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To:	Ms Thérèse BLANCHET, Secretary-General of the Council of the European Union
No. Cion doc.:	SWD(2023) 40 final
Subject:	COMMISSION STAFF WORKING DOCUMENT Detailed report on the implementation by Member States of Directive 2003/88/EC concerning certain aspects of the organisation of working time accompanying the 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

Delegations will find attached document SWD(2023) 40 final.

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Brussels, 15.3.2023
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COMMISSION STAFF WORKING DOCUMENT

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

Accompanying the document

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

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

{COM(2023) 72 final}

I. Introduction

This detailed Staff Working Document accompanies the report[1] 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[2] ('the Directive' or 'the Working Time Directive'). The requirement to submit an implementation report is laid down in Article 24 of the Directive.

Under Article 24, Member States are required to communicate their transposition measures and report every 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 then submits to the European Parliament, the Council and the European Economic and Social Committee a report[3] on the application of the Directive, which takes account of the national reports, and of Articles 22 (the 'opt-out') and 23 (the non-regression principle).

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

In parallel with the implementation report, the Commission has updated[4] the 2017 interpretative communication[5] on the Working Time Directive to reflect the more than 30 judgments and orders rendered since its adoption. The updated interpretative communication aims at bringing legal clarity and certainty when applying the Directive, to make implementation of this key piece of EU labour law more effective. Together with the interpretative communication, this detailed report contributes to identifying the right areas for future cooperation with Member States and enforcement activities.

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

[1] COM(2023) 72 final.
[2] Directive 2003/88/EC of the European Parliament and of the Council of 4 November 2003 concerning certain aspects of the organisation of working time, OJ L 299, 18.11.2003, p. 9-19.
[3] Under Article 24(3), the Commission has to report 'every five years from 23 November 1996.' The Commission's last reports on the Working Time Directive were in 2000 referring to Council Directive 1993/104/EC COM(2000) 787 final (overall transposition), 2003 COM(2003) 843 final (re-examination of various provisions, as required by Articles 19 and 22.1 of Directive 1993/104/EC), 2010 COM(2010) 802 final (overall transposition and application) and 2017 COM(2017) 254 final (overall transposition and application).
[4] C(2023) 969.
[5] Communication from the Commission, Interpretative Communication from the Commission on Directive 2003/88/EC of the European Parliament and of the Council of 4 November 2003 concerning certain aspects of the organisation of working time, C(2017) 2601.

II. The scope of the Directive

A. Material scope: general considerations

Article 1(3) of the Directive states that it '*shall apply to all sectors of activity, both public and private, within the meaning of Article 2 of Directive 89/391/EEC'*. Article 2(1) of Directive 89/391/EEC, the Framework Health and Safety Directive, states that it '*shall apply to all sectors of activity, both public and private (industrial, agricultural, commercial, administrative, service, educational, cultural, leisure, etc.)*'.

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

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

However, in a number of Member States, certain sectors or categories of workers remain excluded from the scope of the transposing legislation. In the public sector this is most commonly the case for the armed forces, police, and other security forces, and also for civil protection services such as public service firefighters and prison staff[6]. In several instances Member States have entirely or partially excluded domestic workers from their transposing legislation[7]. Exclusions are also in place for categories such as workers in educational institutions, the judiciary, archaeological sites, libraries and museums[8].

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

B. Material scope: the case of activities of members of the armed forces

The Working Time Directive applies in principle to members of the military personnel of Member States. This was confirmed by the Court of Justice in a judgment of 15 July 2021[9]. However, the

[6] Ireland (Organisation of Working Time Act Section 3(1), An Garda Síochána (police), armed forces); Ireland (Organisation of Working Time Act Section 3(3)(b) and Organisation of Working Time (Exemption of Civil Protection Services) Regulations (S.I. No. 52/1998 as amended by S.I. No. 478/2009), i.e. fire fighters, prison staff and marine emergency personnel); Cyprus (Organisation of Working Time Law of 2002 Article 3(4)(a), armed forces); Italy (Legislative Decree 66/2003 Article 2, police and armed forces, the judiciary, penitentiary, public security and civil protection services are all excluded if their duties impose particular demands and a Ministerial Decree so provides).

[7] Belgium (Labour Code of 16 March 1971 Article 3)*;* Greece (Presidential Decree No 88/1999 as amended by Presidential Decree No 76/2005 Article 1); Luxembourg (Labour Code Article L. 211-2); Sweden (Act 1982:673 on Working Hours Section 2. The Working Time in Domestic Work Act (1970:943) applies to domestic work, but is not mentioned as a transposition measure by the authorities and does not transpose all the requirements of the Directive).

[8] Italy (Legislative Decree 66/2003 Article 2).

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

Court also made clear that certain activities of members of the armed forces can be excluded from the scope of the Directive.

In its judgment, the Court pointed out that the main tasks of the armed forces, which are the preservation of territorial integrity and safeguarding national security, are expressly included among the essential functions of the State[10]; Article 4(2) of the Treaty on European Union requires that the application to military personnel of the rules of EU law relating to the organisation of working time does not hinder the proper performance of those essential functions[11].

As a consequence, certain activities of members of the armed forces, such as those connected, in particular, to administrative, maintenance, repair and health services, as well as services relating to public order and prosecution, cannot be entirely excluded from the scope of the Directive[12]. At the same time, activities of military personnel are excluded from its scope when they take place in the course of initial or operational training or an actual military operation, are not suitable for a staff rotation system, are carried out in the context of events, such as catastrophes, of exceptional gravity and scale, and where the application of the Directive would require to set up a system for planning working time and would inevitably be detrimental to the proper performance of military operations[13]. EU law must duly take into consideration the specific features a Member State imposes on the functioning of its armed forces, whether they result, inter alia, from the particular international responsibilities of that Member State, from the conflicts or threats with which it is confronted, or from its geopolitical context[14].

About half of the Member States have adopted transposing measures in order to apply the Directive to their armed forces[15]. Several Member States have not explicitly transposed the Directive but, nevertheless, apply its provisions to the armed forces to a certain extent[16]. A few Member States do

[10] Judgment in case C-742/19, *Ministrstvo za obrambo*, para. 37.
[11] Judgment in case C-742/19, *Ministrstvo za obrambo*, para. 43.
[12] Judgment in case C-742/19, *Ministrstvo za obrambo*, para. 69.
[13] Judgment in case C-742/19, *Ministrstvo za obrambo*, para. 88.
[14] Judgment in case C-742/19, *Ministrstvo za obrambo*, para. 44. In his opinion, Advocate General Øe indicated that particular arrangements may be needed in the case of a Member State which, owing to its particular international commitments, such as France, has a corresponding number of military personnel permanently deployed in external theatres of operations, but also in its own territory in order to counter the terrorist threat of which it is the target, while continuously having to carry out certain deterrent tasks which are peculiar to it owing to its geopolitical situation. See Opinion of Advocate General Øe of 28 January 2021, *B. K. v Republika Slovenija (Ministrstvo za obrambo)*, C-742/19, ECLI:EU:C:2021:77, para. 100.
[15] Belgium, Bulgaria (Bulgarian Defence and Armed Forces Act – ZOVSRB), Denmark, Germany (Act on the Legal Status of Soldiers (Gesetz über die Rechtsstellung der Soldaten – SG) and Ordinance on Working Time of Soldiers (Verordnung über die Arbeitszeit der Soldatinnen und Soldaten – SAZV), Greece (Presidential Decree 88/1999), Lithuania, Hungary (Act 205 of 2012 on the legal status of soldiers (Hjt)), Netherlands (Working Time Act of 23 November 1995, as amended), Romania, Slovenia (Service in the Slovenian Armed Forces Act (ZSSloV-A) and Defence Act (ZObr)), Slovakia, Finland (Working Time Act 872/2019, as amended), Sweden (Working Hours Act).
[16] Czechia (Act No. 221/1999 on Professional Soldiers), Estonia (Military Service Act and Estonian Defence League Act), Spain (Ministerial Order 121/2006 of 4 October 2006 approving the rules on working days and hours, holidays and leave for professional members of the armed forces, as amended), Italy, Luxembourg, Austria (Defense Act (Wehrgesetz) and General Service Regulations (Allgemeine Dienstvorschriften)), Poland (Act of 11 September 2003 on professional military service).

not apply the Directive to military personnel[17], without prejudice to the existence of national rules concerning the working conditions and protection of health and safety of armed forces personnel.

Member States have not reported any additional measures following the judgment of the Court in case C-742/19. Following that judgment, the Supreme Court of Slovenia, which had referred the case to the Court, ruled that the peacetime 'guard duty', an on-call period imposed on a member of military personnel at a workplace which is separate from his residence, constitutes working time.

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

The Working Time Directive establishes minimum requirements for 'workers'. However, it does not explicitly state whether its provisions set absolute limits in case of concurrent contracts with one or more employer(s) or if they apply to each employment relationship separately. The Court has clarified that when workers have concluded several contracts of employment with the same employer, the minimum daily rest period applies to those contracts taken as whole, not separately[18]. It has not yet ruled on whether this also applies when workers have concluded several contracts of employment with different employers. As indicated in previous reports[19], the Commission considers that, in the light of the Directive's objective to improve the health and safety of workers, the limits on average weekly working time and daily and weekly rest should as far as possible, apply per worker. Taking into account the need to ensure that the health and safety objective of the Working Time Directive is given full effect, Member States' legislation should provide for appropriate mechanisms for monitoring and enforcement.

The situation differs markedly between Member States.

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

Conversely, Czechia, Spain, Latvia, Hungary, Poland, Portugal and Slovakia apply the Directive 'per-contract'.

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

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[17] Ireland, France, Cyprus, Latvia, Portugal.

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

[19] Report from the Commission on the State of Implementation of Council Directive 93/104/EC of 23 November 1993 concerning certain aspects of the organisation of working time, COM(2000) 787 final; Report from the Commission on the implementation by Member States of Directive 2003/88/EC concerning certain aspects of the organisation of working time and accompanying document, COM(2010) 802 final and SEC(2010) 1611 final; Report on the implementation by Member States of Directive 2003/88/EC concerning certain aspects of the organisation of working time, COM(2017) 254 final and SWD (2017) 204 final.

Different systems are used to verify that the cumulated number of hours do not exceed the limits to working time. In Luxembourg, the worker is required to notify the Labour Inspectorate, who may then be informed by social security institutions of the necessary data to monitor compliance.

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

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

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

III. Definition of working time

A. Definition of working time

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

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

Some Member States, including Denmark, Ireland, Greece, Italy, Cyprus and Slovenia, have introduced in their legislation a definition of working time close to the formulation used in the Directive. The situation is similar in other Member States where the definition includes mention of the performance of work or tasks, of the fact of being at the disposal of the employer and of being at

the working place or another place determined by the employer. This is the case in Croatia[20] and Romania (while allowing for exceptions).

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

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

According to the information available to the Commission, generally the practice in the Member States is in line with the general definition in the Directive.

B. Recording of working time

To ensure effectiveness of the rights enshrined in Articles 3, 5 and 6(b) of the Working Time Directive, the Court held on 14 May 2019 that Member States must require employers to set up '*an objective, reliable and accessible system enabling the duration of time worked each day by each worker to be measured*'[21].

Since then, no Member State has reported specific additional measures to implement this judgment.

In Spain, where case C-55/18 originated and where employers did not have a general obligation to record working time, the government anticipated the Court's ruling and amended its legislation. Royal Decree-Law 8/2019 of 8 March 2019 provides that all employers must set up a system for daily recording of the working day, which must include the specific start and end times for each worker.

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

[21] Judgment of 14 May 2019, *Federación de Servicios de Comisiones Obreras (CCOO) v Deutsche Bank SAE*, C-55/18, ECLI:EU:C:2019:402, para. 60.

In most Member States, employers were already obliged to monitor and register working time[22].

Employers in Greece must declare to the Ministry of Employment's e-system starting and ending hours or working days and overtime employment. As of June 2022, Greece has started to activate a digital system for monitoring working hours remotely. It currently applies to banks and supermarkets with over 250 employees and will be gradually expanded to cover the entire labour market.

In Germany, national law provides in general only for recording of overtime. However, the employer is obliged, under the Occupational Health and Safety Act[23], to ensure appropriate organisation and provide the necessary resources to influence the worker's health and safety. The Federal Labour Court has held that this provision, interpreted in conformity with EU law as interpreted by the Court, obliges the employer to introduce a system to record working time[24]. No general and explicit obligation on recording of working time exists for the public sector.

Five Member States have no, or no clear, obligation for the employer to register regular working time:

Belgium does not have legal provisions to set up, generally, an objective, reliable and accessible system to measure working time, but systems exist to record working time in specific cases (use of gliding rosters), for part-time work and in certain sectors[25].

Danish legislation does not provide for a specific obligation on registering working time, and there has not yet been any case law since the Court's judgment.

In Cyprus, there is no obligation to record all working time.

In Malta, employers are not adequately obliged to monitor and register all working time for all workers in all sectors, as legislation provides only for a very generic obligation to 'keep adequate records'.

In Sweden, employers must only register on-call time, overtime (not for certain categories of independent workers and managers, household workers, crew on ships and certain transport modes)

[22] Bulgaria (Labour Code Articles 142 and 149, Ordinance on Working Time, Rests and Leaves); Czechia (Act No 262/2006 Coll., the Labour Code, Section 96); Estonia (Employment Contracts Act Clause 28(2)(4)); Ireland (Organisation of Working Time Act 1997 Section 25(1)); Greece (Law 4808/2021 and Ministry of Employment Decision No. 49758 OJ/B No 2668/31.5.2022); France (Labour Code Article L. 3171-1 and L. 3171-8 et seq. in the private sector and also for state civil service (Law No 2019-828 as legal basis but further decree not yet adopted), local civil servants (Decree No 2001-623 of 12 July 2001) and hospital civil servants (Decree No 2002/9 of 4 January 2002)); Croatia (Ordinance on the Content and Manner of Keeping records on Employees Articles 8-14); Italy (Act No. 133 of 2008 Article 39); Latvia (Labour Law Article 137); Lithuania (Labour Code Article 120(1)); Luxembourg (for private law contracts Labour Code Article L: 211-29); Hungary (Labour Code Section 134); Netherlands (Working Time Act Article 4:3); Austria (Working Time Act Section 26); Poland (Labour Code Article 149(1)); Portugal (Labour Code Article 202 and General Labour Law for Civil Service Article 104); Romania (Labour Code Article 119); Slovenia (Labour and Social Security Registers Act); Slovakia (Labour Code Article 99); Finland (Working Time Act (Työaikalaki 872/2019) Section 32).

[23] Occupational Health and Safety Act (Arbeitsschutzgesetz) Section 3(2) No 1.

[24] Decision of 13 September 2022, 1 ABR 22/21.

[25] Hotel, restaurants, cafes, horticulture, agriculture, funeral companies, audio-visual sector, banks, driving schools.

and additional time. They are not obliged to register standard working time, daily and weekly rest. However, collective agreements could include a stricter obligation for the employer to register working time.

C. On-call and stand-by time

To the Commission's knowledge, a majority of Member States[26] have legal provisions regulating 'on-call' work, and several Member States[27] address 'stand-by' periods explicitly but in varying detail in their legislation.

'On-call' and 'stand-by' are periods during which workers must remain available to resume their work in case of need. 'On-call' time refers to periods where a worker is required to remain at the workplace or another place determined by the employer, ready to carry out the duties if requested to do so. During 'stand-by', a worker must be reachable at all times but is not required to remain at a place determined by the employer.

Whether these periods qualify as working time or as rest periods under the Directive has been subject to guidance from the Court's case-law, in particular providing clarifications on 'stand-by' periods since 2018[28].

The Court held that time spent 'on-call' must count fully as 'working time' within the meaning of the Directive if workers are required to be present at the workplace separate from their residence. This principle applies both to periods where the worker is working in response to a call ('active' on-call time), and to periods where he or she is allowed to rest while waiting for a call ('inactive' on-call time), provided that he or she remains at the workplace.

'Stand-by' periods do not qualify as rest periods but entirely as 'working time' when the constraints imposed by the employer during the 'stand-by' have an objective and very significant impact on the worker's possibility to freely manage the time during which services are not required, and thus on the possibility to pursue his or her personal and social interest during that time. By contrast, where these constraints do not have such an effect on a worker's ability to pursue own interests, only the time linked to the actual provision of services must be regarded as 'working time'[29].

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[26] Bulgaria, Czechia, Denmark, Germany, Estonia, Spain, France, Lithuania, Latvia, Hungary, Netherlands, Austria, Poland, Slovenia, Slovakia, Sweden.

[27] Bulgaria, Spain, France, Italy, Lithuania, Hungary, Netherlands, Austria, Poland, Finland, Sweden.

[28] Judgment of 3 October 2000, *Sindicato of Médicos of Asistencia Pública (Simap)* v *Conselleria de Sanidad y Consumo de la Generalidad Valenciana*, C-303/98, ECLI:EU:C:2000:528, paras. 46-52; Judgment of 9 September 2003, *Landeshauptstadt Kiel* v *Norbert Jaeger*, C-151/02, ECLI:EU:C:2003:437, paras. 44-71; Order of 4 March 2011, *Grigore*, C-258/10, ECLI:EU:C:2011:122, paras. 42-58; Judgment of 21 February 2018, *Matzak,* C-518/15, ECLI:EU:C:2018:82, paras. 53-66; Judgment of 9 March 2021, *D.J. v Radiotelevizija Slovenija*, C-344/19, ECLI:EU:C:2021:182, paras. 32-56; Judgment of 9 March 2021, *RJ v Stadt Offenbach am Main*, C-580/19, ECLI:EU:C:2021:183, paras. 33-55; Judgment of 11 November 2021, *MG v Dublin City Council*, C-214/20, ECLI:EU:C:2021:909, paras. 38-47; Judgment of 9 September 2021*, XR v Dopravní podnik hl. m. Prahy, a.s.*, C-107/19, ECLI:EU:C:2021:722, paras. 30-43, in a particular context of stand-by duty imposed on a worker during breaks.

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

Where national legislation refers to on-call work, it is generally consistent with the interpretation by the Court, and the national courts in several Member States[30] have introduced the relevant case law of the Court in practice.

The picture is more diverse as regards 'stand-by' time. Where national legislation includes provisions on stand-by time, they provide that during stand-by time, only time actually worked counts as working time, without permitting requalification of non-active periods of stand-by time in case of objective and very significant constraints on the workers' ability to freely manage their time. This does not reflect the more recent case law of the Court.

However, in some Member States[31], national courts have started to apply the more recent case-law of the Court and assess the intensity of constraints and whether they affect the workers' ability freely to manage time when their services are not required during stand-by.

The Commission still notes some inconsistencies over the requirement to treat on-call time as working time. In Slovenia, general labour legislation does not define and regulate on-call time. However, specific acts for particular sectors of activity or professions (e.g. the Medical Services Act, the Judicial Services Act) explicitly stipulate that on-call duty is counted as working time, as do several collective agreements (e.g. the Collective Agreement for Public Sector). However, some inconsistencies and unclear situations remain, since some acts do not clearly distinguish between on-call time at the workplace and stand-by time and still stipulate that only active periods of on-call time shall be considered working time (see, for example, Article 71 of the Police Organisation and Work Act).

On-call time at the workplace does not appear to be fully counted as working time for several groups of workers in public service in Slovakia, including inter alia members of the police force, the prison wardens corps, the fire fighting and rescuing corps and customs officers[32].

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

In Denmark, the Executive Order on Daily and Weekly Rest Periods[33] allows social partners to derogate from certain of its provisions by collective agreements, such as agreeing that the rest period can be placed during on-call duty. Social partners in the health sector have agreed that

[30] France, Italy, Cyprus, Luxembourg, Malta, Portugal.
[31] Belgium, Czechia, Denmark, Spain.
[32] Act No. 73/1998 Coll. on civil service of members of the Police Force, of the Slovak Intelligence Service, of the Prison Wardens and Judiciary Guards Corps of the Slovak Republic and of the Railway Police; Act No. 200/1998 Coll. on civil service of customs officers, Act No. 154/2001 Coll. on prosecutors and legal trainees of the prosecution, Act No. 315/2001 Coll. on the Fire Fighting and Rescuing Corps.
[33] Section 19.

passive hours of on-call duty at the work place count as rest time and that if the worker has not performed active work during a consecutive period of 11 hours (or eight if agreed) a new period of service may, with some restrictions, take place[34].

In Austria, provisions on stand-by time[35] allow, in principle, at most 10 days stand-by duty per month, of which at most two may be stand-by duties during weekly rest[36]. Time to perform work may interrupt the standard daily rest, provided at least eight hours daily rest are guaranteed and the missing part is compensated within two weeks. However, as regards on-call time, the maximum weekly working time limit for workers whose working time includes regularly occurring on-call duties is set at 60 hours[37].

Under general Estonian legislation[38], on-call time is defined as an agreement that the worker is available to the employer for performing duties outside working time. It counts as working time, but on-call time of police officers does not[39] while on-call time of 'rescue servants' counts as rest time[40].

In France, despite the absence of a specific legal provision defining on-call time, the Court of Cassation has established that on-call time performed by doctors in the hospital sector who are obliged to remain at the immediate disposal of their employer at their workplace constitutes working time[41]. However, 'equivalence systems' may be established for professions/positions which entail periods of inactivity, including in particular on-call time, where each hour of on-call time at night is counted as a third of a normal working hour. Such equivalent hours apply in the private hospital and commercial medico-social sector, social and family tourism and retail trade in fruit and vegetables, groceries and dairy products.

IV. Rest periods

The Working Time Directive provides for three types of minimum rest periods[42] (as well as paid annual leave, discussed in Chapter VI). The Court has emphasised that these minimum rest requirements '*constitute rules of Community social law of particular importance from which every*

[34] The Executive Order No 324 of 23 May 2002 on Daily and Weekly Rest Periods Section 19, Collective agreement on working time for health personnel employed by the regions Annex 5, Commented agreement on daily and weekly rest time for the health personnel Section 4 (i.a. nurses, bio analysts, physiotherapists), Collective agreement for doctors employed in the regions section 29.
[35] Working Time Act Section 20a and Rest Act Section 6a.
[36] Collective agreements may provide for 30 days stand-by duty within three months, with at most two stand-by duties per month during weekly rest.
[37] Working Time Act Sections 5 and 9.
[38] Employment Contracts Act Section 48.
[39] Police and Border Guard Act Section 78(3).
[40] Rescue Service Act Section 20(6).
[41] Social Division of the Court of cassation, 8 June 2011, No 09-70.324.
[42] Different rules apply for two specified groups of workers: mobile workers (Article 20) and workers on seagoing fishing vessels (Article 21).

worker must benefit as a minimum requirement necessary to ensure protection of his safety and health'[43].

A. Breaks

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

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

This provision appears in general to have been satisfactorily transposed.

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

Member States' legislative provisions establish minimum breaks ranging from 10 minutes[44] up to 1 hour[45]. The length of the break is set at for example 15 minutes[46], 20 minutes[47] or 30 minutes[48], 30 minutes being the most common length. Some Member States have also introduced a maximum break of 2 hours[49].

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

- whether the break is designated for taking food as well as rest[50];
- whether it is to be counted as working time[51] or as rest time[52];
- whether it is specified that the employee is free to leave the workstation or the workplace during the rest[53];

[43] Judgment of 7 September 2006, *Commission of the European Communities* v *United Kingdom of Great Britain and Northern Ireland*, C-484/04, ECLI:EU:C:2006:526, para 38; Judgment of 14 October 2010, *Union syndicale Solidaires Isère* v *Premier ministre and Others*, C-428/09, ECLI:EU:C:2010:612, para 36.
[44] Italy.
[45] Finland.
[46] Belgium (private sector), Greece (at least 15 to at most 30 minutes), Spain (private sector), Cyprus, Malta, Poland.
[47] France, Hungary.
[48] Belgium (public sector), Bulgaria, Czechia, Germany, Estonia, Ireland, Spain (public sector and armed forces), Croatia, Lithuania, Netherlands, Austria, Slovenia, Slovakia.
[49] Lithuania, Portugal.
[50] Czechia.
[51] Czechia (in case of reasonable time for rest and meal when work cannot be interrupted), Spain (public sector), Croatia, Poland, Portugal (provided that the break is qualified as working time or that it is designed for taking a meal, but the employee must stay at the workplace or near thereby in order to be called for rendering work if necessary), Slovenia.
[52] Bulgaria, Estonia, Lithuania, Austria, Slovakia.

- the timing[54] (most commonly not at the beginning or end of working time);
- the possibility to split the break into shorter periods[55];
- whether exceptions are provided (some Member States allow a shorter minimal break, which must still be long enough to allow the worker to eat, in limited circumstances).

Importantly, a number of Member States have established more protective provisions as regards the length of the working day for which workers are entitled to rest breaks[56] or as to additional or longer breaks to which workers are entitled if their working day goes beyond 6 hours[57].

However, some Member States do not set a minimum duration or other detailed terms for the rest break by law. Instead the legislation lays down only more general terms that the break must be 'on such a scale that the purpose of the break is reached, that its timing is determined according to the normal rules at the work place'[58], that it must be 'adapted to the nature of the activity exercised'[59] or that the number of breaks, the duration of these breaks and their timing must be satisfactory[60]. In Romania, the Labour Code states that the breaks must be in accordance with the terms of the applicable collective employment contract or with the terms of the employer's internal rules[61]. In these countries, employers are empowered to determine the detailed terms applying to breaks, as long as the provisions in the legislation and applicable collective agreements are respected.

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

In Denmark and Sweden, collective agreements are very common. Whereas in Denmark most sectoral collective agreements determine the terms applying to breaks, this does not seem to be the

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[53] Lithuania.
[54] Slovenia (not in the first and last hour of the working day), Ireland (not at the end of the working day), Greece, Cyprus and Austria (not at the start or end of the working day).
[55] Czechia (if the break is split, at least one of its parts must be a minimum of 15 minutes), Netherlands (the break can be split into periods of 15 minutes), Austria (the break can be split into two periods of 15 minutes or three periods of 10 minutes), Slovenia (the break of 30 minutes can be split into more shorter breaks, taking into account the needs of the working process and the needs of the worker to regenerate).
[56] Greece, Slovenia (4 hours); Ireland (4.5 hours); Czechia (for members of security forces), Lithuania, Sweden (5 hours); Netherlands (5.5 hours).
[57] Germany (break of 45 minutes for working days of over 9 hours), Hungary (additional 25 minutes for working days of over 9 hours), Netherlands (break of 45 minutes for working days of over 10 hours), Slovenia (the duration of the break is proportionate to the length of the working day, i.e. the break is longer if the working day is longer), Finland (additional 30 minutes after 8 hours of work where the working time exceeds 10 hours in a day).
[58] Denmark (Statutory Act No 896 of 2004 on the implementation of parts of the Working Time Directive Section 3).
[59] Luxembourg (Labour Code Article L. 211-16).
[60] Sweden (Working Hours Act (1982:673) Section 15).
[61] Romania (Labour Code (Law No 53/2003) Article 134).

case in Sweden. It is not clear to what extent the terms applying to breaks are determined in collective agreements at the local level.

In Romania, the duration and the terms under which the lunch break is granted are most often set in the internal rules of the employer. Some collective agreements have more detailed provisions about breaks whereas others do not.

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

B. Daily rest

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

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

This core requirement appears to have been satisfactorily transposed into national law by Member States for most sectors. However, there are some unclarities for sectors or groups of workers which are, as described in Chapter II A, not included or exempted from the national working time legislation. Furthermore the act applying to members of the regular staff in the Hungarian army provides only for a period of 8 hours daily rest during on-call duty and continuous duty[62].

Most Member States require a minimum of 11 consecutive hours of rest, as imposed by the Directive[63]. However, some Member States go further by requiring a minimum rest of 12 consecutive hours[64].

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

C. Weekly rest

Article 5 provides that:

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

[62] Act CCV of 2012 on the Legal Status of Soldiers (Hjt.) Article 101.
[63] Belgium, Czechia, Denmark, Germany (after the end of the working day), Estonia, Ireland, Greece, Spain (Guardia civil and police), France, Italy, Cyprus, Lithuania, Luxembourg, Hungary, Malta, Netherlands, Austria, Poland, Portugal, Finland, Sweden.
[64] Bulgaria, Spain (private sector), Croatia, Latvia, Romania, Slovenia (but only 11 hours if the working time is irregularly distributed or temporarily redistributed), Slovakia.

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

In other words, Article 5 provides for a minimum 35-hour continuous rest period for every period of seven days, which may only be reduced to 24 hours if objectively justified. Article 16(a) of the Directive allows Member States to lay down a reference period of up to 14 days for the purpose of granting this weekly rest.

This provision has been transposed into national law by the majority of Member States. While around half of the Member States stick to the minimum requirements set out in the Directive[65], a number of Member States go beyond the minimum and provide workers with 36[66], 42[67], 44[68] or 48[69] hours of rest per week.

Some Member States also establish additional rules such as a requirement to grant weekly rest as far as possible simultaneously for all employees[70] or whenever possible on the same day for workers of the same household[71].

Also, the Directive no longer has a requirement for the weekly rest to fall preferably on Sundays, although it remains the 'normal' weekly rest day in many Member States[72].

The possibility for weekly rest to be reduced to 24 hours for objective reasons is transposed in several Member States[73]. In addition, a number of Member States make use of the flexibility to allow for an average weekly rest over a reference period of two weeks[74].

A few Member States appear to have transposed the requirement for weekly rest incorrectly in some respects, e.g. because the requirement is not transposed for a certain sector[75], or by providing for the use of a 24-hour rest period without the presence of concrete objective reasons[76]. Furthermore, unclarities remain for sectors or groups of workers which are, as described in Chapter II A, not included or exempted from the national working time legislation. The use of derogations and exclusions in certain Member States is also considered in Chapter VIII.

[65] Belgium (public sector), Czechia, Denmark, Ireland, Greece, France, Italy, Cyprus, Lithuania, Malta, Poland, Portugal, Slovenia (24+12 for regular working hours and 11 hours for irregular working hours), Finland.
[66] Czechia (security and armed forces), Spain (private sector), France (medical public sector), Croatia, Netherlands, Austria, Sweden.
[67] Latvia.
[68] Luxembourg (Labour Code Article L. 231-11 further stipulates that at the end of a weekly rest period the next weekly rest period must take place within the next seven days).
[69] Bulgaria, Estonia, Spain (Guardia civil and police), Hungary (the 48 hours of weekly rest may also be split into two non-consecutive weekly rest days), Romania, Slovakia.
[70] Czechia, Denmark.
[71] Portugal.
[72] Belgium (private sector), Bulgaria, Czechia, Denmark, Germany, Ireland, Greece, France, Croatia, Italy, Latvia, Lithuania, Luxembourg, Netherlands, Austria, Portugal, Romania, Slovakia, Finland.
[73] Bulgaria, Ireland, Greece, Croatia, Cyprus, Lithuania, Malta, Austria, Poland, Slovenia, Finland.
[74] Belgium (public sector), Ireland, Spain (private sector), Italy, Cyprus, Malta, Netherlands, Finland.
[75] Spain (civil servants), Poland (staff of the Intelligence Agency).
[76]Netherlands (voluntary police and miners), Slovenia (health sector).

V. Limits to weekly working time

A. Maximum weekly working time

Article 6 of the Working Time Directive provides that:

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

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

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

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

Most EU Member States limit maximum average weekly working time to 48 hours[77]. In some cases this is indicated by setting a normal working time (usually 40 hours) and a limit to overtime (usually of 8 hours)[78].

Some Member States have set lower limits, allowing in some cases for derogations: Spain and Slovakia have set the maximum weekly working time at 40 hours, Belgium has set it at 38 hours.

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

Some other Member States, such as Croatia[79], Lithuania[80] and Austria[81], include overtime by setting higher limits to maximum weekly working time in specific circumstances.

[77] Denmark, Germany (indirectly by considering Sundays and public holidays not as working days and by limiting daily working time to normally 8 hours), Estonia, Ireland, Greece, Italy, Cyprus, Lithuania (an agreement on additional work with the same employer allows for the extension of the limit to 60 hours), Hungary, Malta, Netherlands, Austria (working time arrangements based on regular and substantial on-call duties allow for the extension of the limit to 60 hours), Poland, Portugal, Romania, Sweden.

[78] Czechia (40 hours of maximum weekly working time + 8 hours maximum of overtime work per week in average, but not counting overtime balanced by equivalent compensatory leave), Latvia (40 hours of maximum weekly working time + 8 hours maximum of overtime work per week), Luxembourg (absolute maximum of 48 hours for weekly working time), Slovenia (40 hours of maximum weekly working time + 8 hours of overtime per week, which is limited to 20 hours per month and 170 hours per year), Finland (40 hours of maximum weekly working time excluding overtime, which is limited to 138 hours per 4 months period and 250 hours per calendar year).

[79] Labour Act Article 65 sets the limit to maximum weekly working time including overtime at 50 hours in extraordinary cases when certain conditions are fulfilled: in the case of force majeure and in the case of an extraordinary increase in the scope of work and in other similar cases of pressing need. Overtime work per worker may not exceed 180 hours per year, unless agreed in a collective agreement, in which case it may not exceed 250 hours per year (Labour Act Article 65(4)).

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

Several countries have clarified their transposition measures and improved their compliance with the requirements of the Directive on maximum working time. Spain has introduced regulations limiting the working time for the Guardia Civil[82]. France has adopted a number of decrees in order to introduce the thresholds and ceilings of the Working Time Directive for professions where what is called the 'equivalence system' is used. Latvia has slightly reduced the limit on overtime work in order to comply with the Directive[83].

In Ireland, the Directive's restrictions on maximum working time (among others) are still not satisfactorily applied in practice for social care workers, but work is ongoing to remedy the situation.

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

Also Bulgaria does not limit the use of compulsory overtime for national defence forces, for emergency response, for urgent restoration of public utilities or transport or for the provision of medical assistance[84].

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

B. Reference period

Weekly working time (for the purposes of the limit in Article 6) is to be calculated by taking the average over a reference period. Member States may lay down a reference period but this should not be longer than four months[85].

Indeed, the normal reference period for calculating the maximum weekly working time is four months[86] or 16[87] (or 17[88]) weeks in most Member States.

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[80] Since the reform of the Labour Code which came into force on 1 July 2017, work performed in accordance with an agreement on additional work with the same employer is excluded from the limit of 48 hours maximum weekly working time, the limit being set at 60 hours over each period of seven days (Labour Code Article 114(1) and (2)). Further, aggregate recording of working time was introduced, for which the maximum weekly working time is set at 52 hours, excluding work done according to an agreement on additional work and on-call work (Labour Code Article 115).
[81] The limit to maximum weekly working time for working time arrangements based on regular and substantial on-call duties is set at 60 hours (Working Time Act (AZG) Sections 5, 7(3) and 9(4) and (5)).
[82] General Order No 11 of 23 December 2014 laying down the duty systems and the working and duty hours of Civil Guard staff and repealing General Order No 4/2010.
[83] Labour Law of 2001 Section 136.5.
[84] Labour Code Article 146.3.
[85] Article 16(b) of the Directive.

In some cases more protective limits have been set: in Belgium three months (outside the public service) or 13 weeks (for doctors, dentists and veterinarians)[89], three months in Bulgaria (for civil servants)[90], 12 weeks in France[91], three months in Lithuania[92] and four weeks in Slovakia (for evenly distributed working time).

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

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

This derogation has been implemented in Estonia[93], Ireland[94], Spain[95], Croatia[96], Italy, Cyprus[97], Austria, Portugal and Romania.

It seems that the four-month limit is exceeded without being limited to the activities mentioned in Article 17(3) of the Directive in Bulgaria[98], in Germany[99] and in Slovenia[100], where in all cases it is set at six months, in Czechia, where it is set at 26 weeks[101], and in Croatia[102] and Spain, where it is set at 12 months[103].

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

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[86] Belgium (for public service), Denmark, Estonia, Ireland, Greece, Croatia, Italy, Cyprus, Poland, Portugal, Romania, Slovakia (in case of uneven distribution of working time), Finland (for overtime).
[87] Netherlands.
[88] Malta, Austria.
[89] Under Law 12 of December 2010 setting a maximum weekly working time of 48 hours in average over a period of 13 weeks.
[90] Ministry of Interior Act Article 187(3).
[91] Labour Code Article L3121-22. Maximum working time is as a main rule limited to 44 hours calculated over any period of 12 consecutive weeks.
[92] Labour Code Article 113(1). There are several exceptions in place for different categories of workers for whom the reference period is set at four months. The maximum duration of the reference period for workers in energy companies, as well as for workers in agricultural, peat-digging and grain-processing companies, shall not exceed one year (Rules on peculiarities of working time and rest time in the field of economic activity Articles 4.1-4.2).
[93] Security Act Section 21^{1}(2) (security guards) and Rescue Service Act Section 20(2) (rescue servants).
[94] Six months.
[95] Law No 55/2003 Article 48 for the health sector.
[96] By collective agreement (Labour Act Article 66(10)).
[97] Organisation of Working Time Law 63(I)/2002 (six months).
[98] Labour Code Article 142, Civil Servants Act Article 49.
[99] Working Time Act Articles 3, 7(8) and 14.
[100] ZDR-1 Article 144.3.
[101] Labour Code Article 93(4) (the total scope of overtime may not exceed eight hours per week on average in a reference period of 26 weeks).
[102] Labour Act Article 65(4).
[103] Labour Code Article 34.2.

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

This is the case in Belgium, the Czechia[104], Denmark, Germany[105], Estonia[106], Ireland[107], Latvia[108], Malta[109] and Portugal[110].

In other cases the national legal framework allows collective agreements or agreements between the two sides of industry to set reference periods not exceeding 12 months 'for objective or technical reasons or reasons concerning the organisation of work' only. However, it remains unclear whether such agreements have to comply with the general principles on the safety and health of workers. This is the case in Austria[111], Cyprus[112] and Italy.

In Belgium, the working time scheme 'plus minus account'[113] allows companies to amend the working time stipulated by law[114]. The reference period for calculating the maximum weekly working time may exceed one year, being limited to a maximum of six years. This scheme has to be set by collective agreement at sectoral level and by collective agreement at company level.

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

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

[104] Labour Code Article 93(4).
[105] Working Time Act Article 7(1) and (8).
[106] Employment Contract Act of 17 December 2008 Article 46(2).
[107] Organisation of Working Time Act 1997 Sections 15 and 24.
[108] Labour Law Section 140(3) and (4).
[109] Organisation of Working Time Regulations of 2003 (Subsidiary legislation 452.87) Reg. 18.
[110] Articles 211 (1) and 207 (2) of the Portuguese Labour Code, approved by Law no. 7/2009, of 12 February, as subsequently amended.
[111] Working Time Act (AZG) Section 9(4).
[112] Organisation of Working Time Law Article 17(3).
[113] Law of 27 December 2006 Articles 204-213.
[114] To be able to apply this system, companies must meet several criteria: they must belong to a sector with strong international competition; be subject to long-term production or development cycles lasting several years while being faced with a substantial increase or decrease in work over a long period of time; need to deal with a substantial increase or decrease in the demand for a newly developed product or service; face specific economic reasons which make it impossible to respect the average weekly working time within the reference periods allowed by the Labour Code.

VI. Paid annual leave

A. The entitlement to minimum 4 weeks paid leave

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

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

22 days: Portugal

24 days: Belgium, Germany

25 days: Denmark, France, Sweden

26 days: Luxembourg

28 days: Estonia

30 days: Spain, Austria[115], Finland

Consequently the right to at least four weeks paid annual leave has been satisfactorily transposed into national law in all the Member States. In several Member States the days of leave to which the employee is entitled increase with the employee's age or period of service[116]. Specific groups such as civil servants, teachers[117], workers in the health and education sectors[118], workers who are single parents[119], certain categories of workers engaged in works involving exposure to harmful effects[120], workers whose work is associated with increased nervous, emotional or mental stress, occupational risks or specific working conditions[121], workers with disabilities[122] and personnel in the armed forces and the police may also enjoy longer annual leave periods[123]. In many Member States, collective agreements provide more favourable rights to annual leave.

[115] 30 'business days', which results in an entitlement to annual leave of five weeks (Annual Leave Act Section 2).
[116] Hungary (extra days for age and children), Poland (26 days for workers employed more than 10 years), Finland (extra days for central government officials with more than 15 years of service), Lithuania (extra days for continuous service at a given workplace), Austria (six business days after 25 years of service), Slovenia (extra days are provided to older workers, younger workers, workers with disability, workers with at least a 60 % physical impairment and workers who care for a child with disabilities (at least three extra days) and to workers with family responsibilities (one additional day for every child under the age of 15), Portugal (one additional day of leave for every 10 years of effectively rendered service for public sector employees).
[117] Bulgaria, Romania.
[118] Lithuania.
[119] Lithuania (raising a child under the age of 14 or a child with disability under the age of 18).
[120] Croatia.
[121] Lithuania.
[122] Croatia, Lithuania.
[123] Greece (civil servants), Bulgaria (civil servants, teachers and army personnel), Czechia (public sector employees five weeks; teaching staff and university academic staff eight weeks) Romania (armed forces and police), Slovenia (judges not less than 30 working days and up to 40 working days).

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

Under CJEU case-law [124] it is not compatible with the Directive for a Member State to impose a minimum (qualifying) period of uninterrupted work for the same employer which a worker must complete before he or she can begin to acquire rights to annual leave.

Qualification periods for exercising annual leave entitlements (for actually taking the leave acquired) are a slightly different situation. The Court acknowledged in *BECTU* that Article 7(1) allowed Member States to set some conditions on how workers exercise the rights they had acquired and clarified this by saying that the Member States could organise the manner in which workers may take the annual leave to which they are entitled during the early weeks of their employment[125]. However, the reference to the 'early weeks of employment' suggests that the Court is limiting Member States to a relatively short qualification period before a worker can exercise their rights to paid annual leave.

Many Member States provide that the right to paid annual leave may be acquired *pro rata temporis* (i.e. at the rate for the time worked) during the first year of employment[126]. In these Member States the worker will then be entitled to exercise the leave acquired accordingly as laid down in the national rules for exercising annual leave rights.

In Slovenia the worker obtains the right to annual leave (four weeks) by entering into the employment relationship. By contrast, in Germany, Croatia and Austria[127] workers are entitled to full leave entitlements after six months of employment.

Some Member States do, however, impose conditions on the exercising of paid annual leave in the first year of employment by laying down 4-12 months' qualification periods before leave entitlements can be exercised[128].

Two Member States[129] have systems in which the right to annual leave with pay is acquired based on the earnings of the worker in a qualification year which precedes the year in which the paid annual leave can be taken ('the holiday year'). The worker is entitled to time off in the holiday year, but without pay. These rules may result in a delay of more than a year in allowing workers to take

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

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

[126] Czechia, Denmark, Estonia, Ireland, Greece, Malta, Netherlands, Poland, Portugal, Slovenia, Slovakia, Finland.

[127] For the first six months the right to paid annual leave is acquired *pro rata temporis* (Annual Leave Act Section 2(2)).

[128] Bulgaria (the Labour Code Article 155(2) - four months), Estonia (the Employment Contracts Act § 68 (4) - six months), Cyprus (Law on paid leave (8/1967) Article 5(1) - 48 weeks); Lithuania (the Labour Code Article 128(2) - six months), Poland (Law on the Police Article 82(2), Law on Border Guard Article 86(2) and Law on Anti-Corruption Agency Article 84(2) - six months; Law on Marshal's Guard Article 59(2) - 12 months), Portugal (Labour Code, Article 239(1) - six months).

[129] Finland, Sweden.

their accrued paid annual leave entitlements. This seems to go beyond organising the manner in which workers may take their annual leave during the early weeks of their employment.

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

The Court held in the rulings *Schultz-Hoff and Stringer*, *Dominguez* and *Heimann* that a worker who is unable to work due to illness remains entitled to paid annual leave in respect of the period of sick leave[130].

The Court has also held that:

- in the case of a worker who has been on sick leave for the whole or part of the leave year and has not actually had the opportunity to exercise his or her right to paid annual leave, the right to paid annual leave cannot be extinguished at the end of the reference period[131]; but
- the worker concerned should be allowed to carry it over, by scheduling it if necessary, outside the reference period for annual leave[132].

Member States may limit the duration during which paid annual leave can be carried over, but the Court has also framed that possibility by ruling that '*any carry-over period must be substantially longer than the reference period in respect of which it is granted*'[133]. A carry-over period of 15 months has been accepted by the Court[134].

Most Member States do not have explicit legal provisions on this point. Some state that the worker is entitled to acquire paid annual leave entitlements when on sick leave. This is the case for Belgium, Ireland, Greece, Latvia, Hungary, the Netherlands, Austria, Portugal, Romania, Finland and Sweden. Some of these Member States apply a maximum period of acquisition[135] whereas others do not have such a time limit[136].

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

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

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

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

[134] Judgment in case C-214/10, *KHS*, para 38-40.

[135] Belgium (Arrêté royal of 30 March 1967 Article 16 - 12 months); Portugal (Labour Code Article 239(6) - If sick leave overlaps two calendar years and the worker is not at service on 1 of January, the worker has not acquired the 22 business days of annual leave on that date. After ending the sick leave, the worker will acquire the right to two business days of annual leave per each month of service effectively rendered in that year, up to a maximum of 20 business days); Finland (Annual Holidays Act 162/2005 - 12 months); Sweden (Annual Leave Act SFS 1977:480 Section 17 - 180 days).

[136] Latvia, Hungary, Austria, Romania.

Many Member States also have provisions which entitle the worker to carry over or postpone acquired periods of annual leave when the leave coincides with a period of sick leave[137].

About half of the Member States which regulate this aspect of the right to paid annual leave apply some sort of maximum carry-over period, but there is a great variety in the length of this period[138]. The other Member States do not have a maximum limit[139]. In several countries the period before the entitlement to leave with pay is lost is not substantially longer than 12 months, which appears excessively short.

In case C-342/01 *Merino Gomez*[140], the Court concluded that a worker must be able to take her annual leave during a period other than the period of her maternity leave. Some Member States have explicit provisions which entitle workers to carry over periods of annual leave which would otherwise take place at the same time as the employee's maternity or paternity leave[141].

D. Obligations of the employer concerning the taking of leave

In the rulings *Kreuziger* and *Max-Planck-Gesellschaft zur Förderung der Wissenschaften*, the Court held that a worker's failure to request paid annual leave cannot lead to the loss of paid annual leave at the end of the reference period automatically and without prior verification that the employer had in fact enabled the worker to exercise that right[142].

According to the Court, employers should inform the workers accurately and in good time of their leave rights. They should further inform them that annual leave will be lost at the end of the

[137] Bulgaria, Czechia, Denmark, Germany, Estonia, Ireland, Greece, Cyprus, Latvia, Lithuania, Luxembourg, Hungary, Netherlands, Poland, Portugal, Romania, Slovenia, Finland, Sweden.

[138] Bulgaria (Labour Code Article 177 - two years from the end of the year for which it is granted); Czechia (Labour Code Section 218(3) - within the following calendar year); Denmark (Holiday Act, L no. 230 of 12 February 2021, Section 22(1) - in the following holiday period which goes from 1 September to 31 December (16 months)); Estonia (Employment Contract Act of 17 December 2008 Article 68 - within one year as of the end of the calendar year for which the holiday is calculated); Ireland (Organisation of Working Time Act 1997 Section 20 - within 15 months after the end of the leave year); Greece (Law 539/1945 Article 4 - within 31 March of the following calendar year); Italy (Legislative Decree of 8 April 2003 No. 66 Article 10 - within 18 months as of the end of the year in which the leave entitlement is acquired); Lithuania (Labour Code Article 127(5) - three years after the end of the calendar year in which the right to full annual leave was acquired, unless the worker has actually been unable to exercise it); Hungary (Labour Code Article 123 - within 60 days after the worker returned to work if it was not possible to use annual leave during the year in which it is due); Netherlands (Civil Code Article 7:642 - five years if the employee was not able to use the leave due to sickness); Portugal (Labour Code Articles 244(3) and 239(6) - within 30 April or 30 June of the following calendar year); Romania (Law No 12 of 20 January 2015 - within 18 months); Slovenia (Employment Relationships Act (No. 21/2013 et subseq.) Article 162(4) - by 31 December of the following year); Finland (Annual Holidays Act 162/2005 Article 26 - a postponed summer holiday may be granted during the same calendar year after the holiday season, and a postponed winter holiday by the end of the following calendar year); Sweden (Vacations Act Section 18 - within the next five years).

[139] Germany, Latvia, Luxembourg.

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

[141] Estonia, Spain, France, Croatia, Italy, Lithuania, Netherlands, Austria, Romania, Slovakia, Finland.

[142] Judgment of 6 November 2018, *Sebastian W. Kreuziger v Land Berlin*, C-619/16, ECLI:EU:C:2018:872, para. 56; Judgment of 6 November 2018, *Max-Planck-Gesellschaft zur Förderung der Wissenschaften e.V. v Tetsuji Shimizu*, C-684/16, ECLI:EU:C:2018:874, paras. 40 and 61.

reference period or authorised carry-over period or upon termination of the employment relationship, if workers do not take it[143]. However, the Directive does not preclude the loss of the right to paid annual leave if it appears that a worker refrained deliberately and in full knowledge of the ensuing consequences from taking the paid annual leave, after having been given the opportunity to exercise this right[144].

The German Federal Labour Court has adapted its previous case law accordingly. No other Member State has reported a change in its rules or jurisprudence in response to this judgment.

E. Pay

In its judgment in *Robinson-Steele*, the Court stated that '*for the duration of annual leave within the meaning of the Directive, remuneration must be maintained. In other words, workers must receive their normal remuneration for that period of rest*'[145].

In its judgments in *Williams*[146] and in *Lock*[147], the Court set out its view as regards which components of pay are to be included when calculating pay during annual leave.

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

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

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

In the *Hein* ruling, the Court held that remuneration received for overtime does not, in principle, form part of the normal remuneration given its exceptional and unforeseeable nature[148]. However,

[143] Judgment in case C-619/16, *Kreuziger*, para. 52; Judgment in case C-684/16, *Max-Planck-Gesellschaft zur Förderung der Wissenschaften*, para. 45.
[144] Judgment in case C-619/16, *Kreuziger*, para. 54; Judgment in case C-684/16, *Max-Planck-Gesellschaft zur Förderung der Wissenschaften*, paras. 47 and 56.
[145] Judgment of 16 March 2006*, C. D. Robinson-Steele v R. D. Retail Services Ltd and Michael Jason Clarke v Frank Staddon Ltd and J. C. Caulfield and Others v Hanson Clay Products Ltd, joined cases C-131/04 and C-257/04, ECLI:EU:C:2006:177*, para 50; similarly Judgment in joined cases C-350/06 and C-520/06, *Schultz-Hoff and Others*, para 61.
[146] Judgment of 15 September 2011, *Williams and Others* v *British Airways plc.*, C-155/10, ECLI:EU:C:2011:588.
[147] Judgment of 22 May 2014, *Z.J.R. Lock* v *British Gas Trading Limited*, C-539/12, ECLI:EU:C:2014:351.

when the obligations arising from the employment contract require the worker to work overtime on a broadly regular and predictable basis, and the corresponding pay constitutes a significant element of the worker's total remuneration, the pay received for that overtime work should be included when caldulating the pay during annual leave[149].

In addition, the Court has consistently held that, as regards the entitlement to paid annual leave, workers who are on sick leave during the reference period must be treated in the same way as those who have actually worked during that period. Consequently, in the case of a worker who was partially incapacitated for work due to illness and wished to take paid annual leave, the Court has ruled that the level of pay during annual leave must be based on the normal rate, not a rate that has been temporarily reduced due to partial incapacity to work[150].

The legislation in all Member States entitles workers to receive their 'average pay', 'normal weekly rate', 'average monthly remuneration' or similar.

The legislation in several Member States is specific that the worker is entitled to receive both fixed and variable elements of salary[151] or to have benefits in kind taken into account[152].

The reference period used as the basis for the calculation varies greatly. Some Member States use the entire year preceding the holiday year or the last 12 months before annual leave[153]. Some use a period of one to six months prior to the start of the holiday[154]. Luxembourg, Finland and Sweden apply different methods according to the type of salary of the worker (fixed weekly or monthly or varying).

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

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

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

All the Member States provide for an entitlement to a payment in lieu when the employment relationship ends without annual leave being taken. About half of the Member States' legislation contains explicit provisions that this is the only case in which it is permissible to award the worker a

[148] Judgment of 13 December 2018, *Torsten Hein v Albert Holzkamm GmbH & Co.*, C-385/17, ECLI:EU:C:2018:1018, para. 46.
[149] Judgment in case C-385/17, *Hein*, para. 47.
[150] Judgment of 9 December 2021, *XXXX v Staatssecretaris van Financiën*, C-217/20, ECLI:EU:C:2021:987, para. 41.
[151] Belgium, Denmark, Greece, France, Hungary, Poland, Portugal, Romania, Finland, Sweden.
[152] Germany, Ireland, France.
[153] Belgium, France, Sweden (if the remuneration has variable components), Poland (if the remuneration has varied considerably).
[154] Bulgaria (one month), Czechia (preceding calendar quarter), Germany (13 weeks), Croatia (three months), Slovenia (three months), Lithuania (three months before the month of calculation), Hungary (six months), Poland (when the remuneration has not varied considerably), Romania (three months).

payment in lieu, often citing the Directive itself[155]. The Commission does not have information as to whether the other Member States allow payments in lieu to be used in other situations.

VII. Protection of night and shift workers

A. Definitions

1. 'Night time'

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

In this respect, all Member States have transposed the core 'night time' period between midnight and 5 am. Some limit their national definitions to the minimum seven hours required by the Directive, with the start of night time varying between 22:00[156], 23:00[157] and midnight[158], and ending at 05:00, 06:00 or 07:00. On the other hand, most Member States[159] define working time as an eight-hour period and the vast majority of those doing so stipulate that night time starts at 22:00 and ends at 06:00. Finally, two Member States provide for a nine-hour period[160] and two define night time as a 10-hour period[161].

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

The Commission notes two issues with how this provision has been transposed in Italian and Dutch legislation. Italian law does not provide for a definition of night time but delegates this responsibility to collective agreements under the conditions imposed by the Directive (minimum of seven hours including the period between 00:00 and 05:00)[162]. Dutch law defines night time as the

[155] Bulgaria, Czechia, Denmark, Estonia, Greece, Croatia, Italy, Cyprus, Latvia, Lithuania, Malta, Netherlands, Austria, Romania, Slovenia, Slovakia.
[156] Denmark, Austria.
[157] Germany (except for bakery and pastry shops where it is between 22:00 and 05:00), Greece, Cyprus, Slovenia (period between 23:00 and 06:00, and in case of shift work eight uninterrupted hours between 22:00 and 7:00 hours), Finland.
[158] Ireland.
[159] Bulgaria, Czechia, Estonia, Spain (except in the health sector where in the absence of specific rules night time is between 23:00 and 06:00), Croatia (except in agriculture, where night time is between 22:00 and 05:00), Latvia, Lithuania, Luxembourg (except in the hotel and restaurant sector, where night time is between 23:00 and 06:00), Hungary, Malta, Romania, Slovakia, Sweden.
[160] Portugal, where night time is from 22:00 until 07:00, and France, where it runs from 21:00 to 06:00 (except for the public sector, where it is from 22:00 until 05.00).
[161] Belgium (between 20:00 to 06:00) and Poland (between 21:00 and 07:00).
[162] Legislative Decree 66/2003 Article 1.

period between midnight and 06:00, i.e. shorter than the minimum seven-hour period imposed by the Directive[163].

2. 'Night worker'

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

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

The Directive is not entirely clear on whether the two criteria for qualifying as a night worker are cumulative or alternative, but case-law[164] suggests that they are alternative.

It appears that Ireland applies cumulative conditions and thus requires that to be considered a night worker, the workers concerned must carry out at least three hours of their daily working time during night time and that the number of hours worked at night must reach 50 % of the total number of hours[165]. This would be a too limited definition.

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

In terms of definitions under the first criterion, in most Member States a worker must work at least three hours of his or her daily working time during night time to be considered as 'a night worker'[166]. Some Member States qualify as night workers those who regularly work at least three hours at night[167]. However, in Germany a night worker is one who normally works for two hours during night time or where he or she works in rotating shifts during which night work is normally carried out. France qualifies as night workers those who work at least twice per week for at least three hours at night. In Hungary or Austria any worker working 'regularly' at night counts as a night worker, without any minimum duration. In Belgium, a night worker carries out night work with no minimum duration and the law does not seem to require any particular regularity.

The second criterion refers to any worker who is likely during night time to work a 'certain proportion of his annual working time' defined either by legislation or by collective agreement.

[163] Working Hours Act of 23 November 1995 Article 1:7 letter d.
[164] Judgment in case C-303/98, *Simap*, para. 37.
[165] Organisation of Working Time Act, 1997 Section 16.
[166] Bulgaria, Czechia, Estonia, Greece, Spain, Croatia, Italy, Cyprus, Lithuania, Luxembourg, Malta Poland, Portugal, Romania, Slovenia, Sweden.
[167] Bulgaria (employees who work in shifts qualify as night workers where one shift includes at least three hours of night work), Denmark, Slovakia.

Most Member States fix the proportion by law, sometimes allowing derogations by collective agreement. The other Member States define the proportion in varying ways:

- at least an average of three hours of his working time within 24 consecutive hours at least once a week within a reference period of 26 weeks: Czechia
- at least 48 days per year: Germany, Austria
- at least three hours per day for 80 days: Italy
- at least equivalent to three hours per day: Portugal
- at least 270 hours per year: France
- at least 300 hours per year: Denmark
- at least 500 hours per year: Slovakia
- at least 726 hours per year: Greece and Cyprus[168]
- at least a quarter of annual working time: Lithuania, Luxembourg, Poland
- at least 30 % of monthly working time: Romania
- at least a third of annual working time: Estonia, Spain, Croatia, Slovenia, Sweden
- at least half of annual working time: Malta

3. ‘Shift work’ and ‘shift worker’

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

The concepts of shift work and of shift worker have been correctly transposed in Belgium, Czechia, Greece, Spain, Croatia, Italy, Cyprus, Latvia, Hungary, Malta, Poland, Portugal, Romania and Slovakia. In a number of other Member States[169], the definition contained in the Directive has not been clearly transposed.

B. Limits to night work

1. Eight-hour normal work on average

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

[168] In both Member States, all hours of any period of work lasting seven consecutive hours and including at least three hours during night time in Cyprus and during the period 23:00 to 05:00 in Greece are counted as night hours for the purpose of qualifying workers as night workers, regardless of the start/end of the shift.
[169] Bulgaria, Germany, Estonia, France, Lithuania, Luxembourg, Netherlands, Austria, Slovenia, Sweden.

It is logical that the reference period applicable for night work should be substantially shorter than that used for the maximum working week, given the Directive's objective to lay down minimum health and safety requirements and the need to ensure the provision on night work remains effective. Indeed, establishing the same reference periods for both provisions would *de facto* render the night work provision pointless since compliance with the average 48-hour working week and the 24-hour weekly rest period would automatically ensure that the daily working time is eight hours on average. The reference in Recital 6 to the principles of the International Labour Organisation supports this interpretation.

Member States transposed the eight-hour average limit on the work of night workers with reference periods varying from one week[170] to 26 weeks[171]. Some Member States set 15 days[172], one month[173], two months[174], three months[175] or four months[176] as reference periods while one Member State left it entirely to collective agreements[177].

A number of Member States do not apply specific limitations to the average working time of night workers, but only set a general limit of eight hours and a general reference period for a maximum working time of four months[178]. A reference period of four months is in any case too long to ensure effective protection for night workers.

Some Member States set higher levels of protection, for instance by imposing a shorter (seven-hour) limit on normal night work hours[179].

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

Most Member States[180] have transposed this provision appropriately either through specific provisions or by laying down a general absolute limit for all workers carrying out night work. Some Member States apply this absolute limit more broadly, for example by adding shift workers or

[170] Estonia, Greece (longer reference period possible through collective agreement), Luxembourg, Portugal (longer reference period possible through collective bargaining where a flexitime system applies, or else by law).
[171] Czechia (if for operational reasons it is not possible to not exceed the eight hours within 24 consecutive hours - Labour Code Article 94(1)).
[172] Spain (possible extensions, up to six months in certain sectors of activity and six months by collective agreement).
[173] Germany (longer reference period possible through collective agreement), Cyprus (other reference period possible through collective agreement).
[174] Ireland.
[175] Belgium, Lithuania, Romania.
[176] Denmark (Act No 896 of 2004 on the implementation of parts of the Working Time Directive Section 5): Croatia (Labour Act No 93/14, 127/17 and 98/19 Article 69); Malta (Organisation of Working Time Regulations, 2004 (S.L. 452.87), subregulation (4) - collective agreement or 17 weeks); Netherlands (Working Hours Act of 23 November 1995 Section5:8); Slovenia (Employment Relationships Act (No 21/2013) Article 152); Slovakia (Act No 311/2001 The Labour Code Article 98); Sweden (Working Hours Act SFS 1982:673 Section 13a).
[177] Italy (Legislative Decree 66/2003 Article 13).
[178] Hungary (Labour Code Articles 94.1 and 99.2), Poland (Labour Code Article 151^7 Section 3), Finland (Working Time Act Section 11).
[179] Bulgaria, Latvia.
[180] Belgium, Bulgaria, Denmark, Estonia (general absolute limit), Ireland, Greece, Spain, France, Croatia, Cyprus, Latvia, Lithuania (although staff carrying out on-call or standby time appear to be excluded from the limit), Luxembourg, Hungary, Malta, Poland, Portugal, Romania, Slovenia, Slovakia, Finland, Sweden.

continuous activities[181], or work that risks reducing the vigilance of a night worker, i.e. monotonous work or work requiring sustained concentration[182].

Two Member States appear not to have transposed this provision of the Directive[183] and one allows for certain exceptions which are not provided for in the Directive for this kind of work[184].

Some Member States do not define work involving special hazards or heavy physical or mental strain[185]. Other Member States define it in law or regulations[186], by collective agreement[187] or by the employer, often with the cooperation of workers' representatives and as part of compulsory risk assessments[188]. Since hazardous work is allowed to be defined by national legislation and/or practice or by collective agreements, this does not breach the Directive. However, the variety in the definitions and criteria applied by the Member States may have the effect of varying the level of protection under this provision.

C. Protection of night workers and shift workers

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

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

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

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

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

[181] Belgium.
[182] Luxembourg, Portugal.
[183] Germany, Netherlands.
[184] Czechia (Labour Code Section 94(1)).
[185] Lithuania, Netherlands, Romania.
[186] Belgium, Denmark, Cyprus, Luxembourg, Hungary, Austria, Portugal.
[187] Belgium, Spain, Cyprus, Malta.
[188] Belgium, Ireland, Greece, Spain, Croatia, Cyprus, Malta, Poland, Slovenia, Finland.

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

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

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

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

About half of the Member States do not specify in their transposing legislation how frequently health assessments should take place[189]. However, many Member States do have such a provision in place: Portugal, Romania and Slovakia require health examinations at least once per year, Czechia, Italy, Latvia and Austria every two years, Belgium, Denmark, Estonia, Germany and Croatia every three years and Sweden every six years. In Slovenia, workers must be provided with medical examinations in periods not shorter than one year and not longer than three years. In some of those Member States, the intervals at which the medical examinations are to be carried out are also shortened to one year or three years, for example, for workers above the age of 50[190] or for workers having worked for over 10 years at night[191].

Additional health examinations are possible in some Member States at any time during the course of the assignment for certain workers including pregnant or breastfeeding women[192] or for all workers[193], sometimes upon request of a specialist in occupational medicine[194].

Some Member States provide for a medical assessment that is specific for night workers, while others rely on a general scheme that entails health checks for all workers. It is not always clear how such medical examinations are carried out and/or how it is ensured that they are free of charge[195].

[189] Ireland, Greece, Spain, France, Cyprus, Lithuania, Hungary, Malta, Netherlands, Poland, Romania, Finland.
[190] Belgium, Germany, Latvia, Austria, Sweden.
[191] Austria.
[192] Slovakia.
[193] Luxembourg.
[194] Croatia.
[195] Luxembourg, Austria.

Other Member States provide by law that the assessments are free[196] or that the expenses are to be paid by the employer[197].

Confidentiality is often enshrined in the national law[198] but is interpreted in varying ways.

2. Right to transfer to day work

This entitlement has, in general, been satisfactorily transposed, except in Poland where it does not appear to have been transposed. In Lithuania only pregnant workers, workers who have recently given birth and workers who are breastfeeding may be transferred to day work if they provide a certificate that such work would endanger their safety and health[199].

Among Member States, the strength of the right to transfer to day work varies: while in some Member States workers must be allowed such a transfer as far as possible[200], others require that the worker be reassigned[201].

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

- workers aged over 55 and who have worked at least 20 years in night work occupations in Belgium;
- workers whose household includes a child under the age of 12 in Germany and Austria;
- pregnant workers[202], sometimes limited to cases where the work would affect the worker's health and safety or that of the baby[203].

3. Guarantees for certain categories of night workers

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

[196] Czechia, Ireland, Greece, Cyprus, Portugal.
[197] Bulgaria, Germany, Italy, Latvia, Hungary, Romania, Slovenia, Slovakia.
[198] Bulgaria, Ireland, Greece, Hungary.
[199] Law on Health and Safety of Workers Article 37.
[200] Denmark, Greece, Italy, Luxembourg, Netherlands, Portugal.
[201] Bulgaria, Czechia, Germany, Croatia, Slovenia.
[202] Bulgaria, Czechia, France, Luxembourg, Netherlands.
[203] Ireland.

These specific guarantees include bans on night work for young workers[204] or on night work by pregnant workers[205]. In the latter case, the ban can be lifted in some Member States if the worker gives her consent.

Additional guarantees in some Member States require the consent of the worker for night work in situations where the worker has recently given birth or is breastfeeding[206], cares for young children[207] or for a disabled child, regardless of the child's age[208], for the loved ones[209], where the worker is a person with disablities[210] or where no transport to and from work is organised for the worker[211].

4. Notification of regular use of night workers

From the information available, the legislation of a majority of Member States is in line with the requirements of Article 11[212]. Some Member States require employers to provide a notification on the regular use of night workers regardless of whether or not the national authorities have requested it[213]. Member States' legislation may also require employers to provide notification about further aspects such as number of hours worked and the measures taken to ensure safe and healthy working conditions[214].

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

The situation in France is unclear, as no information obligation appears to have been established, although in the absence of a collective agreement, a worker's assignment to night work requires authorisation by the labour inspector. Furthermore, Portugal does not appear to have any specific arrangements for informing the authorities, but the Commission cannot rule out the possibility that general provisions obliging the employer to provide this information apply.

[204] Bulgaria, Czechia (with an exception under specific conditions for over 16 year-olds if necessary for their vocational training), Estonia, France (with possible derogations in certain sectors), Croatia, Italy, Cyprus, Lithuania, Hungary, Netherlands, Austria (with some exemptions), Poland, Portugal, Romania, Slovenia.
[205] Bulgaria, Italy, Latvia, Lithuania, Hungary, Netherlands, Austria (with some exemptions), Poland, Portugal.
[206] Lithuania, Romania, Slovenia.
[207] Under the age of seven in Slovenia, of six in Bulgaria, of four in Poland and of three in Italy, Hungary, Latvia, Netherlands.
[208] Bulgaria, Italy, Netherlands.
[209] Netherlands.
[210] Lithuania, Portugal.
[211] Slovenia.
[212] Belgium, Bulgaria, Denmark, Estonia, Greece, Spain, Cyprus, Latvia, Luxembourg, Hungary, Malta, Romania, Slovenia, Slovakia, Finland.
[213] Cyprus, Spain, Romania.
[214] Bulgaria.

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

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

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

- the obligation to provide them with hot food and refreshments[215];
- the prohibition on working two successive shifts[216];
- the obligation to establish their working hours following occupational science research on humane working conditions[217] or after a risk assessment[218].

Some Member States have incorporated into their legislation the second aspect of Article 12, namely the requirement that the appropriate protection and prevention services or facilities with regard to the safety and health of night workers and shift workers are equivalent to those applicable to other workers and are available at all times[219].

6. Obligations regarding organisation of work patterns

A few Member States have introduced specific legislative provisions taking up the wording of Article 12 and thus imposing a general obligation on employers to take into account the general principle of adapting work to the worker, with a view in particular to alleviating monotonous work and work at a predetermined work-rate[220]. On the other hand, many Member States include similar provisions in their general legislation on the health and safety of workers[221]. In some Member States national legislation also lays down concrete measures to implement these general obligations. These include:

- obligations to organise work in a way which minimises work strain[222];
- extra rest breaks in the case of monotonous work or work at a predetermined rate[223];

[215] Bulgaria, Czechia.
[216] Bulgaria, Lithuania.
[217] Germany.
[218] Ireland, France.
[219] Bulgaria, Greece, Croatia, Italy, Cyprus, Portugal, Slovakia.
[220] Czechia, Greece, Spain, Cyprus, Netherlands.
[221] Austria, Portugal, Romania, Slovenia, Slovakia, Sweden.
[222] Bulgaria, Poland.
[223] Czechia, Estonia.

- prohibitions on carrying out two successive shifts[224];
- carrying out risk assessments[225];
- organising consultations with trade unions or labour inspectorates[226].

VIII. Derogations

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

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

Also, the Court has clarified that the derogations must be interpreted '*in such a way that their scope is limited to what is strictly necessary in order to safeguard the interests which those derogations enable to be protected*[227]'.

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

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

As regards the definition of these workers, Cyprus has transposed the wording of the Directive and the examples presented in it directly. Other Member States have used the same wording but added

[224] Bulgaria, Lithuania, Slovenia.
[225] France, Malta.
[226] France (on establishing continuous shift work), Slovenia, Slovakia.
[227] Judgment in case C-151/02, *Jaeger*, para. 89; Judgment of 21 October 2010, *Antonino Accardo and Others v Comune di Torino*, C-227/09, ECLI:EU:C:2010:624, para. 58; Judgment in case C-428/09, *Union syndicale Solidaires Isère*, para. 40.

some aspects such as the exact extent to which a worker can be considered as a family worker[228] or a managing executive[229], or added categories of workers[230], such as workers working from home and teleworking[231].

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

In the Member States where further detail is introduced concerning the notion of 'managing executives', these concern, first, a criterion related to the worker's capacity to take decisions and to manage the employer's operations[232] including, for example, the capacity to autonomously conclude legal acts in the name and on behalf of the employer[233]; and second (less common), a criterion relating to the worker's remuneration[234] and implying that the workers concerned receive much higher remuneration than other employees in the company or sector.

In addition to the definition of the workers concerned by this derogation, a limited number of Member States have established additional conditions such as requiring the employer to inform the works council about contracts concluded with 'managing executives'[235], and requiring a specific written agreement to be signed between worker and employer[236].

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

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

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

- a worker earning three times the minimum wage[237];
- one who fills a position of considerable importance or trust and whose salary reaches seven times the mandatory minimum wage[238].

[228] Ireland, Luxembourg, Malta, Austria.
[229] Greece, Croatia, Luxembourg, Austria.
[230] Finland (work performed by a State public servant as a court officer or referendary, junior district judge, trainee district judge, public legal aid attorney, prosecutor, bailiff, writ server or at a foreign mission; work performed by a public servant employed by the Bank of Finland - Working Hours Act 872/2019 Section 2(1)).
[231] Italy.
[232] Greece, France, Croatia, Luxembourg, Poland, Slovenia.
[233] Croatia, Slovenia.
[234] Greece, France, Luxembourg.
[235] Croatia.
[236] Portugal.
[237] Netherlands (Working Time Decree of 4 December 1995 Article 2.1:1).

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

Some Member States have adopted more detailed legislation as to the workers concerned and define exactly who is covered by the derogation, such as chief physicians, heads of public services[239] or certain commanding officers in police forces[240]. Although these groups of workers may be expected to have the necessary freedom as regards their working time, compliance with the Directive will always depend on whether the basic requirements in the first phrase of Article 17(1) are fulfilled.

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

The Directive allows for four limited derogations:

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

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

<u>Derogations to the provisions on breaks, daily and weekly rest periods:</u>

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

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

In the *Jaeger* case[241], the CJEU emphasised the health and safety implications of missing minimum rest periods and held that compensatory rest for missed daily rest periods must follow immediately

[238] Hungary (Act I of 2012 on the Labour Code Sections 208 and 209): the exemption applies when the worker's working time is not measured/predetermined or can be decided by the worker himself or herself.
[239] Germany.
[240] Spain.
[241] Judgment in case C-151/02, *Jaeger*.

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. The Court also commented that it was only in '*entirely exceptional*' circumstances, where granting equivalent compensatory rest is '*impossible for objective reasons*', that appropriate protection could be permissible as an alternative.

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

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

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

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

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

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

- by allowing missed rest to be compensated financially[242];
- by not imposing such a requirement for certain sectors or shift work[243];
- by relying on other kinds of protective measures[244];
- by not providing for a compensatory rest period which is equivalent to the shortening of the rest period[245].

There are also two cases where the approach taken by Member States is too extensive as regards the sectors concerned, for example where they have allowed a more general exception for sectors with specific characteristics or the provision of services to the population[246].

[242] France (L.3132-5 Labour Code), (D-3131-2 Labour Code); Finland (with the worker's consent - Working Hours Act 872/2019 Section 28).
[243] France (Decree n°2000-815 25 August 2000 relating to working time in the state public sector Article 3); Hungary (Act LXXXIV of 2003 on Certain Measures for Health Care Workers (Eütv), Act CCV of 2012 on the Legal Status of Soldiers (Hjt.)); Netherlands (Working Time Decree of 4 December 1995 chapter 5); Romania (Labour Code Article 135).
[244] Germany (Working Time Act Article 7(2a)).
[245] Germany (Working Time Act Article 7(9)).

As to the question of the timing of the compensatory rest for missed daily rest (as clarified by the CJEU case-law outlined above), some Member States provide for the daily rest to be granted 'immediately'[247] or through an extension of the following rest period[248], or by requiring that if a shorter daily rest period is applied, the total duration of two consecutive daily rest periods must be at least 22 hours[249]. These ways of ensuring compensatory rest all comply with the Directive.

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

- in some Member States, there appear to be no or unclear provisions on the timing of compensatory rest[250];

- in many Member States a timeframe for granting compensatory rest periods is set but the compensatory rest period does not follow immediately after the working time it is supposed to counteract. The equivalent compensation for missed parts of daily rest is provided within periods ranging from 14 days to six months in certain activities or sectors[251];

- there are also several examples of national legislation which allow the equivalent compensation for missed parts of weekly rest to be granted between six weeks and six months after the missed rest[252].

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

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[246] Bulgaria (Labour Code Article 154a - but the competence has only been used for certain transport activities); Czechia (Act No 262/262 Labour Code Section 90(2)(c)).
[247] Estonia, Spain (Guardia civil), Croatia, Poland.
[248] Czechia (Act No 262/2006 Labour Code Section 90(2)).
[249] Hungary (Act I of 2012 the Labour Code Article 104 Sub. 4 as amended by Act LXVII of 2016 on the establishment of the Hungarian budget for 2017).
[250] Germany (for missed daily rest periods in sectors where stand-by duty is used), Spain, Italy, Cyprus, Latvia (Labour code Article 140), Luxembourg, Malta, Portugal, Romania, Slovenia, Sweden.
[251] Belgium (Law of 14 December 2000 for the Public Sector Article 7, 14 days for activities in which the workers' place of work and place of residence are distant from one another as well as for security and surveillance activities); Czechia (Act No 262/2006 Labour Code Section 90a, six weeks for seasonal work in agriculture); Germany (Working Time Act of 6 June 1994 Article 5.2, four weeks for hospitals, care and support of people, restaurants, transport, agriculture), (Working Time Act of 6 June 1994 Article 5.3 - within a reasonable period in hospitals and care and support for people if called in to perform work during stand-by duties); Spain (Law 55/2003 of 16 December 2003 of the Framework Statute for Statutory Workers in the Health Service Article 54, within three months in the healthcare sector); Lithuania (Decree No 496 of 21 June 2017 of the Government of the Republic of Lithuania, within six months for workers in activities involving the need for continuity of service or production); Austria (Civil Servant Employment Act No 33/1979 Section 48a, within 14 days for civil servants), (Working Time Act Section 12(2), within 10 days in the private sector for derogations stipulated through collective agreements), (Working Time Act Section 12(2a), within four weeks for workers in non-seasonal enterprises in the tourism and hospitality sector and possibly within the season or at the latest after the season for workers in seasonal enterprises in the tourism and hospitality sector), (Working Time Act Section 20a, within 14 days if called in to perform work during stand-by duties within the private sector); Slovenia (Employment Relationships Act (ERA-1) 2013 Article 158, up to six months for certain activities, jobs, types of work or occupations), (Medical Practitioners Act No 72/06-ZZdrS UPB3 Article 41d, Health Services Act No 23/05 - ZZdej UPB 2, up to two months for the health sector); Slovakia (Act No 311/2001 The Labour Code Section 92.2, within 30 days for continuous operations, urgent agricultural work, etc.).
[252] Czechia (Act No 262/2006 the Labour Code Section 92, six weeks for seasonal work in agriculture); Lithuania (Decree No 496 of 21 June 2017, within six months for workers in activities involving the need for continuity of service or production); Slovakia (Act No 311/2001 The Labour Code Section 93.5, within four months); Finland (Working Hours Act 872/2019 Section 28, within three months).

- establishing limits to how much the rest period may be reduced[253];

- limiting the ways in which the derogations can be used, for example by requiring derogations to be agreed in a collective agreement or in an agreement between the worker and the employer or making the granting of derogations conditional on obtaining approval from the labour inspection authorities[254].

2. Derogations through collective agreements

Despite limited information on the situation as to collective agreements in the Member States, it appears that most Member States implement derogations from the Directive under collective agreements, as allowed under Article 18[255].

The requirement of compensatory rest is generally appropriately transposed.

However, similarly to derogations under Article 17(3) and (4), uncertainties remain as to compliance with the Court's case-law on the timing of compensatory rest[256]. Germany explicitly allows the timing of compensatory rest for a partial reduction in daily rest which is agreed in a collective agreement to be set by the collective agreement itself[257], whereas the Directive requires that compensatory rest must be afforded immediately after the working time it is supposed to make up for.

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

- limits on the number of hours by which daily rest periods can be reduced[258];

- limits on the activities for which the collective agreements can allow derogations from certain provisions[259];

- limits on the types of collective agreements which can implement such derogations[260].

[253] Czechia (daily rest of at least eight hours); Germany (daily rest periods of at least 10 hours in most sectors where derogation is allowed or up to half of the rest period in sectors where stand-by duty is used); Estonia (minimum rest of six hours in every 24 hours); France (reduction by a maximum of two weekly rests per month); Croatia (daily rest of at least 10 hours if derogated from by law and eight hours where the derogation arises from a collective agreement); Lithuania (daily rest periods of at least eight hours and weekly rest periods of at least 24 hours for workers in activities involving the need for continuity of service or production); Hungary (minimum eight hours daily rest for members of the regular staff of the army and armed forces).
[254] Estonia, France, Cyprus, Luxembourg, Slovenia, Slovakia.
[255] Notably including Denmark, Germany, Ireland, Greece, Italy, Luxembourg, Hungary, Malta, Austria, Romania, Slovenia, Sweden.
[256] Denmark, Greece, Malta, Austria, Romania.
[257] Germany (Working Time Act of 6 June 1994 Article 7.1).
[258] Germany (reduction of the daily rest is limited to two hours for all jobs), Austria (reduction of the daily rest is limited to eight hours in the private sector).
[259] Germany (depending on the activities or sectors concerned the extent of the possible derogations is variable), Greece and Slovenia (limited to certain sectors or types of activities).

C. Opt-out

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

'*(a) no employer requires a worker to work more than 48 hours over a seven-day period, calculated as an average for the reference period referred to in Article 16(b)*[261]*, 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.'

1. The use of the opt-out derogation

Since the 2017 implementation report, the use in Member States of the Article 22 derogation, also known as the 'opt-out', has slightly decreased.

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

Among the 12 Member States that in 2017 applied a limited opt-out for jobs which make extensive use of on-call time, such as health or emergency services, 11 of them (Belgium, Germany, Spain, France, Croatia, Hungary, the Netherlands, Austria, Poland, Slovenia and Slovakia) have kept this approach, while Latvia ceased to apply the opt-out to medical doctors as from 1 January 2022.

[260] Ireland (collective agreements approved by the Labour Court can extend the reference period to 12 months), Slovenia (only by sectoral collective agreements and not by lower level collective agreements).
[261] Four months under Article 16(b) of the Directive. Six months where derogations pursuant to Article 19 are applied for activities mentioned in Article 17(3) or Article 18. 12 months if agreed in a collective agreement pursuant to Article 19.

Austria provides for the use of the opt-out in the public sector and in the healthcare sector. The derogation in the healthcare sector is in force for a limited period of time and requires the consent of the works council or the workers representation as well as the written consent of the worker. Until 30 June 2025 a worker may consent to work up to a weekly working time of 55 hours averaged over 17 weeks. Until 30 June 2028 individual workers may consent to an average of 52 hours[262].

Czechia applied the opt-out for health services until the end of 2013 and abrogated this derogation on 30 July 2020.

Consequently, 15 Member States now provide for the use of the opt-out. The 12 which do not are Czechia, Denmark, Ireland, Greece, Italy, Latvia, Lithuania, Luxembourg, Portugal, Romania, Finland and Sweden.

2. Protective measures

The implementing legislation in the Member States which allow the performance of more than 48 hours per week on average are with one exception clear that this requires consent from the individual worker. The implementing laws or regulations are, however, not necessarily explicit that this consent needs to be given in advance. Additionally many Member States require that the consent needs to be in writing[263].

According to the information available to the Commission, 12 out of 15 Member States have a clear transposition of the requirements laid down in Article 22(1)(c)-(e)[264]. The Commission has found that 12 out of 15 Member States have transposed measures to ensure that there is no detrimental treatment of workers who refuse to opt-out[265]. Under Hungarian legislation, workers in stand-by jobs[266] are allowed to work up to 72 hours a week. The law prohibits dismissing stand-by workers working under the system of 'scheduled weekly working time'[267] on the sole ground of not agreeing to such an 'opt-out'. Further, such workers, who wish to put an end to their opt-out, are allowed to do so, subject to a 15 days notice effective from the last day of the calendar month or the last day of the 'working time banking' arrangement, if applicable[268]. Moreover the same workers are protected against any detriment in the event of a refusal to opt-out from the maximum weekly working time. However, stand-by workers who are not submitted to the regime of scheduled weekly working time

[262] Act on Working Time in Hospitals (KA-AZG) Section 4.
[263] Belgium, Bulgaria, Germany, Estonia, Spain, Croatia, Malta, Netherlands, Austria (in healthcare), Poland, Slovenia.
[264] Belgium, Bulgaria (as regards the opt-out provision laid down in the Labour Code Article 113), Germany, Estonia, France, Croatia, Cyprus, Hungary, Malta, Poland, Slovenia, Slovakia.
[265] Belgium, Bulgaria, Germany, Estonia, France, Croatia, Cyprus, Malta, Austria, Poland, Slovenia, Slovakia.
[266] Hungarian Labour Code Section 91 and 99(3): 'Stand-by jobs' are jobs in which no work is performed at least one third of the regular working time or the work performed is significantly less strenuous and less demanding than commonly required for a regular job.
[267] 'Scheduled working time' is fixed in advance by the employer in the framework of a special system established under the Hungarian Labour Code, named 'working time banking', where the employer may offset periods of 'peaks' of activity, during which workers might be required to work longer hours, against shorter working hours worked during less work-intensive periods within a certain reference period.
[268] Hungarian Labour Code Section 99(3).

and who can work, subject to their agreement, up to 60 hours per week[269] (thus also beyond 48 hours established by the Directive), do not seem to benefit from the same protection.

In the Belgian 'voluntary overtime' scheme[270], working hour limits may be exceeded by a maximum of 120 hours per calendar year[271] under the condition that the worker initiates it. It also requires the worker's explicit written agreement, valid for a renewable period of six months, prior to the period concerned.

The Directive does not provide explicitly for a right to withdraw the worker's consent. This would, however, appear to follow from Article 22, in the light of the Court's comments in the *Pfeiffer* judgment[272].

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

Several Member States have explicit legislation which entitles workers to withdraw their consent within a certain notice period[273]. The most commonly used notice period is one month, but the starting point and length of this period vary greatly. In the Netherlands, the worker's consent is granted for a period of 26 weeks, after which it is silently renewed, unless the worker explicitly withdraws his or her consent, which must be done in a timely manner.

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

Some eight out of 15 Member States which apply the opt-out have in place some sort of explicit maximum limit on working hours over the limit of 48 per week[274].

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[269] Hungarian Labour Code Section 99(2).

[270] Law on Feasible and Flexible Work (in French: *Travail Faisable et Maniable*, in Dutch: *Werkbaar en Wendbaar Werk*) of 5 March 2017.

[271] Possibility to increase to maximum 360 hours by a collective agreement declared generally binding by Royal Decree.

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

[273] Belgium (one month), Germany (six months), Estonia (two weeks), Hungary (15 days for workers subject to 'scheduled working time arrangements'), Malta (between seven days and three months depending on the agreement between the worker and the employer), Austria (in healthcare, eight weeks), Poland (one month), Slovakia (one month).

[274] Belgium (60 hours on average and max. 72 hours in a single week), Estonia (not more 52 hours per week over a reference period of four months), Spain (may not exceed the normal 48-hour limit by more than 150 hours in total per year - equivalent to a total working time of slightly over 51 hours per week, if averaged over 12 months), Croatia (working hours may exceed 48 hours per week but as a main rule not 56 per week), Hungary (voluntary overtime for

According to the information available to the Commission, five Member States have explicit provisions which require the employer to record the working hours of workers who have chosen to opt out[275]. The recording of working hours may, however, also follow from general legislation which applies to all workers.

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

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

IX. Social partners' evaluations and Member States' views

A. Trade unions' views

In the consultation on the practical implementation of the Working Time Directive, the Commission received answers from the following European-level trade unions: the European Trade Union Confederation (ETUC), which forwarded contributions of affiliates, and the European Confederation of Independent Trade Unions (CESI). It also received input from national-level organisations.

1. Overall views

The ETUC affiliates are of the opinion that the practical application of the Directive does generally meet its objectives to protect and improve workers' health and safety. The trade unions at national level point out that the opt-out is undermining the Directive's aim, because working long hours is damaging workers' health. A multitude of research shows the detrimental effect of long and irregular working hours and of night and shift work.

The ETUC affiliates also argue that the derogation for autonomous workers has led to a structural opt-out, as Member States are increasingly making use of this provision, very often infringing the Directive's requirements. Furthermore, the trade unions at national level state that since the

healthcare workers may not exceed 12 hours a week, calculated as the average of the overtime hours (the 'bank of hours') or 24 hours a week where the overtime consists entirely of emergency medical duty), Netherlands (maximum 60 hours per week), Austria (55/52 hours averaged over 17 weeks), Slovakia (max. 56 hours per week averaged over four months).

[275] Belgium, Germany, France, Cyprus, Slovenia.

Directive does not make it clear that rules apply per worker and not per contract, this results in many workers working far more than the 48 hours limit.

2. Evaluation of transposition

The ETUC affiliates are of the opinion that the Working Time Directive has not been transposed in a satisfactory way in the different Member States. They state that in most Member States national legislation infringes the Directive as interpreted by the CJEU, but national lawmakers are taking no action on this and not adapting national legislation to the Court's rulings. CESI calls on the Commission to be active in ensuring that national legislation complies with the Directive.

The most critical problems concern:

- on-call time and, as applicable, stand-by time not being counted as working time;
- working time not being recorded;
- night work;
- compensatory rest not being taken directly after a shift;
- the reference periods being extended to 12 months by legislation rather than collective agreements;
- rights to paid annual leave not being acquired during sick leave and leave entitlements which cannot be exercised due to sick leave not being carried over;
- the use of the opt-out;
- the derogation for autonomous workers;
- tendencies to reduce the general level of protection afforded to workers which go beyond the minimum standards of the Directive.

According to CESI the most obvious problems concern the recording of working time and the exclusion of military personnel from the provisions transposing the Directive. While it might be justified on a case-by-case basis to exceed the working time limits stipulated by the Directive temporarily for a certain military operation, it is incompatible with the Directive to exclude all members of the armed forces from its scope of application. CESI considers it important that the judgment rendered by the Court in case *Ministrstvo za obrambo*[276] is fully implemented in all Member States, preventing them from deploying exemptions and derogations too widely.

The practical measurement of work performed remotely (telework) is reported to be a challenge which needs to be addressed. These working schemes often result in a blurring between rest and working time and in workers' being constantly available to employers. According to CESI, clear rules for remote working and a right to disconnect should be ensured in a binding way, taking into account the core provisions of the Directive especially in terms of minimum resting time and maximum working hours. Similarly, ETUC affiliates stress the need to define a right to disconnect

[276] Judgment in case C-742/19, *Ministrstvo za obrambo*.

at EU level, setting minimum standards for remote work, a view also shared by trade unions at national level.

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

3. Social partnership

ETUC affiliates state that in most Member States the trade union organisations are involved before the adoption of national measures transposing the Directive.

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

B. Employers' views

In the consultation on the practical implementation of the Working Time Directive, the Commission received answers from the following European-level employers' organisations: BusinessEurope, the Confederation of European Security Service (CoESS), the Council of European Employers of Metal, Engineering and Technology-based Industries (CEEMET), the Council of European Municipalities and Regions (CEMR), the Performing Arts Employers' Associations League Europe (PEARLE), the association of Services of General Interest Europe (SGI Europe) and the association of Crafts and SMEs in Europe (SMEunited). It also received input from national-level organisations.

1. Overall views

There is general and strong agreement among employers' organisations that while the practical application of the Directive meets the objective of protecting the health and safety of workers, it does not provide the necessary flexibility to adapt the working time arrangements to the needs of employers and workers. They consider its prescriptive nature and complexity creates burdens for companies, which are exacerbated by extensive interpretation of the Court going beyond the original health and safety aims of the Directive, and in particular by the specific case-law on on-call time.

2. Evaluation of transposition

The main problems of application raised by employer organisations were:

1) Significant problems and legal uncertainty as a result of the Court's judgments on on-call time and stand-by time, on recording of working time, and on annual leave.

The employer organisations state that this case-law has problematic consequences across the Member States. BusinessEurope and CoESS explain that the case-law meant that considerable amount of Member State' legislation and collective agreements were suddenly in breach of the Directive. For BusinessEurope, it added a layer of detail to the existing requirements and a heavy administrative burden on companies in practice. Some of its member federations point to the need for further clarifications, including on on-call time and compensatory rest. SGI Europe, CEEMET and CEMR point to the extensive use of on-call duty, at the workplace or elsewhere, and state that if they are all considered as working time, it constitutes a severe challenge for the organisation of the healthcare system and public services where on-call duties are necessary to save lives. It observes that the proliferation of case-law creates an unsustainable situation for many of its members trying to adapt working time arrangements and has therefore led to a growing use of opt-out in public services '*as the only way out*'.

These concerns are also voiced by employer organisations in Denmark, France, Spain, Austria and Portugal.

Employer organisations in Belgium and Germany consider the obligation to record working time could affect the currently balanced impact that the Directive has on companies and should not lead to new documentation obligations for the employer. According to a French employer organisation, the case-law on paid annual leave leads to growing legal insecrutiy for companies even if they comply with national legislation.

2) National laws that are stricter than the minimum requirements in the Directive and do not make enough use of available derogations.

This problem is particularly mentioned by BusinessEurope, employer organisations in Bulgaria, Germany and Portugal, SGI Europe and CoESS. They consider it constrains working-time flexibility, burdens companies and is not adapted to the requirements of a globalised and digital world of work. Finding that some Member States do not give enough flexibility to social partners, PEARLE stresses the need for social partners to negotiate derogations to ensure flexibile work-patterns in the live performance sector.

3. Social partnership

BusinessEurope considers that in general there is good involvement of social partners, as do most members of CEEMET and SMEunited that report that social partners are in general sufficiently consulted and involved by national authorities over transposition of the Directive.

PEARLE reports that in the live performance sector, cross-industry social partners have generally been consulted, while this has not always been the case for sectoral social partners.

For all employer organisations and their members, the possibilities to derogate using collective agreements or agreements concluded between the two sides of industry are seen as positive, if not crucial, as they allow some flexibility and the possibility to find effective solutions for workers and employers.

The possibility to extend the reference period for calculating weekly working time from four to 12 months by collective agreement is cited as an example of good practice by some member federations. However, others consider that the Directive is too restrictive as it makes the use of this possibility conditional on obtaining collective agreement.

C. Member States' views

The Member States were asked for their views on the impact of the Directive and on the challenges encountered with the practical implementation of its provisions. Most Member States report that the Directive continues to meet its objectives by providing an adequate and solid framework for taking action on occupational health and safety.

Among the challenges mentioned, the distinction between 'working time' and 'rest periods' is reported to have caused problems of interpretation[277]. Several Member States would find it useful to clarify the concept of working time with regard to on-call and stand-by duties[278] as well as with regard to time spent travelling[279]. Clarification would also be welcome on the workers' right to compensatory rest[280].

France would find it appropriate to reconsider the binary distinction between working and rest time to take better account of intermediate periods of time. This would facilitate the organisation of working time within medical and social care professions, in particular of live-in caregivers.

Some Member States suggested codifying judgments of the Court interpreting the Directive, notably concerning the concept of 'working time'[281] and the employers' obligation to record workers' working time[282].

According to Czechia, Ireland and Slovenia, consideration should be given to increasing working time flexibility by providing that the reference period for averaging out the maximum weekly working time of 48 hours may be extended to 12 months by law without the requirement for collective agreement. Cyprus is in favour of clarifying that the maximum weekly working time limit

[277] Finland.
[278] Belgium, Czechia, Denmark, Ireland, France, Croatia, Slovenia, Finland.
[279] Belgium, Croatia.
[280] Denmark, Hungary.
[281] Italy (case C-518/15, *Matzak*), Netherlands (case C-303/98, *Simap*; case C-151/02, *Jaeger*).
[282] Italy (case C-55/18, *CCOO*).

stipulated in the Directive applies per worker to resolve possible doubts concerning workers employed by two or more employers. To meet a rising demand for workers, Croatia expressed interest to reflect on amending the working hour limits in relation to compulsory daily and weekly rest periods.

Sweden endorsed the fact that the Directive provides discretion to the social partners to agree on the organisation of working time and to conclude collective agreements on sectoral adaptations.

France sees a need for a targeted revision of the Directive in view of the specificities of the activities carried out by the armed forces. France proposed to revise the Directive by allowing for the exclusion of military personnel from its scope of application in order to respect the diversity of military organisation in the Member States.

Several Member States mentioned the challenges of the increasing incidence of new work patterns (e.g. platform work), remote working and working from home due to both digitalisation and the impact of the Covid-19 pandemic, which increasingly blur the boundary between working time and rest periods and make work organisation more and more flexible[283].

The significant increase in the number of workers working from home or from a place other than their employer's premises, has presented several Member States with various challenges in relation to working time including how to record working hours effectively and issues around data protection and the right to disconnect[284]. Several Member States wish to have clarification how to manage and record working time in relation to remote working[285].

Teleworking is reported to be perceived as allowing workers to work in a time-flexible manner, giving them greater autonomy in organising their working time[286]. Working from home offers the possibility of distributing daily working hours over the day, including with multiple interruptions, which challenges the Directive's provisions on breaks and continuous rest periods[287].

A number of Member States mentioned that the Directive is conceived for the organisation of working time within traditional forms of work, and propose reconsidering the Directive's provisions in view of technological progress and new work patterns[288]. Several Member States emphasised the importance of the protective aspects of the Directive and favour more detailed legislation of working time and granting of rest periods for remote workers, as well as on the communication between employers and their workers[289]. Two Member States expressed their interest in refining the Directive's flexibilities and derogations to take account of workers' increased autonomy in organising their working time through new work patterns[290].

[283] Germany, Ireland, Hungary.
[284] Czechia, Ireland, Slovenia.
[285] Ireland, Spain, Slovenia, Slovakia.
[286] Germany, Croatia.
[287] Germany.
[288] Bulgaria, Czechia, Greece, Croatia, Lithuania, Portugal, Romania, Slovakia.
[289] Czechia, Greece, Croatia, Slovakia.
[290] Bulgaria, Romania.

Other Member States favour assessing the functioning of the Directive in respect of working schemes giving workers more freedom to determine where and when to work[291]. A number of Member States are of the opinion that the Directive remains fit to deal with new trends in the world of work[292].

X. Monitoring and enforcement at national level

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

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

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

Social partners' views

BusinessEurope considers that in the vast majority of Member States there is effective monitoring and control. PEARLE, CoESS and almost all of the contributing members of CEEMET, SGI Europe and SMEunited also consider the enforcement and monitoring of the Directive at national level to be satisfactory.

Only few of their members express concerns, namely that monitoring should be better developed and that fines are too high.

Both ETUC affiliates and CESI express dissatisfaction with enforcement at national level. More resources are needed to improve monitoring of the implementation of the Directive. This view is shared by the trade unions at national level which report that enforcement authorities are severely under-resourced. Weak enforcement was especially emphasised by national trade unions in Germany, Ireland and the Netherlands.

The trade unions at national level stress that a better implementation and enforcement of the applicable provisions would improve the working conditions of workers to a great extent.

[291] Portugal, Finland.
[292] Estonia, Latvia, Luxembourg, Malta, Austria, Poland, Sweden.

XI. Covid-related measures in the field of working time

The global Covid-19 pandemic, which affected all Member States as from early 2020, has deeply impacted the world of work. Legislative and/or regulatory measures taken by public authorities to limit the spread of disease led to certain sectors of activity being shut down during periods of 'lockdown' lasting for weeks or months on end, or significantly reduced levels of activity, whereas workers in other sectors faced a greatly increased workload. In this context, Member States have adopted a variety of measures adapting the rules applicable to working conditions, notably working time, by making them more flexible, while at the same time ensuring a degree of protection to the workers concerned. Most of these measures were temporary and are no longer in force.

The outbreak of the pandemic prompted a number of Member States to permit extended working time, for instance by increasing the maximum daily and weekly working time limits[293] and possibilities to work overtime[294] as well as reducing the duration of the minimum daily[295] or weekly rest[296], generally only in a limited number of sectors of activity considered as essential or critical, notably health services. Several Member States authorised employers to require workers to take annual leave[297].

In connection with low levels of activity or even shut-down in certain sectors, short-time working[298] or partial unemployment[299] schemes involving financial support by public authorities were introduced or re-activated, allowing for workers' working time to be reduced, or their duty to perform work to be suspended altogether, with compensation for loss of income. Measures also included, for instance, extended possibilities for carry-over of annual leave[300].

Restrictions introduced on sanitary grounds across the EU have entailed mandatory home-based telework for a sizeable proportion of workers. When the sanitary situation allowed for a progressive easing of restrictions, mandatory telework has, to a large extent, given way to more use of voluntary telework.

National litigation about Covid-related measures is starting to feed through to preliminary references before the Court of Justice. The Court will bring clarifications on the interpretation of the Working Time Directive in this particular context, notably on the question whether a worker who is

[293] Germany (maximum of 12 hours per day and 60 hours per week), Luxembourg (maximum of 12 hours per day and 60 hours per week in the sectors mentioned in the table of essential activities).
[294] Belgium, France (public healthcare sector), Latvia (maximum of 60 hours of work per week including overtime, notably in the public healthcare sector), Slovenia, Finland.
[295] Germany (minimum of nine hours), Poland (minimum of eight hours).
[296] Austria (derogations for certain professional groups), Poland (minimum of 32 hours comprising at least eight hours of uninterrupted daily rest).
[297] Bulgaria, France (including changing the dates of already authorised annual leave, up to initially six and later eight working days), Latvia, Austria (up to two weeks of annual leave from the entitlements of the current year plus the entitlements carried over from previous years, with an overall limit of eight weeks).
[298] Germany, Lithuania (downtime, with funding through the EU's SURE programme), Hungary, Austria, Poland, Romania, Slovenia.
[299] Luxembourg.
[300] Slovenia.

placed in quarantine during a previously authorised period of annual leave can have that leave postponed to a later point in time[301].

XII. Conclusions

Overall views

- In general terms, the large majority of workers in the EU are covered by working time rules that respect EU legislation. In many cases national rules afford greater protection than the minimum standards set out in the Directive.
- Member States' legislation is generally compliant with the requirements of the Directive.
- Some problems of transposition remain. Incorrect transposition of derogations from daily and weekly rest, including compensatory rest, is the most common problem. Some Member States still do not define on-call time at all or do not apply it appropriately in some sectors (e.g. health, security, law enforcement and emergency services).
- During the reporting period most Member States took measures, usually on a temporary basis, to adapt working time requirements to the exceptional sanitary restrictions imposed during the Covid-19 pandemic.
- The Member States are still divided in terms of whether they apply the Directive's limits on working time for each individual worker or for each employment relationship/contract. About half of Member States apply the limits per worker.

Scope

- Certain sectors or categories of workers are excluded from the scope of the legislation transposing the requirements of the Directive. In the public sector this is most common for the armed forces, police and civil protection services. As for the private sector, several Member States exclude domestic workers.

Definition of working time

- Generally the practice in the Member States is in accordance with the general definition set out in the Directive.
- The challenges of responding to the Court's recent case-law, notably on the qualification of stand-by time and on the recording of working time, have not yet been addressed widely.

[301] A ruling of the Court on this issue can be expected in case C-206/22.

Breaks and rests

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

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

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

Paid annual leave

- All Member States explicitly provide for a right to at least 4 weeks' annual paid leave.
- The most common problems are on the taking of annual leave during the first year of employment and on the worker's right to acquire annual leave when on sick leave and to carry over acquired leave rights for a sufficiently long period.
- As regards pay, Member States' legislation is by and large compatible with the Directive.
- All the Member States provide for an entitlement to a payment in lieu when the employment relationship ends without annual leave being taken, but some Member States still impose restrictions on eligibility for such payments.

Night work

- Member States transpose the eight-hour average limit as regards the work of night workers, with reference periods varying from one week to 26 weeks.
- A number of Member States do not apply specific limitations on the average working time of night workers, but set only a general limit of eight hours and a general reference period for a maximum working time of four months. A reference period of four months is in any case too long to ensure effective protection for night workers.
- Two Member States appear not to have transposed the eight-hour absolute limit for work involving special hazards or heavy strain, while one allows for certain exceptions for this kind of work which are not provided for in the Directive.

- The entitlement to a free health assessment before the assignment of a worker to night work, and at regular intervals after that, appears in general to have been satisfactorily transposed. This is also the case for the requirement to ensure that night workers who are 'suffering from health problems recognised as being connected with the fact that they perform night work' can be transferred to day work whenever possible.

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

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

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

- Member States have generally transposed and made use of the possibilities for derogations for certain activities provided in Article 17(3) of the Directive.
- The national laws of many Member States appear to exceed the derogations allowed under the Directive notably:
    - by not imposing any requirement for equivalent compensatory rest to be provided to the worker concerned;
    - by setting a timeframe for granting compensatory rest periods which does not ensure that the compensatory rest period follows immediately after the working time it is supposed to make up for. The equivalent compensation for missed parts of daily rest may be provided within periods ranging from 14 days to six months in certain activities or sectors and for weekly rest within periods ranging from six weeks to six months.

Opt-out

- The number of Member States permitting use of the opt-out has slightly decreased. Czechia and Latvia no longer apply the opt-out in the healthcare sector. The core requirement to obtain the worker's agreement or consent is transposed in almost all cases where this derogation is used. The other protective requirements explicitly stated in the Directive are generally satisfactorily transposed.