding in advance the possibility that the period may fall outside the reference period for the annual leave in question.'*<sup>442</sup>

The Court also held in *Schultz-Hoff and Stringer* that ***a worker who is unable to work due to illness remains entitled to paid annual leave, in respect of the period of sick leave***<sup>443</sup>.

Member States could lay down limited 'carry-over' periods within which any outstanding annual leave must be taken; and ***national law could even provide for annual leave entitlements to be extinguished, if they were not taken up by the end of a leave year, or before the end of the carry-over period. However, they could only do so if 'the worker who has lost his right to paid annual leave has actually had the opportunity to exercise the right conferred on him by the directive.'***<sup>444</sup> If a worker was unable to work during illness throughout a leave year, or beyond a carry-over period, then he or she must be given an opportunity to take the outstanding annual leave.

Alternatively, ***if the worker*** has no opportunity to take the paid annual leave entitlements because she or he ***is still incapacitated by illness at the date when employment is terminated, then he or she must be provided with an allowance in lieu***, under Article 7.2.

*In summary, Directive 2003/88 does not preclude national legislation or practices which allow a worker to take paid annual leave during their sick leave, if the worker wishes to do so.*

*Conversely, if a worker does not wish to take annual leave during a period of sick leave, then he or she is entitled to take the leave during a different period.*<sup>445</sup>

#### Annual leave and part-time workers

In *Zentralbetriebsrat der Landeskrankenhäuser Tirols*<sup>446</sup>, the Court confirmed that in the case of part-time workers, the right to four weeks' paid annual leave under Article 7 of the Working Time Directive may be applied proportionately (*pro rata temporis*), according to Clause 4.2 of the framework agreement attached to the Part-Time Work Directive<sup>447</sup>. *'It is indeed appropriate to apply the principle of pro rata temporis .... to the grant of annual leave*

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<sup>442</sup> *Pereda*, paras 22-23.

<sup>443</sup> *Schultz-Hoff and Stringer*, para 36-43. The Court referred to the Directive's recitals and to ILO Convention 132 (Holidays with Pay), which states that absence from work due to factors such as illness, which are beyond the control of the worker, should be considered as part of the period of service. It also noted that the Directive refers to 'every worker', without distinguishing in any way between those who are at work and those who are on sick leave.

<sup>444</sup> *Schultz-Hoff and Stringer*, paras 42-43.

<sup>445</sup> *Pereda*, para. 25.

<sup>446</sup> *Zentralbetriebsrat der Landeskrankenhäuser Tirols*, Case C-486/08, 22 April 2010.

<sup>447</sup> Council Directive 97/81/EC as amended by Council Directive 98/23/EC ('the Part-time Work Directive').

*for a period of employment on a part-time basis. For such a period, the reduction of annual leave by comparison to that granted for a period of full-time employment is justified on objective grounds.'*<sup>448</sup>

However, the Court pointed out that rights to paid annual leave which were accumulated during a period of full-time work should not be reduced just because the worker concerned has since moved to part-time work: '*... a reduction of working hours when moving from full-time to part-time employment cannot reduce the right to annual leave that the worker has accumulated during the period of full-time employment.*' The *pro rata temporis* principle '*cannot be applied ex post to a right to annual leave accumulated during a period of full-time work.*'<sup>449</sup>

Accordingly, the Part-Time Work Directive precludes a national provision under which a worker who reduces his working hours from full-time to part-time suffers a reduction in the paid annual leave entitlements which he has accumulated but not been able to exercise while working full-time, or can only take that leave with a reduced level of holiday pay.<sup>450</sup>

## **7.2. Transposition in the Member States**

The right to paid annual leave under Article 7 appears, in general, to be satisfactorily transposed into national law in all the Member States.

All Member States explicitly provide for a right to at least four weeks' annual paid leave<sup>451</sup>. A number of Member States provide for paid annual leave exceeding four weeks: for example, Austria, Denmark, Finland, France, Luxembourg and Sweden provide for five weeks, and the minimum entitlement in the UK will increase to 5.6 weeks in April 2009. Specific groups, such as teachers, may also enjoy longer annual leave periods. In many Member States, collective agreements may provide more favourable rights to annual leave.

The main issues which emerge from a review of Member States' transposition of Article 7 are as follows:

### ***Qualification periods for acquiring and for exercising rights to paid annual leave***

A number of Member States made changes to their legislation following the *BECTU* judgement, cited above, which held that Member States were not entitled to impose any precondition on workers acquiring a right to paid annual leave in respect of all periods worked.

The Court also indicated in *BECTU* that Article 7.1 allowed Member States *to organise the exercise of rights to paid annual leave 'by regulating for example, the manner in which workers may take the annual leave to which they are entitled during the early weeks of their employment.'*<sup>452</sup>

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<sup>448</sup> *Zentralbetriebsrat der Landeskrankenhäuser Tirols*, para 33.

<sup>449</sup> *Zentralbetriebsrat der Landeskrankenhäuser Tirols*, paras 32 and 33.

<sup>450</sup> *Zentralbetriebsrat der Landeskrankenhäuser Tirols*, para 35.

<sup>451</sup> Italy, which was mentioned in the Commission's 2000 report as having no explicit right to paid annual leave, amended its legislation by Legislative Decree 66/2003, which provides at Article 10 that every worker has a right to annual paid leave of not less than four weeks.

<sup>452</sup> *BECTU*, para 61.

Accordingly, many Member States now provide that the right to paid annual leave may be exercised *pro rata temporis* during the first year of employment.

For example, Greece formerly provided that the entitlement to paid annual leave was subject to a qualifying period of at least 12 months' continuous employment<sup>453</sup>. This condition was repealed in 2003, and Greek law now provides for paid annual leave to be taken *pro rata temporis* during the first year of employment, both in the private<sup>454</sup> and (from the end of two months following the appointment) in the public<sup>455</sup> sector.

Similar pro-rata arrangements apply, for instance, in Austria.

However, some Member States do impose conditions on a worker taking their annual leave during the first year of employment.

For example, national law in Belgium provides that a worker acquires entitlements to annual leave during the first year of employment, but may not (with very limited exceptions) exercise them till the second year of employment.

Estonia provides in the Employment Contracts Act 2009 at article 68(4) that during the first year of employment, employees must have worked six months before they are entitled to annual leave proportionate to the periods worked.

In view of the Court of Justice's comments in *BECTU* (quoted above) and particularly its observation that Article 7.1 allows Member States to regulate how workers may take annual leave entitlements "in the early weeks of their employments", one may question the compatibility of national rules which effectively delay the exercise of such rights by months, or even into the following year.

### ***Carrying forward annual leave***

A number of Member States allow for the carrying forward of annual leave into a subsequent year for various reasons other than those considered by the Court in *Merino-Gomez* ; in some cases, this may be done without the consent of the worker.

In the Czech Republic, for example, national legislation allows an employer not to schedule annual leave during the year in question, due to urgent operational reasons. In such cases the employer must schedule the leave so that it is taken at latest by the end of the following calendar year. If the employer fails to do so, the employee is automatically entitled to start taking the outstanding leave from 1<sup>st</sup> November in that second year.

In Italy, Legislative Decree 66/2003 provides that at least 2 weeks' paid annual leave must be taken during the year in question. The remaining two weeks may be carried forward and used during the following 18 months. (This may be varied by collective agreements.)

In Latvia, if the worker has taken two weeks' uninterrupted leave, the employer may postpone the other half of the leave into the following year, in exceptional cases where granting all 4

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<sup>453</sup> Under Art. 7, Presidential Decree 88/1999, (see the Commission's Report on transposition in 2000). In the public service, Act 2683/1999.

<sup>454</sup> Law 3144/2003, article 22.1

<sup>455</sup> Civil Service Code, Act 3528/2007 of 9 February 2007.

weeks in the same year may adversely affect the normal course of activities in the undertaking. The written consent of the worker is required. In such a situation, the remaining leave shall as far as possible be added to the leave of the following year.

Also in Malta, the worker may agree to take half of the annual paid leave in the following year. The national authorities consider that this option can help employees trying to achieve work/life balance.

*Carrying forward annual leave where the worker is unable to take it due to long-term illness*

Only preliminary information is yet available to the Commission on this issue. According to this information:

National legislation in the following Member States appears to comply with the Court's ruling in *Schultz-Hoff and Stringer*: *Finland, Hungary*.

In the Netherlands<sup>456</sup> and in Sweden, legislative proposals have been published or are under preparation, to amend national law with the aim of ensuring clear compliance with the ruling.

In addition, the ruling has been applied by the national courts in the following Member States: *France*<sup>457</sup>, *Germany*<sup>458</sup>, *Ireland, Luxembourg, Spain*<sup>459</sup>.

A case on this issue is understood to be currently pending before the Constitutional Court in Bulgaria.

Full information is not yet available regarding the other Member States.

*Postponing annual leave if the worker is unable to take it due to illness*

Only preliminary information is yet available to the Commission on this issue. According to this information:

National legislation appears to comply with the Court's ruling in *Pereda* in the following Member States: *Austria*<sup>460</sup>, *Latvia, Luxembourg*.

In Denmark, it is understood that this issue has been referred by the Minister to a Working Group for consideration.

In addition, the ruling has been applied by the national courts in the following Member State: United Kingdom.

Full information is not yet available regarding the other Member States.

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<sup>456</sup> Press release of the Minister, 18 June 2010.

<sup>457</sup> Cour de Cassation, no de pourvoi 07-44488, judgment dated 24.02.2009.

<sup>458</sup> Federal Labour Court, judgment dated 23.03.2010, 9 AZR 128/09; 9 AZR 983/07.

<sup>459</sup> Supreme Court, 24 June 2009.

<sup>460</sup> Annual Leave Act, article 5.

### *Exclusions from annual leave*

In general, Member States have transposed the right to paid annual leave for the public sector as for the private sector. Full information is not yet available regarding annual leave in the armed forces.

In Belgium, however, it appears that there are no provisions of national law which transpose the right to paid annual leave for members of the armed forces.

### *Relationship of public holidays to annual leave*

The Commission receives a number of queries about how public or national holidays in Member States relate to paid annual leave under the Directive.

The Directive does not contain any specific provisions about national holidays or public holidays, which differ widely between Member States and whose dates are a matter for national law.

In some Member States, national law provides that the four weeks' minimum paid annual leave is in addition to any national or public holidays. This is the case, for instance, in Ireland.

In others, for example the United Kingdom, national law allows national or public holidays to be included in the minimum annual leave entitlement.

### **7.3. Conclusions**

The right to paid annual leave under Article 7 appears, in general, to be satisfactorily transposed into national law in all the Member States. A number of Member States provide for longer annual leave entitlements.

Some doubts may be expressed about three aspects of transposition, in the light of the Court of Justice's recent judgments about annual leave:

- Questions arise about the compatibility with the Directive of national rules whereby a worker must delay taking any annual leave entitlements till some months after the initial weeks of employment. For example, in Belgium, the worker is not normally entitled to take annual leave entitlements until the following calendar year of employment, while in Estonia s/he may not take any annual leave during the first 6 months of employment.
- In certain Member States, national law allows for the carrying forward to a subsequent year of all or half of the annual leave entitlement. Such rules would need to be considered in the light of the health and safety objectives of Article 7. This is the case, for example, in the Czech Republic, Italy, Latvia and Malta.
- Conversely, in some Member States, rights to paid annual leave are extinguished if they are not used within a set period, even if the worker has been unable to take the leave within that period due to reasons (such as illness) which are outside his or her control. This does not appear compatible with the Court's rulings.
- In one Member State, some workers covered by the Directive appear to be excluded from transposition as regards annual leave. This is the case in Belgium (armed forces).

## 8. NIGHT WORK AND SHIFT WORK

### 8.1. The requirements of the Directive

As well as the general rules already set out regarding limits to weekly working time, minimum rests and paid annual leave, the Working Time Directive lays down more protective rules for night workers, and some specific provisions regarding shift workers. Recital 7 sets out the rationale for extra protection of night workers:

*'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.'*<sup>461</sup>

#### 8.1.1. Concept of night work/night workers

A *'night worker'* is defined at Article 2(4) of the Directive as "any worker who during night time works at least three hours of his daily working time as a normal course; and ... any worker who is likely during night time to work a certain proportion of his annual working time, as defined by national legislation (following consultation with the two sides of industry) or collective agreements or agreements between the two sides of industry at national or regional level."

It is worth noting that a worker who is doing on-call work at night is not a 'night worker' for the purposes of the Directive unless his or her work patterns comply with the definition given above (though s/he may still be a night worker, under any more favourable definitions in national law.)<sup>462</sup>

*'Night time'* is defined as "any period of not less than seven hours, as defined by national law, and which must include in any case the period between midnight and 5 a.m."

#### 8.1.2. Special limits to night work

Under Article 8 of the Directive, Member States must take the necessary measures to ensure that for 'night workers':

- 'Normal hours of work' do not exceed an average<sup>463</sup> of 8 hours in any 24-hour period
- Not more than 8 hours' work<sup>464</sup> in any one 24-hour period, if the work involves 'special hazards or heavy physical or mental strain'<sup>465</sup>.

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<sup>461</sup> Recital 6 mentions that account should be taken of the principles of the ILO with regard to the organisation of night work.

<sup>462</sup> In *SIMAP*, the workers concerned (doctors in the public health services) normally worked from 8 am to 3 pm, but every 11<sup>th</sup> day they also worked a consecutive on-call shift from 3 pm till 8 am. Were they 'night workers'? This did not seem to constitute night work 'as a normal course', and national law had not provided what proportion of annual working time a public sector worker would need to work in order to be considered as 'night worker'. The Court of Justice held that it was a matter for the national court to decide whether they were night workers under any provisions of national law.

<sup>463</sup> Article 16(c): Member States may lay down a reference period for calculating the average length of night work, either after consulting the two sides of industry, or to be defined by collective agreements or agreements between the two sides of industry at national or regional level. The minimum weekly rest period (24 hours in each 7-day period) is not to be included in calculating the average.

It is possible to derogate from Article 8:

- Under Article 17(1) (where the duration of working time is not measured or can be freely decided by the worker, such as in the case of managing executives)
- In the activities listed in Article 17(3), provided that the night worker receives equivalent compensatory rest (exceptionally, other appropriate protection)
- By collective agreement or agreement between the two sides of industry (Article 18), provided that the night worker receives equivalent compensatory rest (exceptionally, other appropriate protection)

#### 8.1.3. *Special health checks, and right to transfer to day work*

Under Article 9 of the Directive, Member States must take the necessary measures to ensure the following protection for 'night workers':

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

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

The Directive does not provide for any derogations to Article 9.

#### 8.1.4. *Notifying night work to the authorities*

Member States must also take the necessary measures to ensure that an employer informs the competent authorities, if it regularly uses night workers and the authorities request this information (Article 11).

The Directive does not provide for any derogations to Article 11.

#### 8.1.5. *Additional measures for night workers*

More generally, the Directive provides that Member States shall take the necessary measures to ensure that night workers have safety and health protection appropriate to the nature of their work, together with appropriate safety and health services and facilities, which are available at all times and are equivalent to those applicable to other workers (Article 12.) The Directive also provides that Member States may make the work of certain categories of night workers

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<sup>464</sup> It seems that this limit is intended to include overtime, since Recital 8 of the Directive refers to the '*need to limit the duration of periods of night work including overtime...*'

<sup>465</sup> Article 8 provides that such work shall be defined by national law and/or practice, or by collective agreements or agreements between the two sides of industry, '*taking into account the special effects and hazards of night work.*'

subject to guarantees, where those workers incur health or safety risks linked to night-time working (Article 10).

The Directive does not provide for any derogations to Articles 10 and 12.

### 8.1.6. *Shift work*

A shift worker is defined by Article 2(6) as '*any worker whose work schedule is part of 'shift work'.* 'Shift work' is defined by Article 2(5) as: '*any method of organising work in shifts whereby workers succeed each other at the same work station according to a certain pattern, including a rotating pattern, and which may be continuous or discontinuous, entailing the need for workers to work at different times over a given period of days or weeks.*'

The rules on shift workers are more limited than those on night workers. Article 12 requires Member States to ensure that shift workers have safety and health protection appropriate to the nature of their work, together with appropriate safety and health services and facilities, which are available at all times and are equivalent to those applicable to other workers<sup>466</sup>. The Directive does not provide for any derogations from this Article.

Article 17(4) of the Directive allows for derogations (by laws, administrative provisions, collective agreements...) from the Directive's normal provisions on daily and weekly rests, if a shift worker is changing shifts and cannot take their normal rest between the end of one shift and the start of the next. In such a case, however, the shift worker must receive equivalent compensatory rest (see chapter 6.)

In *SIMAP*<sup>467</sup>, the Court of Justice held that doctors in the public health services, who normally worked 8 am to 3 pm, and who also, every 11 days, remained on-call from 3 pm to 8 am, were shift workers for the purposes of the Directive, since their work was '*organised in such a way that workers are assigned successively to the same work posts on a rotational basis, which makes it necessary for them to perform work at different hours over a given period of days or weeks.*'

## 8.2. Application in the Member States

At the time of the Commission's last report on application of the Working Time Directive, in 2000, the provisions on night work had not been transposed in three Member States: Austria, Italy, and Luxembourg<sup>468</sup>. All three Member States have since transposed the night work requirements<sup>469</sup>. Denmark has also since transposed various night work provisions of the Directive, as regards employees who are not covered by collective agreements providing at least equivalent rights<sup>470</sup>.

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<sup>466</sup> Recital 10 mentions that '*the organisation and functioning of protection and prevention services and resources should be efficient.*'

<sup>467</sup> *SIMAP*, Case C-303/98, judgment dated 3 October 1998.

<sup>468</sup> Until 2001, France maintained a prohibition on night work by female workers. Following a decision by the Court of Justice that such a distinction infringed the principle of equal treatment between men and women, France amended the Code du Travail to provide for night work by men and women (Law no. 2001-397 of 9 May 2001.)

<sup>469</sup> In Austria, by the EU Night Work Harmonisation Act (*EU-Nachtarbeits-Anpassungsgesetz*) of 14 November 2002; Italy, by Legislative Decree 66 of 8 April 2003; in Luxembourg, by the Law of 19 May 2006, now consolidated into the Labour Code.

<sup>470</sup> By amending Act no 258 of 8 April 2003 (now Consolidated Act no 896 of 24 August 2004.)

### 8.2.1. Definition of 'night time' and 'night worker'

In general, the definitions of night time working seem to have been satisfactorily transposed. In some Member States, national laws explicitly define only one of the terms 'night work' or 'night worker', but the essence of the definitions given in the Directive is still correctly transposed.

As regards 'night time', all Member States observe the core 'night time' period between midnight and 5 am. While many Member States observe the seven hour minimum 'night time' required by the Directive, the majority define a longer period as 'night time'. Thus 'night time' is an 8-hour period in Bulgaria, Czech Republic, Estonia, Greece, Latvia, Lithuania, Malta, Poland, Romania, Slovakia, Spain, Sweden; a 9-hour period in France, Portugal and Slovenia; and 10 hours in Belgium.<sup>471</sup> In Luxembourg it is an 8-hour period; except for the hotel and restaurant sector, where the minimum 7-hour night time period (from 23.00 to 06.00) applies.

Most frequently, the designated night time period in Member States is between 10.00 p.m. at the earliest, and 6 a.m. at the latest<sup>472</sup>. Several Member States leave flexibility for collective agreements or workplace agreements to define the exact period of 'night time' differently, within the minimum limits prescribed by the Directive<sup>473</sup>.

In Italy, national law defines 'night work' as any period of seven consecutive hours which includes the period from midnight to 5 am.<sup>474</sup> However, the lack of any precise definition of the overall period appears to create legal uncertainty, in cases where no collective agreement defines the exact period, as to which night workers are covered.

In most Member States, a worker must normally work at least three hours during 'night time' to be treated as a 'night worker'. However, in Germany or Latvia s/he need only normally work 2 hours during 'night time' ; in the Netherlands, one hour; and in Spain, and Hungary it seems that regularly working for any period of time during 'night time' would be sufficient.

Moreover, the Directive provides that workers who are likely to work at least a certain proportion of their annual working time at night are also to be considered as 'night workers'; the exact proportion is to be defined (at the Member State's choice) by national legislation following consultation, or by collective agreements.

Bulgaria and Lithuania do not seem to have defined this proportion. The UK Regulations provide for it to be defined by collective agreements or by workforce agreements.

The requirements, for Member States which have defined the proportion, are as follows:

*At least a quarter of annual working time (Hungary, Luxembourg, Poland)*

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<sup>471</sup> The minimum 7-hour period is observed by Cyprus, Denmark, Finland, France, Germany, Hungary, Ireland, and the United Kingdom.

<sup>472</sup> Member States whose definitions fall slightly outside the most frequently used period are: 8 pm to 6 am in Belgium; 9 pm to 6 am in France and Germany; 9 pm to 7 am in Poland; 10 pm to 7 am in Portugal; midnight to 7 am in Ireland. In Slovenia, night time is 11 pm to 6 am except for night shifts (10 pm to 7 am).

<sup>473</sup> For example Denmark, France, Hungary, Poland, Portugal, United Kingdom.

<sup>474</sup> Decreto Legislativo 8 April 2003, art. 1(d); Ministry of Labour Circular no 8, 3 March 2005.

*At least a third of annual working time (Estonia, Slovenia, Spain, Sweden); a third of monthly working time (Romania)*

*At least half of annual working time (Ireland, Malta\*)*

*At least 48 days per year (Germany, Austria)*

*At least 50 days per calendar year (Latvia)*

*At least 80 days per calendar year (Italy)*

*At least 270 hours per year (France\*)*

*At least 300 hours per year (Denmark)\**

*At least 500 hours per year (Slovakia)*

*At least 726 hours per year (Greece\*, Cyprus\*)*

\* = Or less, if collective agreements so provide. In Cyprus, the employee's total daily working time is to be counted for this purpose, in any case where the employee works 7 or more consecutive hours per day, and three of those hours are between 23.00 and 6.00.

### 8.2.2. *Shift work*

The concept of shift work/shift worker seems to be correctly transposed in Cyprus, Czech Republic, Greece, Hungary, Latvia, Malta, Poland, Portugal, Romania, Slovakia, Spain and the United Kingdom.

Shift work is not expressly defined in the Bulgarian Labour Code, but the concept seems to be used in a similar sense to the Directive. In Estonia, there is no express definition in line with the definition in the Directive, but both the national authorities and independent reports indicate that practice is consistent with the Directive.

In a number of other Member States, including Lithuania and Slovenia, the definition contained in the Directive does not seem to be clearly transposed.

### 8.2.3. *Limits to night work*

#### **8 hours' normal work on average**

The limit of 8 hours' normal work, on average, for night workers seems in general to have been satisfactorily transposed.<sup>475</sup>

Several Member States set higher levels of protection than the 8-hour average limit. Latvia and Bulgaria both provide for a shorter (seven-hour) limit to normal night work hours. In Spain the 8-hour limit is stricter, because it also includes any overtime. In Romania, night work is limited to 8 hours, but a worker who completes more than three hours' night work is also entitled to either an hour's reduction in the length of the shift (without loss of pay) or 15% extra on basic salary for each night hour worked. In Belgium and in France, a limit of 8 hours

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<sup>475</sup> Sweden amended its Working Hours Act to transpose this limit with effect from 1 July 2005.

applies to night work in each 24-hour period, and averaging is only possible where derogations apply. In addition, France sets a weekly limit to night work (not more than 40 hours per week when averaged over 12 weeks, or 44 hours per week if a workplace agreement so provides.)

In the Netherlands, the national authorities state that night workers may not work more than 8 hours on average which include night work; moreover, they must not work more than 10 such hours in any 24-hour period, and must not undertake more than 36 night duty shifts over 16 weeks or, when collectively agreed, more than 140 night duty shifts over 52 weeks<sup>476</sup>. A recent legal change permits an exception: a 12-hour night shift is possible, provided it is followed by a rest period of 12 hours and is worked not more than five times in any two weeks and not more than 22 times in a year.

In Belgium, regular night work requires the consent of the worker and may not be imposed, though there is an exception where s/he holds an educational or professional qualification which generally entails night work.

In Finland and Sweden, night work is in principle prohibited, and is only permitted in limited cases. In Sweden, night work is permitted where the nature of the work requires it to be carried on at night, for reasons of public interest, or in view of other special circumstances. In Finland, the Working Hours Act lists specific activities where night work is permitted; elsewhere, approval from occupational health authorities is required. In France, night work is only to be used exceptionally and where justified by the need to ensure continuity. Introduction of night work normally requires a prior collective or workplace agreement.

Formerly, there did not appear to be any legal limit to night work hours in Estonia. The Employment Contracts Act 2009 now provides at Article 50 that any agreement for a night worker to work more than eight hours per 24 hour period, averaged over a week, is invalid.

In Hungary, there are no specific limits for working time of night workers. A limit of eight hours' normal working time in each 24-hour period generally applies to both day workers and night workers, but extraordinary work (including overtime) can be added to this (up to 400 hours per year in some sectors). Moreover, in so-called 'stand-by jobs'<sup>477</sup>, national law allows a worker to work on average up to 12 hours per day, regardless of whether the work is carried out during night time. Accordingly, the limit does not appear to be correctly transposed.

### **Derogations from the limit**

Member States have made wide use of the derogations permitted under Articles 17 and 18 of the Directive, particularly the possibility to derogate by collective agreement: the main issue in such cases is whether equivalent compensatory rest is provided, as required by the Directive, and within what time-frame.

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<sup>476</sup> A maximum of 20 night shifts per 4 weeks, in the case of bakeries or places of night entertainment, but only if a collective agreement so provides.

<sup>477</sup> 'Stand-by jobs' are defined by s. 117(1)k. of the Hungarian Labour Code as jobs where due to the nature of the tasks involved and the working conditions, at least one-third of total working time is effectively inactive and the employee can rest during those periods, *or* the work is considered to involve a significantly lower burden for the employee, compared to the average. See details in chapter 3.4.

In **France**, night workers in residential care institutions may work up to 12 hours in a 24-hour period<sup>478</sup>. Equivalent compensatory rest must be provided for any work exceeding 8 hours in a 24-hour period, but there is no apparent provision about its timing.

In **Luxembourg**, the hotel sector derogates from the limits to night work under a 2002 law embodying a sectoral collective agreement. These provisions<sup>479</sup> allow night workers in the hotel sector to work up to 12 hours in any 24 hour period during peak seasons<sup>480</sup>, provided that total weekly working time does not exceed 40 hours on average (or any higher figure fixed by collective agreement). Each hour worked between 01.00 and 06.00 attracts a 25% bonus in compensatory free time or pay. (Article 17(3) of the Directive allows derogations in this sector: however, it may be questioned whether the arrangements for compensatory rest necessarily comply with the Directive, since there is no provision about the timing of compensatory rest and the reference periods for averaging weekly working time limits may be as long as 12 months<sup>481</sup>.)

In **Germany**, night workers may not work more than 8 hours on average which include night work; they may work up to 10 hours in any 24 hour period, on condition that the overall working time averages 8 hours per day over a four-week reference period.

There are two exceptions to this limit.

Firstly, in night work which regularly includes a significant element of on-call time at the workplace, night workers may work longer than 10 hours in any 24 hour period, if a collective agreement so provides<sup>482</sup>. This exception does not affect the rules on minimum daily rest periods; and working time must still not exceed 48 hours per week, when averaged over 12 months<sup>483</sup>.

Secondly, in work which regularly includes a significant amount of on-call time at the workplace, the regular working hours of night workers may be extended beyond 8 hours 'without time compensation' (*'ohne Ausgleich'*) if a collective agreement so provides. (This is the provision allowing for use of the opt-out, and also requires the written consent of the worker concerned.) In such cases, 'other measures' must be taken to protect the health of workers, but these are not specified.<sup>484</sup>

This second exception allows derogations from the national rules on minimum daily rest periods, as well as from the limits to working time. A protective clause adds that if the daily working time is extended to over 12 hours, the worker will still be entitled to a rest period of at least eleven hours 'immediately following the end of the working time'<sup>485</sup>. However, this provision does not appear to guarantee *equivalent* compensatory rest for all missed or shortened minimum rest periods. For example, a worker who has completed 24 continuous hours on duty, including on-call time at the workplace, should be entitled to a minimum 22

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<sup>478</sup> Décret no 2007-106 of 29 January 2007 on equivalence in social and medico-social establishments.

<sup>479</sup> Special Law of 20 December 2002; the relevant provisions are consolidated at Art 212 Code du Travail. June to September, plus the Christmas and Easter holiday periods.

<sup>480</sup> The reference periods provided by the 2002 law vary between 2 months and 12 months, depending on the number of workers employed, whether the establishment is seasonal (closing for at least 3 months of the year) and whether a collective agreement extends the reference period beyond 6 months.

<sup>481</sup> Art. 7(1) (4a) Arbeitszeitgesetz (AZG).

<sup>482</sup> Art. 7(8) Arbeitszeitgesetz (AZG).

<sup>483</sup> Art. 7(2a) Arbeitszeitgesetz (AZG).

<sup>484</sup> Art. 7(2a) Arbeitszeitgesetz (AZG).

<sup>485</sup> Art. 7(9) Arbeitszeitgesetz (AZG).

hours' immediately following compensatory rest, rather than the 11 hours' rest which is mentioned here. Accordingly, the compatibility of this exception with the Directive seems questionable.

Similarly in *Austria*, the *EU-Nachtarbeits-Anpassungsgesetz* allows for average working time of night workers to exceed 8 hours per day, over a reference period of 6 months, where on-call time at the workplace (*Arbeitsbereitschaft*, continuous readiness for work) is included. In such cases, the excess over an average 8 hours must be compensated with extra rest periods: however, the compensatory rest does not appear to be equivalent, since it is to be given at the rate of  $2/3$  x the number of excess hours already worked.

### **Reference periods for averaging night work**

In Belgium and France, the eight-hour limit to night work applies to every 24-hour period, so there is normally no need to average night work hours. However, in the case of derogations, Belgium provides for compensatory rest within a reference period of 14 days; while French law seems to allow compensatory rest within the following 12 weeks, and even the replacement of compensatory rest with money compensation. In Bulgaria, the seven-hour limit for night work applies to every 24-hour period, and the national authorities state that it may not be extended.

In Luxembourg, night work hours can be averaged over a week, except in the hotel sector where much longer reference periods may apply (see above.) In Greece, night work can be averaged over a week, though it is possible to fix a longer period by a collective agreement at national or regional level. In Estonia<sup>486</sup>, night work hours may be averaged over a week, but derogations are possible by collective agreement or under an employment contract, provided the work does not harm the employee's health and safety and an average of 48 hours per week is not exceeded. In Portugal, night work can normally be averaged over one week; but longer reference periods may be fixed by collective bargaining, where a flexitime system applies, or by law. Spain allows averaging over 15 days, though this can be extended to four months at most in certain sectors of activity.

In Germany, the reference period may be up to 1 month or 4 calendar weeks. In Ireland, night work can be averaged over up to 2 months, and longer if an approved collective agreement so provides. In the Netherlands, night work can be averaged over a maximum reference period of 16 weeks; or up to 52 weeks under a collective agreement, in cases where the workload cannot be evenly spread over the year. In Romania, night work may be averaged over up to 3 calendar months. In Denmark, four months, unless a collective agreement provides otherwise. In Sweden, four months, unless a collective agreement contains provisions more favourable to the worker. In Slovenia, the limit is four months (or up to 6 months, by collective agreement or workplace agreement.) In the UK, it is a maximum of 17 weeks. In Austria, the 8-hour limit applies per day, so there is normally no need to average night work hours. In case of derogations, it may be averaged over 17 weeks, or longer if a collective agreement so provides; and for night workers performing on-call time at work (*Arbeitsbereitschaft*), the reference period is up to 6 months.

### **8 hour absolute limit, where special hazards or heavy strain**

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<sup>486</sup> Employment Contracts Act 2009, Article 50.

This provision seems to have been satisfactorily transposed in Cyprus, Denmark, Finland, Greece, Hungary, Ireland, Lithuania, Luxembourg, Portugal, Poland, Romania, Slovakia, Sweden, and the United Kingdom.

In Belgium, national law already limits any night work, even without special hazards, to a maximum of 8 hours in any 24-hour period. Belgium allows some derogations to this general principle, but it seems that these would exclude work which presents special hazards or heavy strain. The position appears to be similar in France. Similarly in the Czech Republic, an absolute limit of 8 hours in any 24-hour period applies to all night work, even without special hazards or heavy strain. And in Bulgaria, an absolute limit of seven hours in any 24-hour period already applies to all night work: the national authorities state that this limit may not be extended.

However, it is not clear, from the information presently available, that this provision has been correctly transposed in other Member States.

It does not appear to have been transposed or in Italy.

In Estonia, this provision formerly was not transposed. Under Article 50(2) of the Employment Contracts Act 2009, an agreement for a night worker to work more than 8 hours in any 24 hour period is invalid, if the worker's health is *actually affected* by a working environment hazard or by the characteristics of the work. This change improves transposition but does not appear to fully transpose Article 8(b) of the Directive, which aims at *preventing* damage to health, rather than reacting after it has occurred.

In Spain, the normal rules for night work also apply here (they permit working more than 8 hours at night in specially hazardous or stressful work, provided that the work averages 8 hours over a 4-month reference period.) In the Netherlands also, the ordinary rules for night work also apply to night work involving special hazards or heavy strain.

### **Which night work involves special hazards or heavy strain?**

Several Member States provide legislative guidance for identifying such work, such as in Austria by legislation, Belgium by royal Decree, in Hungary by government Decree, and in Luxembourg and Portugal<sup>487</sup>, through the Labour Codes.

In Luxembourg, the Labour Code identifies such work as any activity which reduces the vigilance of a night worker (monotonous work, tasks requiring sustained concentration or involving certain substances) or which requires a heightened level of physical activity by a night worker (such as high physical effort, or remaining in extreme temperatures.)<sup>488</sup> In Austria<sup>489</sup>, it includes various occupations involving work underground, exposure to extremes of temperature or noise or to harmful substances, use of breathing or diving equipment, continuous prolonged work at display screens, and at least six hours' direct patient care within health and care services (in intensive care facilities such as operating theatres, ambulances and other specified contexts).

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<sup>487</sup> Article 184 of Law No 35/2004 of 29 July 2004 (Portugal).

<sup>488</sup> Article 326-4 (2) Code du Travail.

<sup>489</sup> Article 8(b) of the Heavy Night Work Act, *Nachtschwerarbeitsgesetz*, (BGBl. No 354/1981), identifies 16 types of occupational conditions which will define night work as involving special hazards or heavy strain

Other Member States leave such work to be identified by the social partners. In Slovakia, it is to be defined by collective agreements; in the UK and Malta, by collective agreement, workplace agreement, or by a risk assessment carried out by the employer. In Poland, it is to be identified by the employer, in agreement with the workplace trade union, or if there is no union, by workers' representatives with the opinion of the occupational medical adviser at the workplace. In Finland, it is to be identified by collective agreement or by decree: in addition, general health and safety legislation identifies a list of special hazards relating to night work. In Slovenia, such work is to be identified by a safety statement and risk assessment under health and safety legislation, in consultation with the workplace trade union. In Cyprus, it is to be defined by legislation or collective agreements, or in default, decided by the employer after consulting employee representatives. In Greece, it is to be provided by legislation or collective agreements, or in default, defined at the company or undertaking level, after consultation between the employer and workers' representatives, and according to a written risk assessment which takes explicit account of risks related to night work.

In other Member States, either there is no definition, or no provision for defining, areas of work which present special hazards or heavy strain for night workers; or the available identification of hazards or strain does not refer to the particular context of night work.

In Estonia, Latvia and Romania, for example, health and safety legislation defines some special hazards, but this does not necessarily consider heavy mental or physical strain, or the particular context of night work. In Ireland, there is no general identification of what may constitute 'particularly hazardous work'; every employer is required by law to carry out a written risk assessment of any hazards present at the workplace and the risks they may present to employees, including to night workers.<sup>490</sup> In Italy, these areas were to be identified in a ministerial decree following consultation with the social partners, but none has yet issued.

#### *8.2.4. Health checks and the right to transfer to day work*

##### **Health assessment before assignment to night work and at regular intervals**

The entitlement to a free health assessment before assignment to night work, and at regular intervals thereafter, appears in general to have been satisfactorily transposed.

In France, for example, the Labour Code provides that the occupational health doctor must consider the health and safety implications of night work for the worker, including the impact on their biorhythms and social life, and must certify whether the worker's health is compatible with doing night work. Similarly in Greece, national law states that the assessment must validate the worker's suitability for the night work in question.

However, it is not clear for all Member States that the provisions require a health assessment which takes account of the particular health and safety issues raised by night work, the occupational requirements of the tasks, and the particular situation of the individual worker. In Slovenia, for example, general health and safety legislation requires regular occupational health checks for workers at the employer's expense, but there do not appear to be any

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<sup>490</sup> Safety, Health and Welfare at Work Act 2005, section 19; Safety, Health and Welfare at Work (General Application) Regulations 2007, R. 155.

specific provisions relating to night work aspects. In Portugal, the national authorities state that they have not transposed this provision for the public service<sup>491</sup>.

In Denmark, national law<sup>492</sup> provides that employees shall be offered a free health assessment before they start night work, but does not explicitly state that the assessment shall establish their suitability for night work. .

In the United Kingdom, Government guidance on the Working Time Regulations provides that the employer 'should get help from a suitably qualified health professional when devising and assessing [a medical] questionnaire', but need only request a medical examination if the employer has doubts about the worker's fitness for night work after reading the replies to the questionnaire.

Most Member States do not specify in their transposing legislation how frequently 'regular' health assessments should be made after a worker has started night work. In Poland, the frequency of health assessments depends on the working conditions and on any particular risks which they may present. In France, they must take place at least every six months. In Portugal, Slovakia and in the United Kingdom, at least once a year. In Malta, the assessment must take place within a 'reasonable length of time' after the initial assessment, or if there are changes to the work environment. In Austria, every 2 years until the age of 50, and annually after that age or after 10 years of night work. In Italy, at least every 2 years. In Latvia, at least once every two years; at least once a year if the worker is aged over 50. In Slovenia, after 3 to 60 months, depending on the risk assessment of the work concerned. In Denmark and Estonia, at least once every three years. In Germany, at least every 3 years (every year, if the worker is aged 50 years or more.) In Sweden, every sixth year (every third year if the worker is aged over 50.)

### **Health assessments to be free of charge to the worker and confidential**

The requirement that these health assessments are free of charge to the worker seems in general to have been satisfactorily transposed. It is not clear that this is the case, however, in Austria, and Luxembourg.

More complex is the transposition of the Directive's requirement that the health assessments 'must comply with medical confidentiality.' Member States adopt varying approaches in practice to the questions to whom, from whom, or in what circumstances, the information is confidential.

For example, in Greece, medical confidentiality is an express requirement and national law provides that information from the health assessment may not be used to the detriment of the worker. In Malta, the national law states that the results of health assessments may only be given to the worker, unless he or she consents expressly to release them to the employer. In Luxembourg, the occupational doctor indicates to the employer only whether the worker is, or is not, fit for night work; the medical diagnosis itself remains strictly confidential.<sup>493</sup>

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<sup>491</sup> The national authorities state that in general, the Directive has been transposed for the civil and public service by Decree-Law no. 259/98 of 18 August 1998 as amended by Decree-Law no. 169/2006 of 17 August 2006.

<sup>492</sup> Consolidating Act no 896 of 24 May 2004.

<sup>493</sup> Code du Travail, art. L-326-8.

Conversely, in Bulgaria and in Slovenia, national law seems to refer instead to employers' obligations to keep confidential medical information which has been transmitted to them.

In the United Kingdom, the Working Time Regulations themselves provide that a health assessment shall not be disclosed to any person other than the worker, without his/her written consent, unless it consists only of a statement that the worker is fit for night work. However, the Government's published guidance on the Regulations recommends that employers ask workers to complete a medical questionnaire, which the employer may then use to decide whether a medical examination is needed. Although the guidance recommends employers to get help from a suitably qualified health professional in assessing replies to questionnaires, it does not indicate that these replies should also be protected by medical confidentiality. This does not seem consistent with the requirement that the health assessment must comply with medical confidentiality.

### **Right to transfer to day work**

This entitlement seems, in general, to have been satisfactorily transposed. In some Member States, more favourable provisions apply: for example, in the Czech Republic, the employer is legally obliged to transfer to day work any worker who is medically certified as unfit for night work.

In Sweden, there is no specific provision on the right to transfer to day work; however, the national authorities state that this is considered to follow from provisions in the Work Environment Act<sup>494</sup> which require an employer to transfer an employee where this is needed to ensure that the working conditions are suited to the individual worker's capacities.

However, the right to transfer to day work does not appear to have been clearly transposed in Poland, where Art. 228(4) of the Labour Code provides only that an employee whose health has become unsuited to night work may not be permitted to continue working in a night work post.

#### *8.2.5. Guarantees for certain categories of night workers*

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

The range of guarantees imposed by Member States is quite diverse and includes a ban on night work (for example, on young persons undertaking night work in Bulgaria, Czech Republic, Poland or Slovakia, or on night work by pregnant workers in Bulgaria, Italy or Poland), a ban on night work being imposed without the worker's consent (for example, pregnant workers, or those caring for young children, in Lithuania or Slovakia; workers with disabilities in Lithuania), and a right to be transferred to suitable day work on request (pregnant workers, Belgium and Czech Republic.) In other Member States, the guarantee does not apply automatically to a group of workers, only if a doctor certifies the need in the worker's particular case (for example, a ban on night work by pregnant workers, in Estonia or Luxembourg, or for workers who are breastfeeding or have recently given birth, in Latvia.) In the Netherlands, night duties are considered to be a risk for the health and safety of workers generally, and restrictive provisions therefore apply to night work generally.

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<sup>494</sup> Work Environment Act, chapter 3, sections 2 and 3.

The main groups who are addressed by national transposing provisions are younger workers and pregnant workers. (In many cases, these special guarantees also reflect specific provisions under other Community law directives, such as the Directives on the protection of young people at work (Directive 94/33/EC) or on pregnant and breastfeeding workers (Directive 92/85/EEC).

Younger workers are given special protections as concerns night work, under the law of Austria, Czech Republic, Cyprus, Estonia, France, Germany, Greece, Italy, Latvia, Luxembourg, the Netherlands, Poland, Slovakia, Slovenia, Spain and Sweden. In Germany, Poland, Slovakia and Czech Republic, for example, young people cannot perform night work, and in Sweden night work by young persons is prohibited except for very restricted cases which must be approved by the Work Environment Authority. In Estonia, minors aged 15-17 years may only work up to midnight, in limited sectors (creative activities in culture, sport or advertising), provided that they are not obliged to attend school, and if the work is not damaging to their health, safety, development or studies. The permission of the labour inspector is also required. In Italy, special protection also applies to apprentices. In Slovenia, national law allows night work for workers under 18 years of age in situations of “force majeure”, when such work lasts a definite period of time and must be carried out immediately and there are not enough adult workers available to perform the work.

In Belgium, workers aged over 55 who have worked at least 20 years in night work occupations are entitled to request a transfer to day work, even without medical justification.

There are extra protective provisions about night work during pregnancy in Austria, Belgium, Czech Republic, Cyprus, France, Germany, Greece, Hungary, Italy, Latvia, Lithuania, Luxembourg, the Netherlands, Slovakia, Slovenia, Spain and Sweden.

Some Member States also apply special guarantees to night workers who are breastfeeding (Austria, Germany, Hungary, Latvia, Lithuania, Luxembourg, the Netherlands) or who have recently given birth (Belgium, France, Hungary, Italy, Latvia, Lithuania, the Netherlands, Spain and Sweden).

In a number of Member States, special guarantees also apply to workers who are caring for children or persons with disabilities. For example, in Latvia, an employer cannot assign a worker to night work without his consent if the worker has a child under three years of age. There is a similar rule in Italy for mothers and cohabiting fathers of a child aged under 3; a lone parent caring for a child aged under 12; or a worker caring for any person with a disability. In Lithuania, the same rule applies to parents caring for a child aged under 3, or a child aged under 16 who has a disability, and to a lone parent raising a child under 14. In Poland, to workers caring for a child aged under 4 years. In Slovakia, it applies to a worker caring for a child aged under 15. In Estonia, to a worker who is raising a child under twelve years of age, or a disabled child, or who is also caring for a person with total incapacity for work. In Bulgaria, to a worker who is the mother of a child aged under 6 years or who is caring for a disadvantaged child of any age. In Germany, an employer must transfer a night worker who so requests to a suitable day job, if the worker's household includes a child younger than 12 years who cannot be looked after by another person in the household, or includes a dependant who requires an intensive level of care. In Austria, night workers may request a transfer to day work if this is necessitated by essential duties caring for children aged under 12.

Other Member States provide more generally for special guarantees for *workers identified at being at particular risk to health and safety from night work* (Estonia (if a doctor so certifies for the individual worker), Portugal, Spain).

In Lithuania, national law also lays down special conditions for night work by *workers with disabilities*, who cannot be assigned to night work without their consent.

In Bulgaria, a worker who is continuing their education while in employment may not be assigned to night work without their consent. And in Slovenia, a worker may not be assigned to night work unless s/he has organised transport to and from work.

#### 8.2.6. *Notification of regular use of night workers*

Article 11 requires Member States to 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 Directive does not provide for any derogations to this provision.

The legislation of most Member States would seem to be in line with the requirements of Article 11, including Belgium, Bulgaria, Cyprus, Denmark, Finland, Greece, Hungary<sup>495</sup>, the Netherlands, Poland, Slovakia, Slovenia, Spain, Sweden and the United Kingdom.

In Spain, the employer must inform the labour authorities, even without a request; though collective agreements may provide otherwise.

In Romania, the obligation to notify applies to an employer who *frequently* uses night work, while the Directive refers to an employer who *regularly* uses night work.

In some Member States, national laws only provide a general duty to record working hours, and to provide this general information to the authorities. However, it appears that if the national authorities asked whether an employer used night workers regularly, the employer would be legally obliged to provide that information. This is the case in Estonia, Latvia, and Lithuania. In Czech Republic, national laws only provide a general duty to co-operate with the labour inspectorate.

In other Member States, the specific requirement to notify the use of night workers does not appear to have been transposed.

In France, Ireland, Italy<sup>496</sup>, Luxembourg and Portugal, there do not appear to be any specific arrangements for informing the authorities.

#### 8.2.7. *Safety and health protection for night workers and shift workers*

Article 12 requires Member States to take the measures necessary to ensure that night workers and shift workers have safety and health protection appropriate to the nature of their work, and that appropriate protection and prevention services or facilities with regard to the safety and

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<sup>495</sup> Section 4, Act LXXV of 1996 on labour inspection.

<sup>496</sup> Article 41(14) of Act 133/2008 deletes the requirement formerly contained in Article 12(2) of *Decreto legislativo* 66/2003.

health of night workers and shift workers are equivalent to those applicable to other workers and are available at all times.

Many Member States refer to their general legislation on health and safety of workers in respect of Article 12: Austria, Denmark, Estonia, Finland, Germany, Hungary, the Netherlands, Romania, Slovenia, Sweden, and the UK. However, it is not clear from the available information, for all the Member States mentioned, whether these general provisions would necessarily ensure health and safety protection, prevention services and facilities which are appropriate to the specific nature of night work or shift work, as required by Article 12.

In Cyprus, France, Greece, Italy, Portugal, Slovakia and Spain, national legislation contains general provisions which correspond with Article 12.

Only a few Member States appear to lay down specific provisions to implement Article 12 regarding night workers or shift workers.

Regarding night workers, the Czech Republic provides that the employer shall arrange adequate services for night workers, especially access to refreshments. The employer shall provide workplaces where night work is done with first aid remedies, and shall ensure that these workplaces are so equipped that emergency medical assistance can be called if necessary. Similarly, the Slovakian Labour Code imposes special health and safety measures for night workers and shift workers. For instance, a workplace where night work is done must be provided with appropriate first aid, including methods of calling emergency help during night hours. In Slovenia, employers must provide night workers with longer annual leave, suitable food during working hours, and suitably professional management of the production process or work environment. In Bulgaria, the Labour Code states that an employer shall provide employees with hot food, refreshments and other facilities for the effectiveness of night work. In Portugal, the employer must re-assess every 6 months the occupational risks inherent in night workers' activities, taking into account the worker's mental and physical condition. The assessment document must be made available to the labour inspectorate on request.

Regarding shift workers, Germany provides that working hours of night workers and shift workers must be established following established occupational science research on humane working conditions. Bulgaria, Latvia and Lithuania provide that a worker may not be assigned to work two shifts in succession. In Slovakia, there are special limits to working time for shift workers; 38.75 hours per week for workers working in two shifts, and 37.5 hours per week for those working in three shifts or in continuous operation. In Bulgaria, a worker's shifts must be arranged to suit the organisation of their studies, if the worker is a secondary school student or engaged in continuing education.

#### *8.2.8. Obligations regarding organisation of work patterns*

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

The Cypriot, Estonian, Irish, Greek, Spanish, and Portuguese legislation contains express provisions corresponding to Article 13 of the Directive.

Several Member States refer to their general legislation on health and safety of workers in respect of Article 13: Austria, Denmark, Finland, Hungary, the Netherlands, and Sweden. It seems that there are also relevant provisions in the Dutch working time legislation.

Other Member States specify concrete measures to be taken. These include obligations to organise work in a way which minimises work strain; extra rest breaks in the case of monotonous work or work at a predetermined rate; consultations with trade unions on fixing the rate of work; and adapting work to the individual worker.

In the Czech Republic, Latvia, Slovakia and in Poland, national law provides that the employer is obliged to *organise work so far as possible in a way which alleviates work strain*, particularly where the work is monotonous or is done at a pre-determined rate. In Romania, the employer is obliged to adapt work to the individual worker with a view to reducing the negative health effects of monotonous work and work at a pre-determined work rate. In Estonia, monotonous work and work at a predetermined work rate are identified as physiological and psychological risk factors. Furthermore, under the Slovakian legislation, an employer must not implement a system of remuneration which would increase the risk of work injury, in particular by enhancing productivity in a way detrimental to health and safety.

If monotonous work cannot be completely avoided, Czech, Estonian and Slovakian law requires the employer to provide *extra safety breaks* for workers. In the UK, the national regulations require the employer to ensure that workers who perform monotonous work, or whose work-rate is predetermined, are given adequate rest breaks. In Italy, extra breaks are to be provided by collective agreements for recovering from monotonous work, or from work at a predetermined work rate. In Malta, the employer must do so if a risk assessment shows that the work pattern is such as to increase health and safety risks to the worker, and particularly in the case of monotonous work or work at a pre-determined rate; and such breaks must be adequate to the satisfaction of the occupational health and safety authorities. In Lithuania, different sorts of additional breaks must be provided for workers in intensive types of work.

In the Czech Republic, a workload and pace of work consistent with safe and healthy working are to be set by the employer after *consultation with the trade union*, unless covered by a collective agreement. In Slovenia, the employer must notify the workers and trade union about the distribution of working time, and consult the trade union at least annually about the organisation of ongoing night work. In Poland, work schedules should be established by collective agreement or agreement with the trade union at enterprise level, if a trade union is present and there are more than 20 workers. However, none of these provisions seems to refer to the specific issues mentioned in Article 13 of the Directive.

Several Member States set out the obligation to adapt work to the worker, with concrete measures to follow. In the Czech Republic, in setting the work pace and completion targets, the employer shall take into account an employee's physiological and psychological capacities, as well as health and safety requirements and time for physical needs, meals and rest. In Slovakia, the employer shall allow a special organisation of working time, if a worker asks for this based on health or other serious personal grounds and the employer's operating conditions so permit. In Estonia, the employer is required to adapt the work to suit the workers as much as possible. When designing the organisation of work, the physical and mental characteristics, gender and age of the worker, changes in his or her capacity for work

during a working day or shift, and the possibility of working alone for an extended period of time, are all factors to be taken into account. In Latvia and in Romania, national law requires the employer to adapt work to the individual worker, both regarding the design of workplaces and work equipment, and in the choice of work and production methods.

In several Member States, for example in Bulgaria and Romania, national law provides for flexible working hours to be established, where collective agreements so provide and the employee so agrees. Such a system must respect working time norms, but allows the employee flexibility to choose the exact times of arrival and departure from work provided that a core period of presence is observed.

Article 13 does not appear to have been transposed by any specific provision in Germany.

### **8.3. Conclusions**

Overall, the rules regarding night work have been transposed satisfactorily, and most of the gaps noted in the Commission's last report have been addressed. However, there are a number of areas of concern. The main points which should be mentioned:

- In Hungary, the limit to night work hours does not appear to be clearly transposed.
- Italy does not appear to have transposed the special limit for particularly hazardous or stressful night work: Estonia has only partly transposed it.
- In a number of Member States, no clear criteria have been given for identifying night work involving special hazards or heavy strain (which attracts a higher level of protection under the Directive). This appears to be the case in Estonia, Ireland, Italy, Latvia and Romania.
- Poland does not appear to have clearly transposed the right of a worker whose health is negatively affected by night work, to seek a transfer to daytime work
- The requirement to notify night work to the labour authorities is either not transposed, or lacks the necessary clarity, in France, Ireland, Luxembourg and Portugal.
- The provisions on health assessments for night workers are not always clearly transposed (notably that the assessment should be free, confidential, and repeated regularly)
- Germany and Austria allow certain derogations to night work limits for some on-call activities, without providing that this is conditional on equivalent compensatory rest, as required by the Directive
- In France and Luxembourg, derogations from the limit to night work are subject to equivalent compensatory rest, as required by the Directive, but there is no norm about its timing (see chapter 6).
- Bulgaria and Lithuania have not yet defined the annual proportion of hours worked at night which would make a worker a 'night worker' under the Directive
- In Lithuania and in Slovenia, the Directive's provisions on shift work are not clearly transposed.

- In some cases, transposition relies on very general health and safety provisions, which do not reflect the specific nature of night work.

## 9. GENERAL ISSUES

Earlier chapters of this Working Paper focus on technical analysis of how the different provisions of the Working Time Directive have been transposed and applied in the Member States. This chapter takes a more cross-cutting approach, and gives an overview of how the application is seen by the actors directly involved; particularly, by unions, by employers and by Member States.

It is primarily based on detailed contributions provided by the Member States and by European social partners in 2007 about their views and experience regarding the implementation of the Working Time Directive. The draft of this Working Paper was also provided to the Member States and the social partners in 2008, and their comments on it have been taken into account in this final version.

The views expressed by different actors across the 27 Member States - and even within a single Member State - naturally differed widely at times. The main purpose of this chapter is to give an overall picture of the most frequent issues and views, and also of the range of different opinions, which featured in the replies received.

This chapter looks firstly at the evaluations of trade unions generally; secondly at the evaluations of employers generally; and thirdly at the views of both trade unions and employers on how far they had been consulted and involved by government in the transposition process, and on the role of collective agreements in transposing the Directive or in designing the detail of derogations. The fourth section looks at overall comments made by Member States in national reports. The last section looks at monitoring and enforcement of the Working Time directive at national level, since trade unions, employers and labour inspectorates in a number of national reports expressed particular concern about this issue.

In the meantime, the Commission also consulted the European social partners in March 2010 about their views on a possible review of the Directive<sup>497</sup>. The views expressed on that occasion are analysed separately from this Working Paper, in a second stage consultation paper published by the Commission<sup>498</sup>.

### 9.1. Social partners' evaluations: trade unions

#### *Overall evaluation*

Trade unions' replies generally emphasised the importance of the Working Time Directive for European social policy, and stressed the continuing need for common minimum standards in this area at European level.

ETUC<sup>499</sup> for example stated that *'The Working Time Directive is a very important social policy Directive ... which is necessary to provide a floor in competition between companies, sectors (and countries) on the organisation of working time at the expense of the health and safety of workers. Putting limits to long working hours, and providing workers with the tools to influence their working time patterns, are as important to workers and their families in the*

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<sup>497</sup> COM(2010) 106, 24 March 2010.

<sup>498</sup> COM(2010) 801.

<sup>499</sup> ETUC/ European Trade Unions Confederation

*twenty-first century as they were in the nineteenth....In ETUC's view, although the practical application of the Directive is not perfect ... [it] certainly plays a very important role in promoting the health and safety of workers, which is its central objective.'* Some ETUC affiliates mentioned that the Directive was also considered as important for citizens' identification with the EU.

Similarly, the contribution from CESI<sup>500</sup> underlined the need for EU legislation to set a common European standard for protecting individual workers' health and safety, and to set absolute limits for derogations from those common standards.

The Directive's minimum provision for four weeks' paid annual leave was identified as a particular advance in levels of protection within EU-15 Member States, since there had been no such requirement previously under national law in certain Member States. In some EU-10 Member States, different provisions were mentioned as having introduced new rights for workers, including the limit to weekly working time, the concept of compensatory rest, minimum daily or weekly rests, or the four weeks' paid annual leave.

Trade union contributions strongly reiterated their positions from the re-examination of the Working Time Directive in 2003<sup>501</sup>. They considered that the Directive's existing derogations already allowed for all the necessary flexibility; however, they could support a 12-month reference period by legislation, as well as by collective bargaining, provided it was accompanied by mechanisms to ensure proper consultation of workers and/or their representatives, and adequate protection of workers' health and safety.

### ***Evaluation of transposition***

Trade union contributions underlined that their evaluation of transposition of the Directive varied considerably between different Member States and, sometimes, by sector. A general point which was made regularly was that the consistency of national law and practice with the Directive was considered to be extremely uneven as between Member States, and that both transposition and enforcement should be made much more consistent in certain Member States in the interests of ensuring common and fair minimum standards: *'In several Member States, the lack of proper transposition and enforcement is clearly leaving many workers without proper protection'*.<sup>502</sup> Inconsistent application was seen as a particularly urgent problem as regards on-call time and compensatory rest.

The most important issues where application<sup>503</sup> was considered unsatisfactory for certain Member States were:

- the treatment of on-call time,
- incorrect use of derogations (especially a lack of compensatory rest),

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<sup>500</sup> CESI/ Confédération Européenne des Syndicats Indépendants

<sup>501</sup> *Second phase of consultation of the social partners at Community level concerning the revision of Directive 93/104/EC*, SEC (2004) 610. Trade union priorities were to continue treating inactive on-call time at the workplace as working time and in no circumstances as rest time; reference periods should not exceed the length of the employment contract and should not be extended to 12 months other than by collective agreement; the opt-out should be considered as a temporary exception and should be phased out.

<sup>502</sup> ETUC.

<sup>503</sup> See section 9.5 below for the comments about enforcement.

- wrong use of reference periods,
- inadequate application of protective conditions for the use of the opt-out, and
- an over-broad application of the derogation in Article 17.1 (autonomous workers) which was ‘a matter of growing concern’.<sup>504</sup>

Conversely, trade union contributions did not consider that the Directive’s rules on working time were too difficult to understand, or that they imposed excessive regulatory burdens.

In three instances, trade union contributions felt that the Directive had been transposed into national law in a way which reduced the level of protection previously available. In the Netherlands, trade unions consider that recent changes to working time legislation make it less favourable than the previous law as regards overtime, night work, and co-determination.<sup>505</sup>

### *Particular issues*

The most important issue about application of the Directive, for trade unions, was the continuing impact of long working hours on health and safety.

ETUC reported ‘*deteriorating working conditions, in particular, in sectors which struggle to assure continuity of service due to insufficient funding and staff shortages. The most problematic sectors seem to be health, social services and fire-fighters. There are increasing concerns about the impact of long working hours on health and safety, as well as on the quality of service.*’

Contributions from sectoral social partners – notably a joint submission from the CPME/EMSA/PWG<sup>506</sup> – emphasised the medical and occupational risks, illustrated by peer-reviewed research, which were associated with excessive working hours and with disrupted sleep patterns, both generally and in the particular context of the health sector. They considered that current health care systems generally relied too heavily on doctors (and doctors in training) working excessive hours, which were clearly linked by medical research to adverse effects for the health and safety of individual doctors, and to higher risks of medical errors. In addition, such working conditions contributed to the recognised difficulties of recruiting and retaining enough medical staff, since they created great difficulties for reconciling work and family life and made the medical profession less attractive to work in.

*‘There is an expectation for ... doctors to work hours far in excess of those worked in other industries. ... For many years the links between excessive hours of work and risk to one’s health and safety have been apparent; ... [t]here is now direct evidence that excessive hours of work in [resident hospital doctors] are associated with disrupted sleep patterns, increased incidence of attention failures, increased incidence of motor vehicle accidents and increased numbers of serious medical errors. Excessive workload and lack of adequate rest will make a*

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<sup>504</sup> ETUC.

<sup>505</sup> The other references were to transposition regarding road transport workers in France under Directive 2002/15/EC, and a general reference to greater flexibility for working time in Spain ( no details provided).

<sup>506</sup> CPME/Comité permanent des médecins européens; EMSA/ European Medical Students’ Association; PWG/Permanent Working Group of European Junior Doctors. See also submission of BMA/British Medical Association.

*person more prone to individual error. Correcting these defects in systems is the most effective way to reduce human error. Doctors are no different from other workers, and deserve the same level of protection.'*<sup>507</sup>

Trade union contributions recognised that major changes would be needed to the organisation of health systems in some Member States, but felt that many models were available for reallocating resources to deliver high-quality healthcare while relying less on on-call hours.

Another underlying concern about application in practice was overtime pressures on low-wage employees. As one ETUC affiliate commented, *'Often workers choose to work more overtime instead of enjoying rest periods because they do not have decent wages.'* Pay rates fall outside the scope of the Working Time Directive, but a number of contributions referred to the connection for some groups of workers between low pay and working excessive hours.

Trade union contributions were generally opposed to the application of the 'opt-out'. One ETUC affiliate<sup>508</sup> commented that the widespread use of the opt-out in the UK was perceived as having deprived the Directive of much of its benefits in practice. Some trade union contributions<sup>509</sup> considered that the opt-out might be retained as a very exceptional derogation, and subject to strict protective conditions.

Sectoral contributions from doctors' professional organisations<sup>510</sup> were also concerned about delays in affording compensatory rest, and called for more specific rules in this regard. They cited medical research on the time needed to recover normal functioning after missed daily rest periods or disruption to natural circadian rhythms, concluding that a minimum of five hours' sleep in each 24-hour period was essential to maintain adequate cognitive functions and alertness, that compensatory rest should, in general, be provided immediately if daily rest was reduced below 11 hours in each 24-hour period, that derogations should only be possible by collective agreement, and that no derogations should allow compensatory rest to be postponed beyond 72 hours or allow further overtime before compensatory rest is taken<sup>511</sup>.

Other issues raised by trade union contributions were a call for clarification of whether the Directive should be applied per-contract or per-worker, for more attention to reconciliation of work and family life, for more definition on what was included in working time (travelling time for work purposes, stand-by at home....) and for rules on new issues, such as the protection of working time accounts in the event of insolvency of employers.

### ***Formerly excluded sectors***

Trade union contributions raised a number of issues regarding transposition and application for the formerly excluded sectors, in different Member States. These included the use of derogations in France regarding road transport workers; the adequacy of rest periods for

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<sup>507</sup> Quotation from CPME/EMSA/PWG submission; research citations are omitted here.

<sup>508</sup> TUC/Trade Union Congress

<sup>509</sup> CESI/ Confédération Européenne des Syndicats Indépendants (with extra measures to prevent abuse including an annual review of why the opt-out is needed); BMA/British Medical Association (limited to genuinely autonomous workers and protected from any preferential link to future contracts); DBB/ Deutsche Beamtenbund und Tarifunion (for example, to ensure 24-hour health services, but with a maximum limit of 54 -58 hours per week depending on intensity of work, conditional on overtime pay rates and with stronger protective conditions).

<sup>510</sup> CPME/EMSA/PWG, BMA contributions.

<sup>511</sup> CPME/EMSA/PWG.

seafarers in the Netherlands and for urban transport workers in the UK; the application of annual leave and reference periods to offshore workers in the UK. In Germany, where the rail sector was already covered by the *Arbeitszeitgesetz* before 2003, trade union contributions complained of enforcement problems in the rail sector, regarding working time limits and minimum rests for train drivers who were contracted by rail operators as self-employed workers. (The national authorities disagree with this comment.)

Trade union replies were critical of the standard of transposition and application in a number of Member States regarding doctors in training, and called for more concerted efforts to ensure that the Directive was fully transposed in this respect at least by 2009. Submissions from doctors' organisations<sup>512</sup> did not consider that applying the Directive would jeopardise training standards or require longer training periods, but did call for medical training to be re-designed to maximise pedagogical quality within the 48-hour week.

### *Useful measures*

Trade union contributions advocated improving implementation and enforcement regarding Working Time by exchanges of good practice, for example on existing models for rethinking organisation of hospital services to comply with the 48-hour week, on practical alternatives to the opt-out, and on innovative working time arrangements.

## **9.2. Social partners' evaluations: employers**

### *Overall evaluation*

Employers' contributions agreed on the importance of working time as a theme, perceiving it as a main component of flexicurity and hence essential for competitiveness in companies of all sizes.<sup>513</sup>

A number of employer contributions<sup>514</sup> also supported the need for working time rules to protect against fatigue and improve health and safety. CEEP underlined that tired workers are ineffective and can present dangers to themselves and to others: therefore, as a matter of principle, workers should be managed in a way which avoids, or at least minimises, the risk of work-related fatigue. In public services, for example, safety of patients was paramount, and they should not be treated by tired staff. In the opinion of CEEP, the practical application of the Working Time Directive *'has led to an improvement in the health and safety of some public service workers and also to increased patient/client safety, but at a very significant cost to the taxpayer. However, due to subsequent rulings of the European Court of Justice, the Directive lost some of the flexibility that may originally have been intended.'*

In general, however, employers' view was that the Directive went beyond what was needed to protect health and safety of workers, and their overall focus was on the need for more flexibility in working time.

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<sup>512</sup> CPME/EMSA/PWG

<sup>513</sup> Eurochambres, Business Europe. Similarly UEAPME: *'Working time is one of the main components of internal flexibility and a key feature for the competitiveness of small businesses. Therefore, the way it has been implemented at national, sectoral and enterprise level is an important factor for small companies' economic success'*.

<sup>514</sup> CEEP/European Centre of Enterprises with Public Participation; CoESS/Confederation of European Security Services.

*'While most [member] federations find that the Directive meets its objectives regarding the protection of health and safety of workers, it is also pointed out that the Directive has gone well beyond its original intention of providing minimum standards on the grounds of health and safety. There is general and strong agreement among employers' federations about the lack of flexibility in application of the provisions of the Directive. ... Working time flexibility is crucial for companies' competitiveness and also serves the interest of workers.'*<sup>515</sup>

Like trade unions, employers' organisations strongly reiterated their positions from the re-examination of the Working Time Directive in 2003<sup>516</sup>, which were indicated as still urgent priorities.

Overall, employer organisations were satisfied with national transposition of the Directive. Regarding its application in practice, employers' replies generally emphasised the financial and organisational costs of compliance, and called for greater simplicity and flexibility in the transposition and application of working time rules at national level.

The main problems of application raised by employer organisations were:

- national laws which were seen as stricter than what the Directive required
- national laws which were seen as not making enough use of available derogations
- transposition in certain Member States resulted in overlapping legal rules, leading to confusion;
- problems in practical application of the *SIMAP-Jaeger* judgments about on-call time
- Working Time rules seen as difficult to understand
- compliance seen as an excessive burden.

In certain cases, employer organisations also felt that some working time rules made it harder for employers to adjust working time to the wishes of employees. For example, UEAPME indicated that in Sweden, employees preferred for cultural reasons to work longer shifts in order to be able to have longer equivalent periods of time off. The Directive's requirements about immediate compensatory rest now made this very difficult to achieve. Similar points were made in a number of letters to the Commission and petitions to the Parliament from certain groups of workers. For example, petitions from groups of public service firefighters in

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<sup>515</sup> Business Europe. Similarly Eurochambres; and CEEP, which stated that *'To leap from the general proposition [of minimum rules to avoid dangerous levels of fatigue at work] to the detailed regulation of the Working Time Directive is to fall into a trap of believing that all types of work are equally tiring and that all workers, regardless of their age, fitness and commitments outside work are equally vulnerable to work-related fatigue. We therefore believe that the level of detail regarding working hours regulated by the Directive is inappropriate. More flexibility should be available to Member States to regulate working time in line with national conditions.'*

<sup>516</sup> *Second phase of consultation of the social partners at Community level concerning the revision of Directive 93/104/EC*, SEC (2004) 610. Employer organisations' priorities were to maintain the opt-out as an option for all Member States and by either individual agreement or collective agreement; to allow Member States to provide for the reference period (for calculating weekly working time) to be extended to up to 12-months by legislation, with further extension possible by collective agreement; and to amend the Directive so that inactive on-call time at the workplace was not counted as working time.

Germany stated that they did not want to discontinue their existing system (regular 24-hour shifts of standard working time followed immediately by on-call time at the workplace.) The firefighters considered that the high physical and psychological stress of their work was better compensated by long recovery phases involving several consecutive free days in each week, than by regular rotating shifts designed to comply with the *Jaeger* judgment's requirement for immediate compensatory rest.<sup>517</sup>

Some employers' organisations considered that complying with the Directive's requirements had led them to reduce opening hours, leading to some job losses and to a greater reliance on temporary work and fixed term contracts, although 'employers would have preferred to hire people under contracts of indefinite duration, if the rules had been more flexible.'<sup>518</sup>

The main sectors for which particular problems were raised in certain Member States were the health sector (on-call time, timing of rests); information technology and the performing arts (need for flexibility to accommodate intensive work for project or premiere deadlines, alternating with flexible hours at other times); security services; transport<sup>519</sup> and hospitality.

In the case of the hospitality sector, a number of contributions considered that national rules on night work in some Member States were not sufficiently adapted to its particular needs, and called for the derogations available under the Directive to be transposed in a way which was more adapted to actual needs and practices.<sup>520</sup>

UEAPME commented that transposition, particularly of the Court of Justice's decisions regarding on-call time, was seen as varying widely between Member States. In countries where national rules were stricter than Community law required, this was considered to impose substantial limitations on companies' internal flexibility.

#### National laws seen as too restrictive

Employer's organisations in some Member States reported as generally problematic the fact that national laws applied more protective provisions than the Directive required.<sup>521</sup> This was the perception regarding Germany, the Netherlands, Portugal and the UK.

Regarding transposition in Germany, employers' organisations<sup>522</sup> referred to the limit to daily working time under national law, although UEAPME noted that there was extensive scope to derogate from this national provision by collective agreements.

In the Netherlands, employers' contributions praised legislative changes in 2007 for simplifying working time obligations, but considered that protection for night workers was still set too high (employees need only work one hour between midnight and 6 am to be a 'night worker', limits to number of night shifts per month, requirement for collective agreement to operate 20 night shifts per 4-week period in night entertainment sectors.) Employer bodies accepted the need for higher health and safety protection in the case of night

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<sup>517</sup> For examples see petitions 5/2007 (firefighters), 667/2006 (police officers); for petitions wishing to enforce *Jaeger*, see for example petitions 852/2005 and 546/2002 (firefighters).

<sup>518</sup> UEAPME

<sup>519</sup> Eurochambres, PEARLE, UEAPME.

<sup>520</sup> UEAPME (hotel and catering, Austria); HORECA (hospitality sector, Netherlands); SHR (Swedish Hotel & Restaurant Association); BHA (British Hospitality Association.)

<sup>521</sup> UEAPME,

<sup>522</sup> Business Europe, UEAPME

work, but argued that lower levels of regulation would be sufficient, than those provided by national law.

Similarly, SMEs thought national transposition of rules on night work was too restrictive in Luxembourg; while in Sweden, SMEs felt that national rules had maintained a near-prohibition on night work, which limited companies' flexibility, and that exemptions allowed by national authorities in individual cases were too unpredictable, causing legal uncertainty.<sup>523</sup>

### Not enough use of derogations

Eurochambres called for the application of the Directive in Member States to use all possibilities for a more flexible allocation of working time at sector, company and individual level, within the framework defined by law. Similarly CoESS<sup>524</sup> stated that national laws in most Member States did not make enough use of the Directive's derogations for security services.

UEAPME affiliates called for more flexibility to be introduced in national law as regards Austria (on-call time), Belgium (overtime and part-time work), Luxembourg (night work) and Sweden (night work, more use of the Article 17 derogations).

### On-call time

Business Europe commented that the treatment of on-call time as working time was considered to *'have serious consequences across the EU, in particular for sectors such as health and transport or in industrial activities where in-company fire brigades exist or other safety-related services have to be performed.'* Treating inactive on-call time as working time was seen as raising costs in many sectors, due to the need to recruit more staff, and having a negative effect on working time flexibility; although Business Europe noted that in some Member States and sectors, no major problems were reported because the members already employed a high proportion of part-time workers, and hence could absorb some extra working hours more easily.

CEEP considered that treating on-call time as working time imposed *'significant problems and disproportionate costs for public service employers.'* In health services, application of the *acquis* concerning on-call time and compensatory rest had led to the recruitment of thousands of extra doctors and a significant increase in costs. There had also been major implications for social care services provided or funded by local authorities, such as residential care for the elderly or young persons, sheltered housing, school trips, and holidays for people with disabilities or disadvantaged individuals,

UEAPME said that application of this interpretation was seen as causing *'huge legal uncertainties'* and problems in several Member States: one affiliate felt that it failed to take account of the realities of certain branches and professions, causing a significant increase in costs and administrative burdens for employers without, in their view, improving health and safety of workers.

Regarding transposition in Germany, employers' organisations<sup>525</sup> also stated that the 8-hour limit to daily working time under national law made it extremely difficult to organise work in

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<sup>523</sup> UEAPME

<sup>524</sup> CoESS/Confederation of European Security Services

<sup>525</sup> Business Europe, UEAPME

the context of hospitals providing 24-hour services. They called for national law to be changed on this point. Protective conditions introduced for use of the 'opt-out' for on-call sectors, particularly the requirement for collective agreement as well as individual consent by the worker concerned, were considered as too restrictive.

French affiliates wanted to fully reinstate the 'equivalence' system for calculating on-call time as a proportion of standard working time, arguing that it was 'indispensable' to continue such an old, widespread and valued practice in national law.

### Rules are hard to understand

Business Europe commented that the finer details of working time rules were seen as very complicated, especially for SMEs who did not generally employ specialist advisors.<sup>526</sup>

The provisions in Article 17, including the 'autonomous workers' derogation at Article 17.1, were identified particularly as very hard to apply in practice.<sup>527</sup> Several employer organisations also called for a simpler and more generally-applicable derogation than the Article 17.3 derogation for particular activities.

In one Member State (Sweden), employers' contributions indicated that problems of interpretation were due to overlapping national and Community law rules, rather than to the content of the Community law provisions<sup>528</sup>.

### Compliance is an excessive burden

Business Europe commented that compliance with all aspects of working time regulation was seen as making it more difficult for employers to design effective work schedules which met business demands, and also satisfied employees' demands for specific working time arrangements<sup>529</sup>.

Keeping records of employees' work patterns was described generally by employers' organisations as onerous for all companies, but imposing a particularly heavy burden on SMEs.<sup>530</sup> Danish employers were concerned that applying the Directive per-worker might increase administrative burdens or reduce labour market flexibility, for example if employers had to stipulate that employees were not allowed to take jobs with other employees which might entail working over 48 hours per week on average.<sup>531</sup>

Eurochambres considered that application of the opt-out, in particular, should be 'easy to handle and non-bureaucratic.' However, it supported measures to curb the risks of abusive opt-outs, such as making it unlawful to ask an employee to opt-out as part of the employment contract or during the probationary period; better information for employees about rights relating to the opt-out; a right for employees to terminate their opt-out at any point and annual reviews of the need for opt-outs. CEEP likewise supported a tightening of controls regarding

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<sup>526</sup> The same point was made for certain Member States by UEAPME.

<sup>527</sup> Business Europe, Eurochambres.

<sup>528</sup> UEAPME, SHR/ Swedish Hotel & Restaurant Association

<sup>529</sup> Czech Republic, Ireland, Sweden, United Kingdom.

<sup>530</sup> Business Europe; UEAPME for some Member States.

<sup>531</sup> Danish Employers Confederation.

the use of the opt-out 'to ensure that abuse is prevented but the necessary flexibility – both for the employer and employees – is maintained.'

### ***Examples of good transposition/application***

UEAPME referred to the transposition of night work provisions in Austria, which was seen as taking account of workers' desire for extra rest periods in a way which did not impose disproportionate burdens on employers. The use of derogations via collective agreements in Austria was also cited as providing flexible solutions to suit the specific needs of the retail, road transport, fuel and IT/consulting sectors.

### ***Excluded sectors***

CEEP stated that in certain Member States where doctors in training were not already covered by the general working time rules, transposition of the Directive to include this group had involved significant (and often costly) changes. These had been accepted despite the cost involved, and there had been benefits in the reduction of hours worked by doctors in training.

At the same time, application of the *acquis* concerning immediate provision of compensatory rest was leading to inflexible work practices, including, at times, temporarily withholding patient care. Implementation was particularly challenging for small and isolated hospitals. There were also concerns that implementation was resulting in increased shift working, and that this could affect the quality of training for doctors, since daytime work offered better access to expert supervision.

Lack of enforcement of the Directive in certain Member States regarding doctors in training was raised by two employer organisations<sup>532</sup>.

Transport was mentioned as a sector where working time rules were considered to present particular difficulties of application in certain Member States (on-call time in the transport sector, Czech Republic; employers wanted to include annual leave and sick leave when calculating average weekly working time, in the Netherlands, in order to reduce the average; government considered not to have sufficiently used available derogations, in Portugal; specificity of the inland waterway transport sector, in Netherlands, though it was noted that the social partners are discussing a possible agreement for this sector.)

### ***Useful measures***

Employers' organisations generally referred to their positions on the revision of the Working Time Directive, and indicated that amendment of the Directive should take precedence over any other flanking measures at European level.

Eurochambres indicated that in principle measures to simplify the Directive would be very welcome, but felt that in practice, any initiative for legislative change would carry too much risk of proposals for substantive change rather than technical simplification, '*with the potential for increased uncertainty and a weightier burden for business.*'

UEAPME favoured the exchange of good practices, to improve transposition of the directive at national and enterprise level. Some Business Europe affiliates were interested in

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<sup>532</sup> UEAPME, Business Europe.

exchanging good practices; the main examples mentioned were ways to organise flexible working time within the 48-hour limit, working time accounts, the system of '*commissions paritaires*' of workers' and employers' representatives to oversee implementation of collective agreements on working time, and joint employer/trade union projects on reducing long-hours working.

### **9.3. Social partnership in transposition**

#### *Consultation regarding national transposition*

Trade union contributions expressed satisfaction that in most Member States, they had been fully consulted and sufficiently involved in relation to transposition of the Directive at national level. Tripartite implementation groups established in Denmark, Sweden and Latvia were cited as an example of good practice. In a number of Member States (Belgium, Ireland, Romania), trade unions felt that the consultation process had enabled them to make a significant contribution to the design of national transposing rules.

In a smaller number of cases (Austria, Germany, Poland), the trade union side considered that it had been fully consulted, but would have wished their views to be more taken into account in the actual transposition. In five Member States (Greece, the Netherlands, Portugal, Spain, United Kingdom), trade unions were dissatisfied with the consultation process, or felt that their views had been largely ignored.

Employers' organisations also, in general, expressed satisfaction that they had been fully consulted and sufficiently involved in relation to transposition of the Directive at national level. In three Member States (Ireland, Poland, Sweden), employers' organisations considered that they had been fully consulted, but would have wished their views to be more taken into account in the actual transposition.

In two other Member States (Poland, Spain), employers' bodies were dissatisfied with the consultation process, or felt that their views had been largely ignored. Employer organisations from specific sectors (security, performing arts) and for SMEs also considered that insufficient attention was paid to sectoral employers' views, or to the views of smaller employers.

#### *Transposition by collective agreements*

In Member States such as Austria, Belgium, Denmark, Finland, Germany, Italy, the Netherlands, Slovenia, Spain and Sweden, collective agreements play an important role in implementing the Working Time Directive.

Community law recognises the importance of collective bargaining as a source of law in the industrial relations systems of the Member States. It acknowledges collective agreements as a sufficient method of implementing directives<sup>533</sup>, provided that their effect is sufficiently clear and precise<sup>534</sup> and that Member States take any necessary additional measures to guarantee effective protection for all workers covered by the Directive (for example, regarding workers who fall outside the scope of collective agreements because they are not union members)<sup>535</sup>.

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<sup>533</sup> Article 137(4) EC Treaty: COM (2003) 843.

<sup>534</sup> See e.g. Case C-59/89 *Commission v Germany* [1991] ECR I-2607

<sup>535</sup> Case 143/83 *Commission v Denmark* [1985] ECR 427.

In the 2005 judgment *Commission v Sweden*<sup>536</sup>, the Court of Justice again held that it was not necessary for a Member State to transpose the Working Time Directive by express formal provisions in a specific legal measure: the general legal context might be sufficient. However, the legal position must, in that case, be sufficiently clear and precise to ensure that individuals could be fully aware of the extent of rights conferred on them by the Directive, and could be able to vindicate those rights effectively, where needed, before the national courts or tribunals.<sup>537</sup> Both Sweden and Denmark have introduced national laws which seek to provide the minimum rights guaranteed under the Directive to any workers who are not entitled to the same (or a higher) level of protection under a collective agreement<sup>538</sup>.

Conversely, other Member States such as Poland and the UK underlined that collective agreements were unusual above the company level.

### ***Derogations by collective agreement***

Trade union contributions stressed that collective bargaining and social partnership were seen as key conditions for bringing about modern, innovative and balanced working time arrangements. Many trade unions contributions underlined their preference for derogations to be made by collective agreement, as providing flexibility which was well-tailored to national, sectoral and local needs.

However, a small number of trade union contributions expressed concern that unions sometimes risked having to concede too much regarding working time rules, in order to secure 'whole-package solutions' – '*our experience shows that such derogations prove to be to the detriment of employees in most cases...*'. One contribution advocated that in Member States with weaker collective bargaining systems, national labour inspectorates should evaluate whether decentralised company-level agreements complied sufficiently with the minimum levels of protection required by the Directive.

The views expressed by employers on derogations by collective agreements were rather varied. It was noted that certain Member States did not allow for derogations by collective agreement, and that in others the practice was relatively rare, while in many Member States, it was widely used. '*Where derogations [by means of collective agreements] do exist, they have made it possible to respond better to the needs of businesses and workers. ... Working time flexibility is further constrained in those countries where no possibility exists for derogation by collective agreement or by agreements between both sides of industry.*'<sup>539</sup>

Likewise UEAPME commented that '*Models of good practice [regarding working time] come essentially from the Member States where national legislation allows social partners to play an active and effective role through the negotiation of collective agreements.*' Some sectoral employers' organisations praised the flexibility offered by derogation through collective

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<sup>536</sup> Commission v. Sweden, Case C-287/04

<sup>537</sup> *Commission v Sweden*, Case C-287/04, judgment dated 26th May 2005, para 6.

<sup>538</sup> In Denmark, Act no 896 implementing parts of the Working Time Directive, 24 August 2004 (consolidating earlier measures of 2002 and 2003); in Sweden, the Working Hours Act 1982 as amended in 2005 (SFS 2005: 165).

<sup>539</sup> Business Europe. UEAPME mentioned, for example, the situation in Austria of businesses with fewer than 5 employees, which fell below the threshold for electing works councils and therefore had no possibility of negotiating collective agreements at enterprise level. It felt that in such situations derogations should be possible through written agreements, provided all workers supported them.

agreements: for example, in the performing arts, where intensive periods of activity while preparing performances or touring, could alternate with relatively quiet periods<sup>540</sup>. Others expressed a preference for derogation by collective agreement, linked with a view that national legislation was over-regulatory or did not make a sufficiently broad use of the available derogations. One contribution from a national affiliate objected that the hospitality sector in that Member State was primarily composed of SMEs and non-unionised, so that derogations by collective agreement were seen as impracticable.

One employer contribution expressed concern that employers sometimes had to concede too much regarding working time rules in order to secure 'whole-package solutions'. This referred to collective agreements in the public health sector. The contribution considered that hospitals had been obliged to make very large concessions regarding basic and overtime pay, in order to secure by collective agreement the flexibility they needed about doctors' working time, following long and difficult industrial relations bargaining.

Employer organisations underlined however their position that *'while experience with derogation [by collective agreement] is evaluated as positive by member federations . . . the possibility to derogate should not be seen as an alternative to the option of an opt-out which can be used across all sectors.'*<sup>541</sup>

#### **9.4. Member States' evaluations**

The German national report described the Working Time Directive as *'a keystone of the social Europe'*, which set minimum requirements for organising working time and protecting workers' health and safety throughout the EU, and prevented workers from being exploited in a way which might also distort competition. Other Member-States also referred to the Directive's importance in ensuring common minimum rules regarding cross-border employment (Hungary) and contributing to balance between work and family life (Cyprus, Austria, Latvia, Malta, Slovenia.)

Some Member States felt that it was still too early to evaluate the overall impact, when the Directive had been recently transposed. Sixteen Member States considered that transposition of the Directive had produced a positive impact (Austria, Cyprus, the Czech Republic, Estonia, France, Germany, Greece, Italy, Hungary, Ireland, Latvia, Malta, the Netherlands, Poland, Spain, and the UK). In most cases the positive impact mentioned was that transposition had led to additional rights (or a higher level of protection) for workers. In Germany, Greece and Italy, the Member State considered that transposition had led to a more organised and coherent national law on working time. In five Member States, transposition was considered important because it had led to legal protection of certain groups which were previously excluded (transport workers in Austria, doctors in training in Cyprus, Ireland, Spain and UK, non-unionised workers in Cyprus, workers not covered by sectoral working time regulations in Malta).

However, eleven Member States also indicated that they considered the Directive to have had an important negative impact.

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<sup>540</sup> PEARLE/  
<sup>541</sup> Business Europe.

All of these Member States said this arose from major difficulties with transposition of the Court of Justice's interpretation in the *SIMAP* and *Jaeger* cases regarding on-call time and immediate compensatory rest, particularly in specified sectors. They were the Czech Republic (doctors, police, firefighters, transport workers); Denmark (collective agreements generally across many sectors); France (residential care, residential schools and supervision of school trips); Germany (firefighters); Hungary (major difficulties considered to endanger the functioning of the healthcare system); the Netherlands (health, care, defence forces, services for persons with disabilities, emergency services, firefighters); Poland (health care); Portugal (doctors); Slovakia (doctors); Sweden (generally, also healthcare, energy production and distribution, fire protection services) and the United Kingdom (health and residential care services, services for people with disabilities).

A small number of Member States raised different points to explain why the Directive was seen as having a negative impact. Sweden was critical of the impact of the Court's decisions on matters which in Sweden had been '*regulated for decades through collective agreements to the satisfaction of both employees and employers.*' The Czech Republic and the Netherlands had experienced problems transposing Working Time rules in the transport sector, due to the operation of specific sectoral directives as well as the Working Time directive. Hungary had found transposition very complex and difficult because of conceptual differences between Community law concepts and those already existing in national law.

Fourteen Member States stated that revision of the Directive regarding the treatment of on-call time, the timing of compensatory rest, or (for fewer of this group) the extension of reference periods to 12 months by legislation, remained a major and urgent priority. These Member States were: Austria, Belgium, Czech Republic, Denmark, Germany, France, Hungary, Netherlands, Poland, Portugal, Slovakia, Spain, Sweden, and the United Kingdom.

Twelve Member States wanted to clarify whether the Directive should be applied per-contract or per-worker: Cyprus, Czech Republic, Denmark, France, Germany, Hungary, Ireland, Poland, Romania, Slovakia, Slovenia, United Kingdom; though Denmark, Poland, and Slovakia insisted on a per-contract application. Smaller numbers of Member States wanted to clarify other issues, such as the application of the Directive to teleworking, home-based work or on-call time spent at a place selected by the worker (Bulgaria, Estonia, France, Portugal, Poland): streamlining with more specific directives in the transport sector (Netherlands, Czech Republic), or the detailed application of the Directive to groups such as armed forces (Belgium, Hungary, Spain).

Member States generally considered that the main priority for common action at EU level regarding working time was to complete a legislative revision of the Directive. Other suggestions for further work at EU level were largely limited to exchanging information and good practices, although there was a call (Greece) for more research on the health and safety effects of long-hours working and of disrupted rest cycles, broken down by sector, and on the relationship between working time rules and reductions in work-related illnesses or accidents.

## **9.5. Monitoring and enforcement at national level**

Monitoring and enforcement was raised rather frequently as a concern, both in national reports and by social partners.

In general, national reports referred to national labour inspectorates and other enforcement mechanisms, which were responsible for enforcing the Working Time Directive. In a number

of reports, details were provided of substantial information campaigns at the time of transposition, or regarding specific issues (such as on-call time in the health sector.) Some national reports also included contributions from these national enforcement authorities.

The comments received are not directly comparable: a Member State (or a national labour inspectorate) with high enforcement and monitoring standards may be more critical of its own performance than another where enforcement standards are far more relaxed. However, it is striking that overall, national reports from eleven Member States expressed strong concerns about the effectiveness of monitoring and enforcement at national level. (Austria, Bulgaria, Cyprus, Finland, Germany<sup>542</sup>, Greece, Hungary, Italy, Poland, Slovakia, Slovenia.)

The main problems highlighted by labour inspectorates and other national authorities were the view that they had not enough staff or resources to enforce the Directive effectively, and in some cases, the fact that their functions did not cover monitoring working time within the public sector. The sectors where more problems have been detected were catering, hotels and restaurants; construction, public health, retail, security services and tourism. The concrete issues which were most often mentioned as problematic were:

- *employers do not keep proper records of excess working time*
- *employers leave undefined the dates of the reference period for calculating the average weekly working time*
- *employers disregard minimum daily rests or weekly working time limits due to business imperatives*
- *national rules which were considered to transpose the Directive in an unclear or impractical manner (for example, where the 11-hour daily rest is supposed to be taken during the 24 hours between midnight and midnight)*
- *excess working time and missed minimum rests in public hospitals, particularly regarding on-call time by doctors*
- *employers do not provide annual leave entitlements within the same year.*

In a number of cases, national reports indicated that the social partners were also directly involved in enforcement and monitoring, either through '*commissions paritaires*' of workers and employers which were responsible for monitoring application, or through a role for works councils. The comments on this form of involvement were favourable, and a number of comments called for it to be more widely used in Member States.

Employers' organisations were, with few exceptions, satisfied with enforcement and monitoring of the Directive at national level. However, lack of enforcement of the Directive in certain Member States regarding doctors in public services (or doctors in training) was raised by some employer organisations<sup>543</sup>. CoESS<sup>544</sup> also called for improved enforcement and monitoring in the security sector, to avoid unfair competition practices.

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<sup>542</sup> The BDA (German employers' association) did not share this criticism and states that it considers enforcement and monitoring to be satisfactory.

<sup>543</sup> UEAPME, Eurochambres.

<sup>544</sup> CoESS/Confederation of European Security Services.

The main other problems about enforcement and monitoring which were raised by employers were legal uncertainty due to overlapping of Community and national rules, in some Member States; and the 'bureaucratic cost' of compliance with all aspects of national rules on working time, in certain Member States. (These issues are discussed above, under the employers' views.) Many employers' contributions felt that keeping records of employees' working and rest times was a substantial burden, particularly for SMEs and for undertakings where all staff in practice worked less than 48 hours on average per week.

Trade union contributions, on the other hand, were worried about this issue<sup>545</sup>. While they were satisfied with monitoring in some Member States, overall they considered that:

*'The enforcement and monitoring of the Directive is insufficient, even poor in a few instances. National authorities, often understaffed, are not given sufficient capacity to effectively monitor enforcement.'*<sup>546</sup>

Trade union contributions stated that satisfactory enforcement and monitoring arose primarily in Member States with a strong social dialogue and where trade unions or works councils were involved in monitoring and enforcement. One employer contribution also called for more active involvement of the social partners in monitoring implementation of Working Time rules.<sup>547</sup>

The main problem identified by unions was a perceived shortage of staff or resources; trade union contributions in many Member States also called for more investment in the capacity and staffing of labour inspectorates.<sup>548</sup> It was also noted that in certain Member States, the labour inspectorates did not have power to monitor application of Working Time rules in the public sector.

## 9.6. Conclusions

Despite the complexity of the subject and the diversity of the views expressed, some broad areas of agreement can be identified. In particular, there is much common ground between the views of trade unions across different Member States, and of employers across different Member States. There are also some strong prevailing views among Member States. An interesting point, on which a number of different actors agreed, is a concern for better enforcement and monitoring of the Directive at national level.

However, there is a wide gap, on most issues, between the consensus reached by trade unions, and the consensus reached by employers.

Trade unions generally saw transposition and application of the Directive as very important to social Europe, particularly for its introduction of new minimum rights and extension of rights to certain workers who were not previously protected by law. They considered that the quality

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<sup>545</sup> See for example, the comments on enforcement and monitoring for the construction sector in 11 Member States in a report prepared for the European Federation of Building and Woodworkers, *Working Time in Construction*, 2010 (available on [www.efbww.org](http://www.efbww.org))

<sup>546</sup> ETUC.

<sup>547</sup> Eurochambres.

<sup>548</sup> Dutch trade unions were very concerned that in the Netherlands, enforcement of some working time rules was now left to private parties, rather than the Labour Inspectorate.

of transposition was very uneven when comparing different Member States, and called for more consistent transposition, as well as for improved enforcement at national level.

The main concern for trade unions was the incidence and health and safety implications of excessive-hours working, particularly in public services such as the health sector. Regarding transposition to the previously-excluded transport sectors and to doctors in training, trade unions wanted more attention in certain Member States to ensuring timely transposition for doctors in training, and underlined some problems for application in practice in the transport sectors, which required attention. Trade unions did not see the Directive as imposing excessive costs or as difficult to understand; and they were strongly opposed to introducing additional flexibility, considering that it already offered all necessary flexibility. Unions strongly reiterated their position from the 2003 consultations on the possible revision of the Directive<sup>549</sup>, however, they could support a 12-month reference period by legislation, if it was accompanied by mechanisms to ensure proper consultation of workers and/or their representatives, and adequate protection of workers' health and safety.

Employers generally agreed that the Working Time Directive was very important, but for a different reason - its link to flexible working hours, as a prerequisite to competitiveness. There was a strong general view that the application of the Directive went beyond what health and safety considerations required<sup>550</sup>, and constrained business flexibility. In part, these comments referred to national rules, which were seen as often more stringent than the Directive required. The *SIMAP-Jaeger* decisions were generally considered to impose significant problems of application, and disproportionate financial and organisational costs.

The main concern for employers was securing more flexibility regarding working time. They strongly reiterated their position from the 2003 consultations on the possible revision of the Directive<sup>551</sup>, indicating that they considered this an urgent priority. Employers also called for maximal use at national, sectoral and enterprise level of all available derogations. Working Time rules were thought to be relatively complicated and difficult to apply. With some exceptions, employers considered monitoring and enforcement at national level to be satisfactory, but were critical of the organisational and financial costs of compliance, particularly for SMEs.

Employers agreed with trade unions that the quality of application in practice varied widely between Member States; and there was also some agreement that application in the transport

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<sup>549</sup> *Second phase of consultation of the social partners at Community level concerning the revision of Directive 93/104/EC*, SEC(2004) 610. Trade union priorities were to continue treating inactive on-call time at the workplace as working time and in no circumstances as rest time; reference periods should not exceed the length of the employment contract and should not be extended to 12 months other than by collective agreement; the opt-out should be considered as a temporary exception and should be phased out.

<sup>550</sup> Some employer federations, particularly in the public sector, considered the Directive important to health and safety of workers, but thought that the costs imposed by compliance, in particular with the *SIMAP-Jaeger* judgments, were disproportionate.

<sup>551</sup> *Second phase of consultation of the social partners at Community level concerning the revision of Directive 93/104/EC*, SEC(2004) 610. Employer organisations' priorities were to maintain the opt-out as an option for all Member States and by either individual agreement or collective agreement; to allow Member States to provide for the reference period (for calculating weekly working time) to be extended to up to 12-months by legislation, with further extension possible by collective agreement; and to amend the Directive so that inactive on-call time at the workplace was not counted as working time.

sectors raised some practical problems requiring attention and that transposition was unsatisfactory in some Member States regarding doctors in training.

One area on which there was more common ground between the social partners was the importance of social dialogue for application of the Directive. With some exceptions, both trade unions and employers were satisfied with how Member States had consulted and involved them regarding transposition of the Directive. Both employers and unions were also positive about the role of collective agreements and social dialogue in applying the Directive, and in framing derogations suitable to the needs of particular sectors, workplaces and workers. It was noted that the practice in this regard differed between Member States, and also according to the degree of worker representation in specific Member States, sectors and workplaces. But subject to this variation, unions were very positive, and employers were also broadly positive.

National reports from Member States also contained some general observations about application of the Directive. Some Member States considered it too early to evaluate the overall effect of applying the Directive. However, sixteen Member States stated that they saw the Directive as having a positive effect, referring particularly to it introducing additional health and safety rights for workers or contributing to a more comprehensive or coherent legal protection for workers.

At the same time, it should be stated that eleven Member States also considered that the Directive had had an important negative impact. All of these Member States referred to major difficulties with transposing or applying the *acquis* from the *SIMAP* and *Jaeger* decisions regarding on-call time and immediate compensatory rest, particularly in specified sectors. Fourteen Member States indicated that revision of the Directive regarding the treatment of on-call time at the workplace, the extension of the reference period to 12 months by legislation, or the timing of compensatory rest, remained a major and urgent priority for them.

Trade unions and employers expressed some interest in exchange of good practices and information at the European level regarding working time issues. However, Member States and employers in general preferred to give priority to completing legislative revision of the Directive on the points indicated above.

Monitoring and enforcement of the Directive at national level was mentioned as an important concern by trade unions generally, by some national authorities and labour inspectorates, and by a small number of employers. In all, this issue arose in eleven of the national reports.

10. APPENDIX I:

**Table of exclusions and derogations under the Directive**

<b>EXCLUSIONS</b>		
<b>Provision:</b>	<b>Scope</b>	<b>Effect</b>
Article 1.3	Excludes the <b>limited range of certain specific public service activities</b> permitted by Article 2.2 of the Framework Health and Safety Directive 89/391/EEC	Directive is not applicable <i>'where characteristics certain specific public service activities, such as forces or police, or to certain specific activities protection services, inevitably conflict with it'</i> . situation, <i>'the safety and health of workers must be far as possible in the light of the objectives of the Art 2.2, Directive 89/391/EEC: see interpretation Commission v Spain, C-132/04 (Chapter 2).</i>
Article 1.3	Excludes <b>'seafarers'</b> as defined in Directive 1999/63/EC ....	... (but 'offshore workers' under Article 2(8) are s by the Working Time Directive)
Article 14	Exclusion <i>'where other Community instruments contain more specific requirements relating to the organisation of working time for certain occupations or occupational activities'</i>	Relates mainly to seafarers, mobile workers in civ some road transport workers and some workers in c rail transport. See list of more specific instruments 2
Article 20.1	Partial exclusion regarding <b>'mobile workers'</b> ((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')	Workers in this group who are not fully excluded un 14, are excluded from the application of Articles 3 ((daily and weekly rests, rest breaks, length of night  However, 'adequate rest' must still be ensured s Member States so choose) in certain exce unforeseeable circumstances beyond the employer's in case of accident or imminent risk of accident.  Maximum weekly working time, paid annual leave night work provisions still apply.
Article 21.1	Partial exclusion regarding <b>workers on board seagoing fishing vessels</b> which fly the flag of a Member State.	Articles 3 to 6 and 8 do not apply (daily and weekl breaks, maximum weekly working time, length of n  However, 'adequate rest' must still be ensured, and rules on working time and rest set out in Article applied.
<b>DEROGATIONS</b>		
<b>Provision:</b>	<b>Scope: Member States may choose to derogate regarding:</b>	<b>Effect: Member States may derogate from:</b>
Article 17.1	Activities whose 'specific	Articles 3 to 6, 8 and 16 (daily and weekly rests,

<p><b>'Autonomous workers'</b></p>	<p>characteristics' mean that 'the duration of working time is not measured and/or predetermined, or can be determined by the workers themselves',</p> <p><u>Examples:</u></p> <ul style="list-style-type: none"> <li>• Managing executives</li> <li>• 'Other persons with autonomous decision-taking powers'</li> <li>• 'Family workers'</li> <li>• 'Workers officiating at religious ceremonies in churches and religious communities'</li> </ul>	<p>maximum weekly working time, length of night work (of reference periods)</p> <p>Paid annual leave, and other night work provisions</p> <p><b><u>Condition:</u> Due regard for the general principle of protection of workers' safety and health</b></p>
<p>Article 17.3 <b>(Specific activities or situations)</b></p>	<p>In seven types of activity or situation listed in Article 17.3 (with some specific examples). (See Appendix II for details).</p> <p>By means of laws, regulations or administrative provisions, OR by means of collective agreements, or agreements between the two sides of industry.</p>	<p>Articles 3, 4, 5, 8 and 16 (daily and weekly rests, length of night work, length of reference periods)</p> <p>Maximum weekly working time, paid annual leave and night work provisions still apply</p> <p><b><u>Condition:</u> Workers must be afforded equivalent compensatory rest</b> (in exceptional cases where objectively impossible, workers must be afforded alternative protection.)(Art. 17(2))</p> <p>The Court of Justice held in <i>Jaeger</i> (C-15) compensatory rest must be provided in the period immediately following the missed minimum rest.</p> <p><b><u>Condition:</u> Reference periods may not exceed</b> (Art. 17(2))</p> <ul style="list-style-type: none"> <li>• 6 months (if derogation is by laws, regulations or administrative provisions); or</li> <li>• 12 months, if: <ul style="list-style-type: none"> <li>• derogation is by collective agreement between the two sides of industry</li> <li>• Member States so choose</li> <li>• compliance with general principles of safety of workers</li> <li>• for objective or technical reasons concerning the organisation of work.</li> </ul> </li> </ul>
<p>Article 17.4 <b>Shift work and work split up over</b></p>	<ul style="list-style-type: none"> <li>• <b>Shift work activities</b>, where the worker cannot take daily and/or weekly</li> </ul>	<p>Only Articles 3 and 5 (daily and weekly rests).</p> <p>Other provisions of the Directive still apply.</p>

<p><i>the day</i></p>	<p>rest periods between the end of one shift and the start of the next shift</p> <ul style="list-style-type: none"> <li>• Activities involving <b><i>periods of work which are split up over the day</i></b>, particularly those of cleaning staff.</li> </ul> <p>(By means of laws, regulations or administrative provisions, OR by means of collective agreements, or agreements between the two sides of industry)</p>	<p><b><u>Condition:</u> Workers must be afforded equivalent compensatory rest</b> (in exceptional cases where objectively impossible, workers must be afforded alternative protection.) (Art. 17(2)).</p> <p>The Court of Justice held in <i>Jaeger</i> (C-15) compensatory rest must be provided in the period following the missed minimum rest.</p>
<p>Article 17.5 <b><i>Doctors in training</i></b></p>	<p>By means of laws, regulations or administrative provisions, OR by means of collective agreements, or agreements between the two sides of industry</p>	<p>Articles 6 and 16(b) (maximum weekly work reference period for calculating maximum weekly time)</p> <p>Transitional derogation which allows for a phased in over the period August 2004 to July 2009, (possibly 2012 at latest in some cases). The usual provision full thereafter. (See chapter 2 for details.)</p> <p><b><u>Condition (Art. 17(2)):</u> Workers must be afforded periods of compensatory rest</b> (in exceptional cases where objectively impossible, workers must be afforded appropriate alternative protection.)</p> <p>The Court of Justice held in <i>Jaeger</i> (C-15) compensatory rest must be provided in the period following the missed minimum rest.</p>
<p>Article 18 <b><i>Collective agreements</i></b></p>	<p>Derogations by means of:</p> <ul style="list-style-type: none"> <li>• collective agreements,</li> <li>• agreements between the two sides of industry at national or regional level, or</li> <li>• collective agreements, or agreements between the two sides of industry at local level. (in conformity with the rules laid down by them), by</li> </ul>	<p>Articles 3, 4, 5, 8 and 16 (daily and weekly rests, length of night work, length of reference periods)</p> <p>Maximum weekly working time, paid annual leave and night work provisions still apply</p> <p><b><u>Condition:</u> Workers must be afforded equivalent compensatory rest</b> (in exceptional cases where objectively impossible, workers must be afforded alternative protection.) (Art. 18)</p> <p>The Court of Justice held in <i>Jaeger</i> (C-15) compensatory rest must be provided in the period following the missed minimum rest.</p> <p><b><u>Condition:</u> Reference periods may not exceed</b> (Art. 17(2))</p> <ul style="list-style-type: none"> <li>• <u>6 months</u> (if derogation is by laws, regulations or administrative provisions);</li> <li>• <u>12 months</u>, if:</li> </ul>

		<ul style="list-style-type: none"> <li>• derogation is by collective agreement between the two sides of industry</li> <li>• Member States so choose</li> <li>• compliance with general principles of safety of workers</li> <li>• for objective or technical reasons concerning the organisation of work.</li> </ul>
Article 22.1 ('Opt-out')	Workers generally	<p>Article 6 (maximum weekly working time)  <i>Other provisions of the Directive still apply.</i></p> <p><b><i>Conditions:</i></b> (Article 22.1 and <i>Pfeiffer, C-397/01</i>)</p> <ul style="list-style-type: none"> <li>• Respect for general principles of protecting work and safety</li> <li>• Worker must first give a free and informed consent</li> <li>• Worker must not be subject to any detriment for withdrawing consent</li> <li>• Employer keeps up to date records of all opted-out and provides the relevant authorities on request information on cases where workers have agreed to</li> <li>• These records are available to national authorities may prohibit or restrict exceeding maximum weekly hours, for reasons connected to workers' health and/</li> <li>• Member States availing of this option must Commission forthwith.</li> </ul>

## 11. APPENDIX II:

The derogation at Article 17.3 of the Directive applies:

*'(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; [which states that 'This Directive shall not restrict the option of the Member States to provide for the exclusion or limitation of employers' responsibility where occurrences are due to **unusual and unforeseeable circumstances** beyond the employer's control, or to **exceptional events whose consequences could not have been avoided** despite the exercise of all due care.']*

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

