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COMMUNICATION FROM THE COMMISSION

**Interpretative Communication 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**

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I. Introduction

The Working Time Directive¹ (the ‘Directive’ or the ‘Working Time Directive’) is a key element of the acquis of the European Union (the ‘EU’). It has become one of the cornerstones of Europe’s social dimension. The first Directive of general application in the field of working time was adopted almost 25 years ago.²

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

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

As rights guaranteed by the Charter, the limitation of maximum working hours, daily and weekly rest periods and paid annual leave are subject to Article 52 of the Charter which provides that: ‘*Any limitation on the exercise of the rights and freedoms recognised by this Charter must be provided for by law and respect the essence of those rights and freedoms. Subject to the principle of proportionality, limitations may be made only if they are necessary and genuinely meet objectives of general interest recognised by the Union or the need to protect the rights and freedoms of others.*’.

A. *Meeting the challenges of changing work organisation*

The Directive itself came into force more than twenty years ago, in a society where, overall, employment was more stable and work organisation more standardised in the common ‘9 to 5’ workday, with mobile work, shift work or night work more exceptional than they are now.

Since then, we have witnessed important changes in society and economy including ICT developments, changes in global value chains, increased female labour market participation and new demographic challenges. This has deeply impacted the world of work. Over the years, new forms of employment relationships have emerged, with an increase in part-time and temporary employment.

Workers are increasingly seeking autonomy, more flexible working lives as well as wellbeing in the workplace. New business models in global value chains with just-in-time production require increased flexibility and sometimes lead to an intensification of work. As a result, the

¹ 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.

² Council Directive 1993/104/EC of 23 November 1993 concerning certain aspects of the organization of working time, *OJ L 307*, 13.12.1993, p.18-24.

changing work environment and flexible working arrangements are recognised as the leading driver of changes in the world of work³.

Digitalisation leads to an increasing fragmentation of work, both with regard to location and to time. About 30% of people in employment are working in multiple locations, but only 3% of people are teleworking from home and 8% are exclusively ICT-mobile workers⁴. At the same time, digital technology is opening the way to new possibilities of monitoring working time.

In parallel, companies use novel working time arrangements, often developed through collective agreements, to respond to their specific needs⁵. New forms of employment such as ICT-based mobile work and portfolio work offer significant advantages for employees to organise their work time flexibly, while at the same time entailing dangers such as increased working time⁶ and possible impacts on the health and safety of the workers concerned⁷. Such arrangements are made possible since the Working Time Directive sets out minimum standards and aims to *'avoid imposing administrative, financial and legal constraints in a way which would hold back the creation and development of small and medium-sized undertakings'* according to its Recital 2.

Aspirations for more flexibility from employers, in a 24/7, globalised and highly competitive economy, and from employees, notably seeking better work-life balance, must be reconciled with risks to the health and safety of workers in terms of working time.

This is one of several elements taken up in the broad consultation which the European Commission initiated in 2016 with EU institutions, Member States, social partners, civil society and citizens on a European Pillar of Social Rights.

The need to ensure a healthy and safe work environment is at the core of the Commission's proposal for the European Pillar of Social Rights. A wide consultation on the first outline of the Pillar confirmed the importance of working time arrangements adapted to new forms of work and which preserve workers' health and safety.

In particular, the contributions with regard to new forms of work, health and safety and working time pointed on the one hand to the flexibility needed by employers to respond with their workforce to changing economic circumstances and on the other hand to the need to preserve the workers' health and safety by protecting their right to reasonable working time. The need for the legal framework and collective agreements between social partners to support work-life balance and autonomy in time management and work arrangements were other recurrent issues brought up in the replies.

In its Opinion on the launch of a consultation on a European Pillar of Social Rights, the European Economic and Social Committee stressed the need to accompany longer working careers *'by a life-cycle approach encompassing good working conditions, including health*

³ World Economic Forum, The Future of Jobs, 2016. 44% of the respondents surveyed identified this as the major driver for change in the world of work.

⁴ Eurofound, 6th European Working Conditions Survey: Overview Report, 2015, pages 62 and 86.

⁵ Eurofound, New forms of employment, 2015, page 49.

⁶ Eurofound, New forms of employment, 2015, page 138.

⁷ Eurofound, New forms of employment, 2015, page 139.

*and safety and working time policies*⁸. The European Parliament, in its Resolution of 19 January 2017, also specifically recalled that *‘the right to healthy and safe working conditions also involves protection against workplace risks as well as limitations on working time and provisions on minimum rest periods and annual leave’* and *‘urges Member States to fully implement the relevant legislation’*⁹.

Additionally, the need to better enforce and implement the existing *acquis* was a recurrent topic in the consultation on the European Pillar of Social Rights. Many stakeholders pointed as well to the need to increase awareness of existing social rights and to better support national implementation.

This is why the Commission is presenting two documents: the present Interpretative Communication (the ‘Communication’) and the Implementation Report¹⁰ foreseen in Article 24 of the Directive. The first aims to increase legal certainty and clarity, while the second analyses the state of play as regards the transposition of the Directive. Jointly, these documents share the goal of allowing Member States to ensure a better implementation of the Directive in order to make sure that these deliver better results for citizens, businesses and public authorities.

This initiative on the clarification and implementation of the Working Time Directive¹¹ is an integral part of the implementation of the European Pillar of Social Rights and corresponds to the objectives of the Commission in respect of effective application, implementation and enforcement as presented in the Communication *‘EU Law: Better Results through Better Application Communication’*¹².

B. An important corpus of case-law and thorough review process

This initiative is all the more relevant in light of the number of interpretations which have been given by the Court of Justice of the European Union (‘the Court’). Indeed, since 1993, more than 50 judgments and orders of the Court have dealt with the Working Time Directive and interpreted its provisions, including the scope and limitations of the flexibility it affords.

Case-law on this scale makes it difficult for Member States, employees and employers, other stakeholders such as social partners or labour inspectorates and interested citizens to understand the exact content and extent of the Directive’s provisions. Yet this jurisprudence is key to ensuring correct implementation of the Directive since misunderstandings or lack of

⁸ Opinion of the European Economic and Social Committee on the Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, Launching a consultation on a European Pillar of Social Rights, SOC/542-01902-00-03-ac, para. 3.23.

⁹ European Parliament, Resolution of 19 January 2017 on a European Pillar of Social Rights, 2016/2095(INI).

¹⁰ Report from the Commission on the implementation of Directive 2003/88/EC, COM(2017) 254, and the detailed report, SWD(2017) 204.

¹¹ Commission Staff Working Document, Regulatory Fitness and Performance Programme REFIT and the 10 Priorities of the Commission Accompanying the document Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, Commission Work Programme 2017, Delivering a Europe that protects, empowers and defends, SWD/2016/0400 final.

¹² Communication from the Commission, EU law: Better results through better application, C/2016/8600, OJ C 18, 19.1.2017, p. 10–20.

awareness of the latest developments in case-law may in turn lead to compliance issues and to avoidable complaints or litigation.

The present Communication follows a series of unsuccessful attempts by the EU institutions to review the Directive between 2004 and 2009 and is also the culmination of a thorough review process which has been carried over the past 7 years.

This review process included a two stage consultation of EU Social Partners in 2010 as well as a public consultation and several external studies carried out in the period 2014-2015.

In the period 2010-2012 the review was suspended in view of the negotiations between the cross-industry social partners, which aimed at redesigning in a balanced manner the legal framework in the area of working time, and which did not conclude in an agreement. The Commission resumed the review process, including a public consultation, several external studies and the assessment of options for follow-up, in 2013.

Taking into account all the elements which fed into this process, one of the conclusions of the Commission's review is that the Working Time Directive remains a relevant instrument. The various consultation processes also showed awareness among many stakeholders of the difficulty of coming to an agreement on a revised Directive which would satisfy all parties' positions and that would allow for a balanced result.

Nevertheless, the review confirms the existence of very concrete challenges in terms of implementing the Directive due to constantly evolving patterns of work arrangements. The Working Time Directive is indeed complex to implement due to the unclarity of some of its provisions, including its derogations, the volume of already existing case-law and the interaction of the text with ongoing changes to the world of work.

C. A renewed engagement to support legal clarity and certainty

Therefore, in line with the Commission's new '*Better Results through Better Application*' approach¹³, this Communication aims to contribute to an effective application, implementation and enforcement of the existing EU law and to help the Member States and the public ensure that EU law is applied effectively.

Its specific objectives are:

- to offer greater certainty and clarity to national authorities on the obligations and flexibilities contained in the Directive to help reduce burdens and infringements;
- to help better apply the Directive's provisions in the context of new and flexible work arrangements;
- to ensure the effective enforcement of existing EU minimum standards contained in the Directive and therefore support better protection of workers' health and safety against risks associated with excessive or inappropriate working hours and inadequate rest periods, to the benefit of all parties.

¹³ Communication from the Commission, EU law: Better results through better application, C/2016/8600, OJ C 18, 19.1.2017, p. 10–20.

The Communication aims to bring legal clarity and certainty to the Member States and other involved stakeholders when applying the Working Time Directive and to assist national authorities, legal practitioners and social partners in its interpretation. To that end, it brings together in a single document the provisions of the Directive and the case-law of the Court that interpreted them.

In addition, the Communication presents the Commission's standpoint on several aspects. In doing so, the Commission bases itself as much as possible on existing case-law and takes into account the guiding principles for interpreting EU law: the wording¹⁴, context and objectives of the Working Time Directive¹⁵. In cases where these elements do not point to a specific outcome, the Commission employs the *in dubio pro libertate* principle in order to give guidance on possible gaps in the Directive and its case-law, bearing in mind the Directive's purpose to improve workers' safety and health at work.

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

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

D. An overview of the main provisions

In respect of its [material scope of application](#), the Directive is applicable to all sectors of activity, including to those which deal with events which, by definition, are unforeseeable, such as firefighting or civil protection services. Indeed, the Court has held that the exclusion from the scope of the Directive was strictly limited to exceptional events such as '*natural or technological disasters, attacks, serious accidents or similar events*'¹⁶.

¹⁴ With respect to the Directive's wording, it can be pointed out at the outset that, as was recognised by Advocate General Kokott in her observations on case C-484/04, '*The wording of the different provisions of the Directive is highly inconsistent depending on language version and also within individual language versions*'. This means that any analysis of the Directive's provisions must take into account not only the wording in a single language but that of several versions in order to identify the intended meaning of the provision examined. See Opinion of Advocate General Kokott of 9 March 2006, *Commission of the European Communities v United Kingdom of Great Britain and Northern Ireland*, C-484/04, ECLI:EU:C:2006:166, paras. 62-64.

¹⁵ See Opinion of Advocate General Kokott of 9 March 2006, *Commission of the European Communities v United Kingdom of Great Britain and Northern Ireland*, C-484/04, ECLI:EU:C:2006:166, para. 22.

¹⁶ Order of 14 July 2005, *Personalrat der Feuerwehr Hamburg v Leiter der Feuerwehr Hamburg*, C-52/04, ECLI:EU:C:2005:467, para. 54.

As concerns the [definition of working time](#), the Court has given specific guidance in particular in its *SIMAP*, *Jaeger* and *Dellas* cases¹⁷. It held that the time spent 'on-call' by workers is to be regarded in its entirety as working time within the meaning of the Directive if they are required to be present at the workplace and that by contrast, where workers must be reachable at all times but are not required to remain at a place determined by the employer, also called 'standby time', only the time linked to the actual provision of services must be regarded as working time.

As to the main provisions established by the Directive, the Communication mentions the relevant case-law as well as clarifies the various possibilities for application arising from the text of the Directive itself.

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

On [paid annual leave](#), the Communication outlines the extensive case-law of the Court which covers various aspects ranging from the obligation to grant workers with a right to carry-over untaken paid annual leave where they did not have the opportunity to exercise that right, for example due to sick leave¹⁸ to the clarification that additional periods of paid annual leave granted by the Member States in excess of the 4 weeks required by the Directive can be subject to conditions set out in national law¹⁹.

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

For example, the derogation permitted for [autonomous workers](#) is neither automatically applicable nor limited to the three categories of workers listed in the relevant article (managing executives or other persons with autonomous decision-taking powers; family workers and workers officiating at religious ceremonies in churches and religious communities) but requires that the working time of the workers concerned is not measured and/or predetermined as a whole²⁰ or that it can be determined by the workers themselves.

¹⁷ 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.

¹⁸ Judgment of 10 September 2009, *Francisco Vicente Pereda v Madrid Movilidad SA*, C-277/08, ECLI:EU:C:2009:542, para. 19.

¹⁹ Judgment of 24 January 2012, *Maribel Dominguez v Centre informatique du Centre Ouest Atlantique and Préfet de la région Centre*, C-282/10, ECLI:EU:C:2012:33, paras. 47-49; Judgment of 3 May 2012, *Georg Neidel v Stadt Frankfurt am Main*, C-337/10, ECLI:EU:C:2012:263, paras. 34-37.

²⁰ Judgment of 7 September 2006, *Commission of the European Communities v United Kingdom of Great Britain and Northern Ireland*, C-484/04, ECLI:EU:C:2006:526, para. 20; Judgment of 14 October 2010, *Union syndicale Solidaires Isère v Premier ministre and Others*, C-428/09, ECLI:EU:C:2010:612, para. 41.

Also, in respect of the [individual opt-out](#) from the 48 hour weekly limitation to working time, the Commission recalls that the consent has to be individual and cannot be replaced by consent given by trade-union representatives for example in the context of a collective agreement²¹ and that workers must be protected against any detriment, and not only against a dismissal, where they do not or no longer agree to opt-out.

In terms of its format, the Communication follows as far as possible the order of the Directive's chapters and articles. However, it does not deal with Article 17(5) on doctors in training and Articles 24, 25, 26 and 27 on reports, review of the provisions with regard to workers on board seagoing fishing vessels and workers concerned with the carriage of passengers and repeal. The first is excluded because the derogations have expired and the latter are not tackled due to their procedural nature.

II. Legal basis and purpose of the Directive

The previous 1993 Working Time Directive²² was based on Article 118a of the Treaty establishing the European Community. This enabled minimum requirements to be adopted for gradual implementation with a view to '*encouraging improvements, especially in the working environment, as regards the health and safety of workers*'.

In reply to a challenge to the use of this legal basis, the Court confirmed that it embraced all factors, physical or otherwise, capable of affecting the health and safety of workers in their working environment, including certain aspects of the organisation of working time. The Directive was therefore properly adopted on its basis²³.

As a result, the current Directive, which repealed and replaced the 1993 one, was adopted by the European Parliament and the Council on the basis of the successor Article 137(2) of the Treaty establishing the European Community²⁴. This allows the adoption of directives establishing minimum requirements with a view to improving in particular the working environment to protect the health and safety of workers.

Except for the increased scope of the Directive and deletion of the earlier provision that weekly rest should '*in principle, include Sunday*', the provisions of the currently applicable Working Time Directive are drafted in terms which are essentially identical to those of the previous Directives of 1993 and 2000²⁵. For this reason, the developments set out in the Communication take into account, where appropriate, the answers given by the Court to questions referred to in the previous Directives. Unless otherwise provided, the provisions

²¹ Judgment in case C-303/98, *op. cit.*, para. 74; Judgment of 5 October 2004, *Bernhard Pfeiffer, Wilhelm Roith, Albert Süß, Michael Winter, Klaus Nestvogel, Roswitha Zeller and Matthias Döbele v Deutsches Rotes Kreuz, Kreisverband Waldshut eV*, C-397/01 to C-403/01, ECLI:EU:C:2004:584, para. 80.

²² Council Directive 93/104/EC of 23 November 1993 concerning certain aspects of the organisation of working time, OJ L 307, 13.12.1993, p. 18-24.

²³ Judgment of 12 November 1996, *United Kingdom of Great Britain and Northern Ireland v Council of the European Union*, C-84/94, ECLI:EU:C:1996:431, paras. 15-49; Judgment in case C-151/02, *op. cit.*, para. 93.

²⁴ Now Article 153(2) of the Treaty on the Functioning of the European Union.

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

presented in this Communication are therefore extracted from the currently applicable text of Directive 2003/88/EC. Reference is made to the prior texts where necessary²⁶.

In line with its legal basis, the purpose of the Directive as laid down in Article 1(1) and in several recitals of it²⁷ is to establish ‘*minimum safety and health requirements for the organisation of working time*’.

The legal basis and purpose of the Directive are guiding principles in the Court’s interpretation of it and must therefore be taken into account. In addition, in line with Recital 4 of the Directive, which states that ‘[t]he improvement of workers’ safety, hygiene and health at work is an objective which should not be subordinated to purely economic considerations’, the Court has refused to take into account the economic and organisational consequences raised by Member States as to whether time spent on-call qualifies as working time²⁸.

III. Scope of the Directive

A. *Personal scope*

1. Application of the Directive’s provisions to ‘workers’

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

This concept of ‘worker’ is not defined in the Directive itself. The accompanying document to the proposal for the 1993 Working Time Directive²⁹ suggested that the definition in the 89/391/EEC Directive³⁰ would apply, i.e. ‘*any person employed by an employer, including trainees and apprentices but excluding domestic servants*’. However, the Court has refuted this on the grounds that the Working Time Directive itself made no reference to this provision of Directive 89/391/EEC. It also excluded the application of a definition derived from national legislation and/or practices³¹.

On the contrary, the Court held that this concept could not be interpreted differently according to the law of Member States but had an autonomous meaning specific to European Union law. It considered that the concept of worker could not be interpreted narrowly³² and concluded that it ‘*must be defined in accordance with objective criteria which distinguish the employment relationship by reference to the rights and duties of the persons concerned. The essential feature of an employment relationship, however, is that for a certain period of time a*

²⁶ The purpose of this Interpretative Communication however remains to present the state of play of the applicable text and modified provisions will therefore not be examined unless relevant for the developments. This is notably the case for the provision establishing that the weekly rest period should normally fall on Sundays and for the exclusion of transport sectors from the Directive which no longer exist as such.

²⁷ See notably recitals 2 and 4.

²⁸ Judgment in case C-151/02, *op. cit.*, paras. 66-67.

²⁹ Explanatory memorandum concerning the proposal for a Council Directive concerning certain aspects of the organisation of working time, 20 September 1990, COM(90)317 final — SYN 295, p. 3.

³⁰ Council Directive 89/391/EEC of 12 June 1989 on the introduction of measures to encourage improvements in the safety and health of workers at work, OJ L 183, 29.6.1989, p. 1-8.

³¹ Judgment in case C-428/09, *op. cit.*, para. 27.

³² Order of 7 April 2011, *Dieter May v AOK Rheinland/Hamburg — Die Gesundheitskasse*, C-519/09, ECLI:EU:C:2011:221, para. 21.

person performs services for and under the direction of another person in return for which he receives remuneration'³³. The Court thereby linked the interpretation of 'worker' for the purposes of Directive 2003/88/EC to that established by case-law in the context of the free movement of workers as laid down in Article 45 of the Treaty.

The Court holds that *'[i]t is for the national court to apply that concept of a 'worker' in any classification, and the national court must base that classification on objective criteria and make an overall assessment of all the circumstances of the case brought before it, having regard both to the nature of the activities concerned and the relationship of the parties involved.'*³⁴.

However, it has issued guidance on the application of these criteria and established that the category 'worker' under EU law is independent from the national one³⁵. It has for example held that employees in a body governed by public law qualify as 'workers' irrespective of their civil servant status³⁶. It also reasoned that casual and seasonal staff employed under fixed-term contracts who are not subject to certain provisions of the national labour code fall within the scope of the concept of 'workers'³⁷. The Court has also ruled that the concept of worker could cover a person admitted to a work rehabilitation centre, regardless of the person's productivity level, the origin of the funds linked to remuneration or the limited amount of remuneration³⁸.

It is not the status of the person under national law that is decisive for the applicability of the Working Time Directive. On the contrary, its applicability will depend on whether the person concerned qualifies as a 'worker' according to the EU jurisprudential definition of worker. This is based on aspects of his/her concrete working arrangements, in particular on whether the person performs effective and genuine activities under the direction and supervision of another person and for remuneration.

This in turn means that certain persons qualified as 'self-employed' under national law could nonetheless be categorised as 'workers' by the Court of Justice for the purpose of the application of the Working Time Directive³⁹. The Court indeed held that *'the classification of a 'self-employed person' under national law does not prevent that person being classified as an employee within the meaning of EU law if his independence is merely notional, thereby disguising an employment relationship'*⁴⁰. The Court pointed to the following elements as possible indicators of the 'worker' qualification: if the person acts under the direction of his employer as regards, in particular, his freedom to choose the time, place and content of his

³³ Judgment in case C-428/09, *op. cit.*, para. 28.

³⁴ Judgment in case C-428/09, *op. cit.*, para. 29.

³⁵ Judgment in case C-428/09, *op. cit.*, para. 30.

³⁶ Order in case C-519/09, *op. cit.*, paras. 25-26.

³⁷ Judgment in case C-428/09, *op. cit.*, paras. 30-32.

³⁸ Judgment of 26 March 2015, *Gérard Fenoll v Centre d'aide par le travail 'La Jouvène' and Association de parents et d'amis de personnes handicapées mentales (APEI) d'Avignon*, C-316/13, ECLI:EU:C:2015:200, paras. 29-41.

³⁹ See by analogy, Judgment of 4 December 2014, *FNV Kunsten Informatie en Media v Staat der Nederlanden*, C-413/13, ECLI:EU:C:2014:2411, paras. 35- 37.

⁴⁰ Judgment in case C-413/13, *op. cit.*, para. 35.

work⁴¹, if the person does not share the employer's commercial risks⁴² and if he/she forms an integral part of the employer's undertaking for the duration of that relationship⁴³.

Although there is no specific case-law to date on the situation of 'volunteers', 'trainees' or of persons under zero-hours or civil-law contracts in respect of the Working Time Directive, the same assessment, on the basis of the criteria presented above, could lead to individuals under any form of contractual relationships being categorised as 'workers' and therefore being covered by the Working Time Directive.

2. Application of the Directive in case of concurrent contracts

The Working Time Directive establishes minimum requirements for 'workers'. However, it does not explicitly state whether its provisions set absolute limits in case of concurrent contracts with one or more employer(s) or if they apply to each employment relationship separately. The Court has not yet had to rule on this point.

As indicated in previous reports⁴⁴, the Commission considers that, in the light of the Directive's objective to improve the health and safety of workers, the limits on average weekly working time and daily and weekly rest should as far as possible, apply per worker. Taking into account the need to ensure that the health and safety objective of the Working Time Directive is given full effect, Member States' legislation should provide for appropriate mechanisms for monitoring and enforcement.

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

B. Material scope — sectors concerned

1. Principle: the Directive applies to all sectors

Article 1 of the Working Time Directive provides that:

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

⁴¹ Judgment of 13 January 2004, *Debra Allonby v Accrington & Rossendale College, Education Lecturing Services, trading as Protocol Professional and Secretary of State for Education and Employment*, C-256/01, ECLI:EU:C:2004:18, para. 72.

⁴² Judgment of 14 December 1989, *The Queen v Ministry of Agriculture, Fisheries and Food, ex parte Agagate Ltd*, C-3/87, ECLI:EU:C:1989:650, para. 36.

⁴³ Judgment of 16 September 1999, *Criminal proceedings against Jean Claude Becu, Annie Verweire, Smeg NV and Adia Interim NV*, C-22/98, ECLI:EU:C:1999:419, para. 26.

⁴⁴ 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.

Article 2 of Directive 89/391/EEC on the introduction of measures to encourage improvements in the health and safety of workers at work⁴⁵ to which reference is made provides that:

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

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

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

In accordance with well-established case-law of the Court, which takes account of the objective of the Directive, namely to encourage improvement in the health and safety of workers at work, and of the wording of Article 2(1) of Directive 89/391/EEC, the scope of the Working Time Directive must be interpreted broadly⁴⁶.

As a consequence, exclusion from the scope set out in Article 2(2) of Directive 89/391/EEC must be interpreted restrictively⁴⁷ and *‘in such a way that its ambit is confined to what is strictly necessary in order to safeguard the interests which it enables the Member States to protect’*⁴⁸.

In point of fact, the Court has ruled that this exclusion does not apply to the sectors of activity considered in their entirety. Its sole aim is to ensure *‘the proper operation of services essential for the protection of public health, safety and order in cases, such as a catastrophe, the gravity and scale of which are exceptional and a characteristic of which is the fact that they are liable to expose the health and safety of workers to considerable risk and that, by their nature, they do not lend themselves to planning as regards the working time of teams of emergency workers’*⁴⁹.

The Court has established that although certain services must deal with events which, by definition, are unforeseeable, the activities which they entail in normal conditions and which also correspond to the duties specifically assigned to a service of that kind are nonetheless capable of being organised in advance, including the working hours of staff and the prevention of risks to safety and/or health⁵⁰.

⁴⁵ Council Directive 89/391/EEC of 12 June 1989 on the introduction of measures to encourage improvements in the safety and health of workers at work, OJ N° L 183, 29.6.1989, p. 1-8.

⁴⁶ Judgment in case C-303/98, *op. cit.*, para. 34.; Judgement in case C-428/09, *op. cit.*, para. 22.

⁴⁷ Judgment in case C-303/98, *op. cit.*, para. 35; Order of 3 July 2001, *Confederación Intersindical Galega (CIG) v Servicio Galego de Saude (SERGAS)*, C-241/99, ECLI:EU:C:2001:371, para. 29; Judgment in joined cases C-397/01 to C-403/01, *op. cit.*, para. 52; Order in case C-52/04, *op. cit.*, para. 42; Judgment of 12 January 2006, *Commission of the European Communities v Kingdom of Spain*, C-132/04, ECLI:EU:C:2006:18, para. 22;; Judgment in case C-428/09, *op. cit.*, para. 24.

⁴⁸ Order in case C-52/04, *op. cit.*, para. 44; Judgement in joined cases C-397/01 to C-403/01, *op. cit.*, para. 54; Judgment in case C-132/04, *op. cit.*, para. 23.

⁴⁹ Order in case C-52/04, *op. cit.*, para. 45; Judgment in joined cases C-397/01 to C-403/01, *op. cit.*, para. 55.

⁵⁰ Judgment in joined cases C-397/01 to C-403/01, *op. cit.*, para. 57; Order in case C-52/04, *op. cit.*, para. 46.

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

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

In its case-law, the Court has ruled that the Directive applies to the activities of primary care teams and medical and nursing staff providing services in primary healthcare teams⁵¹. It also applies to other services which respond to emergencies such as medical and nursing staff in primary care teams and in other services which treat outside emergencies⁵², workers in an emergency medical service⁵³, intervention forces of public firefighters⁵⁴, municipal police⁵⁵, or non-civilian personnel of public administrations where their duties are carried out under normal circumstances⁵⁶.

2. Derogation: exclusion in exceptional situations

Exclusion from the scope of the Directive nevertheless exists, and the Court has clarified that it would only allow exclusions in the case of *‘exceptional events in which the proper implementation of measures designed to protect the population in situations in which the community at large is at serious risk requires the personnel dealing with a situation of that kind to give absolute priority to the objective of those measures in order that it may be achieved’*⁵⁷.

This would be the case for *‘natural or technological disasters, attacks, serious accidents or similar events, the gravity and scale of which require the adoption of measures indispensable for the protection of the life, health and safety of the community at large, measures the proper implementation of which would be jeopardised if all the rules laid down in Directives 89/391 and 93/104 [the Working Time Directive] were to be observed’*⁵⁸.

The exclusion interpreted by the Court arises from Article 2(2) of Directive 89/391/EEC. It states that *‘This Directive shall not be applicable where characteristics peculiar to certain specific public service activities, [...] inevitably conflict with it’* (Commission's emphasis).

The Commission considers that the decisive factor here should be the nature of the workers' activities in delivering ‘public service activities’ intended to uphold public order and

⁵¹ Judgment in case C-303/98, *op. cit.*, para. 41.

⁵² Judgment in case C-241/99, *op. cit.*, para. 30.

⁵³ Judgment in joined cases C-397/01 to C-403/01, *op. cit.*, para. 63.

⁵⁴ Order in case C-52/04, *op. cit.*, para. 52; Judgment in case C-429/09, *op. cit.*, para. 57.

⁵⁵ Judgment of 21 October 2010, *Antonino Accardo and Others v Comune di Torino*, C-227/09, ECLI:EU:C:2010:624, para. 39.

⁵⁶ Judgment in case C-132/04, *op. cit.*, paras. 25-38.

⁵⁷ Order in case C-52/04, *op. cit.*, para. 53; Judgment in case C-132/04, *op. cit.*, para. 26.

⁵⁸ Order in case C-52/04, *op. cit.*, para. 54; Judgment in case C-132/04, *op. cit.*, para. 27.

security⁵⁹ rather than the mere existence of a public sector employer or a public intervention in the financing or organisation of the relevant service.

Although the Court has not yet ruled on this point, it would appear unjustified in the case of exceptional events cited above to temporarily exempt only public sector workers and to continue to require strict compliance with the provisions of the Directive for private sector workers, for example workers in private hospitals.

In any event, the Court has stressed that, even where the Directive is not applied in exceptional situations, it requires ‘*the competent authorities to ensure the safety and health of workers ‘as far as possible*’⁶⁰.

3. Seafarers

Article 1(3) of the Directive provides that:

‘[...] *This Directive shall not apply to seafarers, as defined in Directive 1999/63/EC without prejudice to Article 2(8) of this Directive. [...]*’

A contrario, this provision means that the general Working Time Directive applies to seafarers who are not covered by Directive 1999/63/EC.

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

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

4. Sectors and workers subject to specific legislation

Article 14 of the Directive also establishes that:

‘*This Directive shall not apply where other Community instruments contain more specific requirements relating to the organisation of working time for certain occupations or occupational activities.*’

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

⁵⁹ Judgment in case C-303/98, *op. cit.*, para. 36.

⁶⁰ Order in case C-52/04, *op. cit.*, para. 56; Judgment in case C-132/04, *op. cit.*, para. 28.

- *Young workers*

Council Directive 94/33/EC of 22 June 1994 on the protection of young people at work⁶¹.

- *Civil aviation*

Council Directive 2000/79/EC of 27 November 2000 concerning the European Agreement on the Organisation of Working Time of Mobile Workers in Civil Aviation concluded by the Association of European Airlines (AEA), the European Transport Workers' Federation (ETF), the European Cockpit Association (ECA), the European Regions Airline Association (ERA) and the International Air Carrier Association (IACA)⁶².

- *Road transport*

Directive 2002/15/EC of the European Parliament and of the Council of 11 March 2002 on the organisation of the working time of persons performing mobile road transport activities⁶³ and Regulation (EC) No 561/2006 of the European Parliament and of the Council of 15 March 2006 on the harmonisation of certain social legislation relating to road transport and amending Council Regulations (EEC) No 3821/85 and (EC) No 2135/98 and repealing Council Regulation (EEC) No 3820/85⁶⁴.

- *Cross-border railway*

Council Directive 2005/47/EC of 18 July 2005 on the Agreement between the Community of European Railways (CER) and the European Transport Workers' Federation (ETF) on certain aspects of the working conditions of mobile workers engaged in interoperable cross-border services in the railway sector⁶⁵.

- *Inland waterway*

Council Directive 2014/112/EU of 19 December 2014 implementing the European Agreement on certain aspects of the organisation of working time in inland waterway transport,

⁶¹ Council Directive 94/33/EC of 22 June 1994 on the protection of young people at work, OJ L 216, 20.8.1994, p. 12–20.

⁶² Council Directive 2000/79/EC of 27 November 2000 concerning the European Agreement on the Organisation of Working Time of Mobile Workers in Civil Aviation concluded by the Association of European Airlines (AEA), the European Transport Workers' Federation (ETF), the European Cockpit Association (ECA), the European Regions Airline Association (ERA) and the International Air Carrier Association (IACA), OJ L 302, 1.12.2000, p. 57–60.

⁶³ Directive 2002/15/EC of the European Parliament and of the Council of 11 March 2002 on the organisation of the working time of persons performing mobile road transport activities, OJ L 80, 23.3.2002, p. 35–39.

⁶⁴ Regulation (EC) No 561/2006 of the European Parliament and of the Council of 15 March 2006 on the harmonisation of certain social legislation relating to road transport and amending Council Regulations (EEC) No 3821/85 and (EC) No 2135/98 and repealing Council Regulation (EEC) No 3820/85, OJ L 102, 11.4.2006, p. 1–14.

⁶⁵ Council Directive 2005/47/EC of 18 July 2005 on the Agreement between the Community of European Railways (CER) and the European Transport Workers' Federation (ETF) on certain aspects of the working conditions of mobile workers engaged in interoperable cross-border services in the railway sector, OJ L 195, 27.7.2005, p. 15–17.

concluded by the European Barge Union (EBU), the European Skippers Organisation (ESO) and the European Transport Workers' Federation (ETF)⁶⁶.

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

C. Scope of the provisions

1. What is (or not) covered?

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

*‘[...] (a) minimum periods of daily rest, weekly rest and annual leave, to breaks and maximum weekly working time;
(b) and certain aspects of night work, shift work and patterns of work.’*

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

The Working Time Directive also does not deal with the issue of remuneration, including the level of salaries and the methods of remuneration and various pay rates which can be established at national level⁶⁷. The Court has held that this was clear from both the purpose and the wording of the Directive's provisions. It is also an unambiguous consequence of Article 153(5) of the Treaty on the functioning of the European Union⁶⁸. The only exception to this principle recognised by the Court is that of the pay which must be ensured during the workers' annual leave (see Chapter VII).

2. Minimum provisions

In line with its legal basis, the Working Time Directive establishes minimum standards in the above-mentioned areas. Its minimum provisions aim to provide a ‘safety net’ for the health and safety of the workers concerned⁶⁹. These are binding for the Member States, which are under the obligation to ensure the transposition of those minimum standards in their national legal order. However, the minimal character of the Directive's provisions also means that it

⁶⁶ Council Directive 2014/112/EU of 19 December 2014 implementing the European Agreement concerning certain aspects of the organisation of working time in inland waterway transport, concluded by the European Barge Union (EBU), the European Skippers Organisation (ESO) and the European Transport Workers' Federation (ETF), OJ L 367, 23.12.2014, p. 86–95.

⁶⁷ Order of 11 January 2007, *Jan Vorel v Nemocnice Český Krumlov*, C-437/05, ECLI:EU:C:2007:23, paras. 32–35; Judgment in case C-266/14, *op. cit.*, paras. 48–49; Order in case C-258/10, *op. cit.*, para. 81.

⁶⁸ Judgment of 1 December 2005, *Abdelkader Dellas and Others v Premier ministre and Ministre des Affaires sociales, du Travail et de la Solidarité*, C-14/04, ECLI:EU:C:2005:728, paras. 38–39.

⁶⁹ Proposal for a Council Directive concerning certain aspects of the organisation of working time, 20 September 1990, COM(90)317 final — SYN 295, *op. cit.* page 3.

does not prevent Member States from applying or introducing national provisions which are more favourable to the protection of the health and safety of workers.

Article 15 of the Directive specifically points to this aspect:

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

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

Where Member States make use of this option to implement or apply more protective provisions, compliance with the rules laid down by the Directive must be ascertained by reference solely to the limits fixed by it. An obligation remains on the 'Member States to guarantee that each of the minimum requirements laid down by the Directive is observed'⁷⁰.

3. Non-regression

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

While the Member States enjoy a degree of freedom in the way they transpose and implement these provisions, Article 23 of the Directive provides that:

'Without prejudice to the right of Member States to develop, in the light of changing circumstances, different legislative, regulatory or contractual provisions in the field of working time, as long as the minimum requirements provided for in this Directive are complied with, implementation of this Directive shall not constitute valid grounds for reducing the general level of protection afforded to workers.'

While the Court has not had the occasion to rule on this provision in terms of the Working Time Directive, it has ruled on a similar provision contained in the Fixed-Term Work Directive⁷¹, i.e. Clause 8(3), which states that 'Implementation of this agreement shall not constitute valid grounds for reducing the general level of protection afforded to workers in the field of the agreement'.

⁷⁰ Judgment in case C-14/04, *op. cit.*, para. 53.

⁷¹ Council Directive 1999/70/EC of 28 June 1999 concerning the framework agreement on fixed-term work concluded by ETUC, UNICE and CEEP, OJ L 175, 10.7.1999, p. 43-48.

In this context, the Court has ruled that this clause could not be interpreted restrictively due to the Agreement's aim of improving the living and working conditions of the workers concerned⁷².

The Court also identified two criteria to be examined in respect of that clause⁷³:

- the existence of a reduction in 'the general level of protection' and
- the fact that this reduction must be connected to the 'implementation' of the Agreement.

While the Court held that it is for the national courts to rule on the existence of a reduction in the protection of workers⁷⁴, it nevertheless considered that, in terms of the first criterion, the fact that the reduction relates to the 'general level of protection' meant that only a '*reduction on a scale likely to have an effect overall on national legislation [...] is liable to be covered*' by this provision⁷⁵.

As to the second criterion, the Court considered that the connection with the 'implementation of the Agreement' did not limit itself to the original transposition of the Directive; but also covered '*all domestic measures intended to ensure that the objective pursued by the Directive may be attained, including those which, after transposition in the strict sense, add to or amend domestic rules previously adopted*'⁷⁶. However, it did exclude reductions covered by texts justified by the need to encourage '*another objective, one that is distinct from [the implementation of the Agreement]*'⁷⁷.

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

IV. Definitions

A. *Working time and rest periods*

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

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

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

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

⁷² Judgment of 23 April 2009, *Kiriaki Angelidaki and Others v Organismos Nomarchiakis Autodioikisis Rethymnis, Charikleia Giannoudi v Dimos Geropotamou and Georgios Karabousanos and Sofoklis Michopoulos v Dimos Geropotamou*, joined cases C-378/07 to C-380/07, ECLI:EU:C:2009:250, paras. 112-113.

⁷³ Judgment in joined cases C-378/07 to C-380/07, *op. cit.*, para. 126.

⁷⁴ Judgment in joined cases C-378/07 to C-380/07, *op. cit.*, para. 129.

⁷⁵ Judgment in joined cases C-378/07 to C-380/07, *op. cit.*, para. 140.

⁷⁶ Judgment in joined cases C-378/07 to C-380/07, *op. cit.*, para. 131.

⁷⁷ Judgment in joined cases C-378/07 to C-380/07, *op. cit.*, para. 133.

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

1. Definition of working time and rest periods

In terms of the wording of the Directive, the Court has ruled that in the logic of the Directive, working time is ‘*placed in opposition to rest periods, the two being mutually exclusive*’⁷⁸ and that the Directive ‘*does not provide for any intermediate category between working time and rest periods*’⁷⁹.

The Court has held that the concepts of ‘working time’ and ‘rest period’ ‘*may not be interpreted in accordance with the requirements of the various legislations of the Member States but constitute concepts of Community law which must be defined in accordance with objective characteristics by reference to the scheme and purpose of that directive, intended to improve workers’ living and working conditions. Only such an autonomous interpretation is capable of securing full effectiveness for that directive and uniform application of those concepts in all the Member States*’⁸⁰.

This also means that Member States cannot unilaterally determine the scope of these concepts⁸¹. This is further corroborated by the fact that the Directive does not permit any derogation from Article 2 of the Directive⁸², which establishes, amongst others, the definitions of ‘working time’ and ‘rest period’.

With reference to the text of Article 2(1) itself, the Court’s case-law⁸³ and historical documents⁸⁴, three cumulative criteria determine whether certain periods are deemed to be ‘working time’:

- the worker is working

This first criterion is a spatial one that corresponds to a condition that ‘the worker is at work’ or that he/she is ‘present at his/her workplace’. In English, this amounts to a slight move away from the Directive’s exact wording. This can be explained by a small difference between the various linguistic versions of the Directive: for example, in French it states ‘*le travailleur est au travail*’ and in Spanish ‘*el trabajador permanezca en el trabajo*’, not ‘*le travailleur travaille*’ or ‘*el trabajador trabaja*’.

⁷⁸ Judgment in case C-303/98, *op. cit.*, para. 47; Judgment in case C-151/02, *op. cit.*, para. 48, Order in case C-437/05, *op. cit.*, para. 24; Judgment in case C-14/04, *op. cit.*, para. 42; Judgment in case C-266/14, *op. cit.*, para. 25.

⁷⁹ Order in case C-437/05, *op. cit.*, para. 25; Judgment in case C-14/04, *op. cit.*, para. 43; Order in case C-258/10, *op. cit.*, para. 43; Judgment in case C-266/14, *op. cit.*, para. 26.

⁸⁰ Judgment in case C-14/04, *op. cit.*, para. 44; Judgment in case C-151/02, *op. cit.*, para. 58; Order in case C-437/05, *op. cit.*, para. 26; Judgment in case C-266/14, *op. cit.*, para. 27; Order in case C-258/10, *op. cit.*, para. 44.

⁸¹ Judgment in case C-14/04, *op. cit.*, para. 45.

⁸² Order in case C-258/10, *op. cit.*, para. 45; Judgment in case C-266/14, *op. cit.*, para. 28.

⁸³ Judgment in case C-266/14, *op. cit.*, paras. 30, 35 and 43.

⁸⁴ Explanatory Memorandum of the Communication from the Commission on the organisation of working time in the sectors and activities excluded from Directive 93/104/EC of 23 November 1993, 18 November 1998, COM(1998)662 final, para. 6.

As a uniform interpretation of the provisions of European law is necessary, the text of the Directive has to be interpreted and applied in the light of the versions that exist in the other official languages. If there is divergence, the provision must be interpreted by reference to the purpose and general scheme of the rules of which it forms part⁸⁵.

In the case of the Working Time Directive, such interpretation has led the Court to consider the criteria of the ‘*the worker is working*’ as a spatial one relating to the need for the worker to be ‘at the workplace’ or ‘at a place determined by his employer’. This has been interpreted clearly by Advocate General Bot⁸⁶ and implicitly by the Court⁸⁷ which repeatedly pointed out that a decisive factor in determining ‘working time’ is whether the worker is required to be physically present at the place determined by the employer⁸⁸.

It should be noted that the place determined by the employer does not need to be the workplace. [As presented below](#), the Court has also held that travel time could, in certain cases, also count as working time since the working time of such workers could not be restricted to the time spent on the premises of their employer or the customers such as in that of workers without fixed places of work in the *Tyco* case⁸⁹.

- the worker is at the employer’s disposal

On this issue, the decisive factor is that the worker is available to provide the appropriate services immediately in case of need⁹⁰.

This is the case where workers are legally obliged to obey the instructions of their employer and carry out their activity for that employer. On the contrary, where workers can manage their time without major constraints and pursue their own interests, this could prove that the period of time in question does not constitute working time⁹¹.

- the worker must be carrying out his activity or duties

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

⁸⁵ See by analogy: judgment of 19 April 2007, *UAB Profisa v Muitinės departamentas prie Lietuvos Respublikos finansų ministerijos*, C-63/06, ECLI:EU:C:2007:233, para 13-15.

⁸⁶ Opinion of Advocate General Bot of 11 June 2015, *Federación de Servicios Privados del sindicato Comisiones obreras (CC.OO.) v Tyco Integrated Security SL and Tyco Integrated Fire & Security Corporation Servicios SA.*, C-266/14, ECLI:EU:C:2015:391, para. 31 and 48.

⁸⁷ See notably the judgment in case C-303/98, *op. cit.*, para. 48 in which the Court considers that the two first conditions of working time (‘is working’ and ‘at the employer’s disposal’) are fulfilled in the case of time spent on call [at the health centre](#); see also judgment in case C-266/14, *op. cit.*, para. 43 in which the Court states in respect of the application of the criteria ‘is working’ to workers travelling to/from a customer that ‘*the place of work of such workers cannot be reduced to the physical areas of their work on the premises of their employer’s customers.*’

⁸⁸ Judgment in case C-266/14, *op. cit.*, para. 35; Judgment in case C-14/04, *op. cit.*, para. 48; Order in case C-437/05, *op. cit.*, para. 28; Order in case C-258/10, *op. cit.*, para. 63.

⁸⁹ Judgment in case C-266/14, *op. cit.*, paras. 43-46.

⁹⁰ Judgment in case C-266/14, *op. cit.*, para. 35; Judgment in case C-14/04, *op. cit.*, para. 48, Order in case C-437/05, *op. cit.*, para. 28; Order in case C-258/10, *op. cit.*, para. 63.

⁹¹ Judgment in case C-266/14, *op. cit.*, paras. 36-37; Judgment in case C-303/98, *op. cit.*, para. 50.

In line with the objective of the Working Time Directive to ensure the safety and health of workers, the Court has ruled that, *‘even if the activity actually performed varies according to the circumstances, the fact that [the workers] are obliged to be present and available at the workplace with a view to providing their professional services means that they are carrying out their duties in that instance’*⁹². The Court has indeed stressed that the intensity of the work done by the employee and his/her output are not amongst the defining characteristics of ‘working time’ within the meaning of the Directive⁹³ and that the time concerned may qualify as working time *‘irrespective of the fact that [...] the person concerned is not continuously carrying on any professional activity’*⁹⁴.

Where national courts are asked to rule on whether time qualifies as working time or a rest period, they must not limit their analysis to the provisions of national law. They should examine the conditions which apply in practice to the working time of the worker concerned⁹⁵.

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

2. Application of the Directive’s definition to specific periods of time

a. *On-call and standby time*

The situation as regards ‘on-call’ and ‘standby’ time has received specific guidance from the Court, in particular in its *SIMAP*, *Jaeger* and *Dellas* cases, which concerned doctors in primary care teams and at the hospital as well as a special needs teacher in residential establishments for handicapped young people and adults⁹⁶.

In those cases, the Court held that the time spent on-call by workers is to be regarded in its entirety as working time within the meaning of the Directive if they are required to be present at the workplace. In such a situation, the workers concerned are required to be available to provide their services at a place determined by the employer for the whole duration of the period. The workers are also subject to much greater constraints as they have to remain away from their family and social environment and have less freedom to manage the time during which their professional services are not required⁹⁷.

In support of its stance, the Court pointed to the fact that excluding on-call time from working time if physical presence is required would seriously undermine the objective of ensuring the health and safety of workers by granting them minimum periods of rest and adequate breaks⁹⁸.

It should be noted that on-call time has the status of ‘working time’ regardless of whether the person actually work during the period of on-call duty⁹⁹. This means that if on-call time

⁹² Judgment in case C-303/98, *op. cit.*, para. 48.

⁹³ Order in case C-437/05, *op. cit.*, para. 25; Judgment in case C-14/04, *op. cit.*, para. 43.

⁹⁴ Judgment in joined cases C-397/01 to C-403/01, *op. cit.*, para. 93.

⁹⁵ Order in case C-258/10, *op. cit.*, para. 50.

⁹⁶ Judgment in case C-303/98, *op. cit.*; Judgment in case C-151/02, *op. cit.*; Judgment in case C-14/04, *op. cit.*

⁹⁷ Judgment in case C-151/02, *op. cit.*, para. 65.

⁹⁸ Judgment in case C-303/98, *op. cit.*, para. 49.

⁹⁹ Order in case C-437/05, *op. cit.*, para. 27; Judgment in case C-14/04, *op. cit.*, para. 46.

includes inactivity, this is irrelevant for its status as ‘working time’¹⁰⁰. Similarly, if a rest room is available to workers and they can rest or sleep during the periods when their services are not required, this does not affect the status of on-call time as working time¹⁰¹.

In respect of the use of systems of equivalence whereby a ratio is established for the accounting of on-call time, the Court has ruled that if such systems do not ensure compliance with all the minimum safety and health requirements, they are incompatible with the Directive¹⁰².

In contrast, where workers must be reachable at all times but are not required to remain at a place determined by the employer, they may manage their time with fewer constraints and pursue their own interests. In such situations, also called ‘standby time’, only the time linked to the actual provision of services — including the time taken to travel to the place where these services are provided — must be regarded as working time within the meaning of the Directive¹⁰³.

b. Time spent by workers without a fixed place of work travelling between their first and last customers and their homes

The Court has ruled in the *Tyco* case on whether the time spent travelling to the first and from the last customer by workers without a fixed place of work qualifies as ‘working time’¹⁰⁴.

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

The Court considered that the three criteria of ‘working time’ were fulfilled. Firstly, it held that the journeys of workers travelling to customers designated by their employer were a necessary means of their providing technical services to customers. As a result, it concluded that these periods must be regarded as periods during which the workers carry out their activity or duties¹⁰⁵. Secondly, in terms of the fact that the workers concerned received an itinerary for their journeys and they were not able to use their time freely and pursue their own interests during that period, the Court held that the workers were, also during that time, at the employer’s disposal¹⁰⁶. Thirdly, the Court confirmed that workers travelling to or from a customer and therefore carrying out their duties must also be regarded as working during those journeys. Given that travelling is an integral part of being a worker without a fixed or habitual place of work, the place of work of such workers cannot be reduced to the premises of their employer’s customers¹⁰⁷.

¹⁰⁰ Order in case C-437/05, *op. cit.*, para. 28.

¹⁰¹ Judgment in case C-151/02, *op. cit.*, paras. 60 and 64.

¹⁰² Judgment in case C-14/04, *op. cit.*, para. 63.

¹⁰³ Judgment in case C-303/98, *op. cit.*, para. 50.

¹⁰⁴ Judgment in case C-266/14 *op. cit.*.

¹⁰⁵ Judgment in case C-266/14 *op. cit.*, paras. 30-34.

¹⁰⁶ Judgment in case C-266/14 *op. cit.*, paras. 35-39.

¹⁰⁷ Judgment in case C-266/14 *op. cit.*, paras. 43-46.

c. Other periods of time

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

- Journeys in between appointments during the working day

The issue of journeys between jobs during the working day is not dealt with in the *Tyco* ruling. This is because, in the case at hand, these periods were already counted as part of the daily working hours calculated by the employer¹⁰⁸.

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

- if the journeys concerned constitute a necessary means of providing the services to customers and they must therefore be regarded as periods during which the workers carry out their activity or duties;
- if the workers concerned are at the employer’s disposal during that time, meaning that they act on instructions of the employer and they cannot use their time freely to pursue their own interests;
- if the time spent travelling forms an integral part of the workers’ work and the place of work of such workers cannot therefore be reduced to the premises of their employer’s customers.

- Irregular journeys of workers to a different workplace

Following the same line of reasoning as for journeys in between appointments during the working day, it is possible to consider that, in the light of the above-mentioned criteria and the Directive’s objective to protect the health and safety of workers, journeys of workers who, instead of going to their main workplace, go directly to appointments or to a different workplace upon request of their employer should be considered as working time. Indeed, during these periods, the workers’ situation can be assimilated to that of workers in the *Tyco* case since they are sent by their employers to a different place than that of the usual performance of their work¹⁰⁹.

- Journeys to and from the workplace

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

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

¹⁰⁸ Judgment in case C-266/14 *op. cit.*, para. 16.

¹⁰⁹ Judgment in case C-266/14 *op. cit.*

ability to freely determine the distance between their homes and the usual place of the start and finish of their working day¹¹⁰.

B. Night time and night worker

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

‘3. ‘night time’ means any period of not less than seven hours, as defined by national law, and which must include, in any case, the period between midnight and 5.00;

4. ‘night worker’ means:

(a) on the one hand, any worker, who, during night time, works at least three hours of his daily working time as a normal course; and

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

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

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

As regards the definition of ‘night time’, its content is similar to that used for ‘night work’ in the International Labour Organization’s (the ‘ILO’) Convention on night work¹¹¹. The definition finally agreed for the Working Time Directive imposes on each Member State the obligation to define a period of 7 hours in its national law which constitutes ‘night time’. This means that any work carried out during this period, regardless of its duration, qualifies as night work.

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

The English wording of the Directive seems to be flawed in that it links criteria (a) and (b) with an ‘and’, implying that they could be cumulative. At the same time, both paragraphs are introduced separately by ‘on the one hand’ and ‘on the other hand’. Some other language versions do not include this ‘and’¹¹², which suggests that the conditions are alternative. This second understanding appears supported by the Court, which stated in its SIMAP ruling that ‘Article 2(4)(a) of Directive 93/104 defines a night worker as any worker who, during night time, works at least three hours of his daily working time as a normal course’ and that ‘Article 2(4)(b) also permits the national legislature or, at the option of the Member State concerned, the two sides of industry at national or regional level to treat as night workers other workers who work during night time a certain proportion of their annual working time.’¹¹³

¹¹⁰ Judgment in case C-266/14 *op. cit.*, para. 44.

¹¹¹ International Labour Organization, Convention concerning Night Work, C171, 26 June 1990.

¹¹² See notably the French and German texts of the Working Time Directive.

¹¹³ Judgement in case C-303/98, *op. cit.*, para. 55.

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

The original proposal¹¹⁴ explicitly stated that night workers can be performing shifts. This confirms that the different categories were not intended to be mutually exclusive and that a worker can be a 'shift worker' at the same time as being a 'night worker'. While the Court has not clearly upheld this approach, it has ruled separately and in parallel in its *SIMAP* case that 'doctors in primary care teams' can be deemed to be both night workers and shift workers. This implicitly acknowledges that such workers may be covered by both definitions¹¹⁵. In such a situation, the workers concerned benefit from all the protective measures inherent to the categories to which they belong.

C. Shift work and shift worker

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

'5. 'shift work' means any method of organising work in shifts whereby workers succeed each other at the same work stations according to a certain pattern, including a rotating pattern, and which may be continuous or discontinuous, entailing the need for workers to work at different times over a given period of days or weeks;

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

The definitions of 'shift work' and 'shift worker' have been subject to only very limited interpretation by the Court. In its *SIMAP* ruling, the Court held that the working time of doctors, organised so that workers are assigned successively to the same work posts on a rotational basis, fulfils the requirements of the definition of shift work¹¹⁶. In this case, the workers, doctors in public health services, normally worked from 8 a.m. to 3 p.m. However, they also carried out on-call periods from 3 p.m. to 8 a.m. every 11 days. The Court held that this 'on-call time' at the health centre or 'standby' time where the workers had to be reachable at all times fulfilled the definition of shift work on the grounds that:

- workers were assigned successively to the same work posts on a rotational basis;
- and that, even if the duty is performed at regular intervals, the doctors concerned are called upon to perform their work at different times over a given period of days or weeks.

In this case, the Court did not hold that the 'normal' work schedule of doctors amounted to shift work, possibly due to the fact that the workers then worked at the same time and in different posts¹¹⁷.

¹¹⁴ Explanatory memorandum concerning the proposal for a Council Directive concerning certain aspects of the organisation of working time, 20 September 1990, COM(90)317 final — SYN 295.

¹¹⁵ Judgment in case C-303/98, *op. cit.*, para. 53-64.

¹¹⁶ Judgment in case C-303/98, *op. cit.*, paras. 59-64.

¹¹⁷ Judgment in case C-303/98, *op. cit.*, para. 61.

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

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

D. Mobile worker

Article 2(7) establishes that:

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

The distinction between mobile and non-mobile staff for the purpose of the application of the Working Time Directive was one of the aspects discussed in the preparation of Directive 2000/34/EC and introduced therein¹¹⁸.

Under Directive 93/104/EC, doubts existed as to whether or not the exclusion of certain sectors had to be applied to all workers in these sectors or solely to those subject to specific mobility obligations¹¹⁹. The amending Directive therefore aimed to establish certain specific provisions for mobile staff while guaranteeing that non-mobile staff in sectors with mobile workers would benefit from a working time organisation which complied with the general provisions.

According to the text of this Directive, the qualification as ‘mobile workers’ is limited to workers who concurrently:

- are part of travelling or flying personnel;
- work for an undertaking operating transport services for passengers or goods;
- work in the road, air or inland waterway.

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

¹¹⁸ Explanatory Memorandum of the Communication from the Commission on the organisation of working time in the sectors and activities excluded from Directive 93/104/EC of 23 November 1993, 18 November 1998, COM(1998)662 final., point 27.

¹¹⁹ It can however be noted that the Court eventually clarified this aspect in its judgment of 4 October 2001, *J.R. Bowden, J.L. Chapman and J.J. Doyle v Tuffnells Parcels Express Ltd*, C-133/00, ECLI:EU:C:2001:514, where it ruled that the exclusion of certain transport sectors which was entailed in Article 1(3) of Directive 93/104/EC excluded not only mobile workers but all workers in these sectors from the scope of the Directive and the application of its provisions.

This definition of Directive 2003/88/EC is linked to the derogation introduced by Article 20 of this Directive for mobile workers (see below under point [IX.D.1](#)).

However, as indicated under point [III.E.4](#) above, only mobile workers not covered by a specific transport legislation fall under this Directive and its derogations.

E. Offshore work

Article 2(8) states that:

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

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

F. Adequate rest

Article 2(9) provides that

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

The concept of adequate rest is referred to both in Recital 5 of the Directive stating that ‘All workers should have adequate rest periods’ and in Articles 20 and 21 establishing derogations for mobile and offshore workers as well as workers on board seagoing fishing vessels. It is therefore used in relation to workers who are not covered by the provisions on rest periods set out in Articles 3-5. These specific derogatory provisions state that such workers are entitled to ‘adequate rest’ as a minimum level of protection¹²⁰.

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

¹²⁰ Articles 20 and 21 provide respectively that mobile workers, and workers on seagoing fishing vessels, are not covered by Articles 3, 4, or 5, but that Member States shall take the necessary measures to ensure that these workers are still entitled to ‘adequate rest’.

V. Minimum rest periods

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

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

In the Directive, three types of rest periods are defined: daily rest (Article 3), breaks (Article 4) and weekly rest (Article 5). Article 7 also provides for a period of paid annual leave, which was originally called ‘yearly rest’¹²¹ and is further discussed in Chapter VII.

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

A. *Daily rest*

Article 3 provides that:

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

The requirement to grant every worker 11 consecutive hours of rest is a minimum standard and more protective provisions are often provided by national law transposing the Directive, for example granting workers a longer period of daily rest or establishing a maximum daily working time. The Commission considered it as a ‘safety net’ for the health and safety of the workers concerned¹²², which also took into account economic requirements and shift work cycles¹²³.

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

Workers must receive one period of daily rest for each 24-hour period. However, the Directive does not define this period as being a calendar day. Such an approach would *de facto* amount to imposing a work schedule which would not fit with the usual periods of work¹²⁴.

¹²¹ Explanatory memorandum concerning the proposal for a Council Directive concerning certain aspects of the organisation of working time, 20 September 1990, COM(90)317 final — SYN 295.

¹²² Explanatory memorandum concerning the proposal for a Council Directive concerning certain aspects of the organisation of working time, 20 September 1990, COM(90)317 final — SYN 295.

¹²³ Explanatory memorandum concerning the proposal for a Council Directive concerning certain aspects of the organisation of working time, 20 September 1990, COM(90)317 final — SYN 295.

¹²⁴ This would impose for workers to work between 00.00 and 13.00 and to benefit from their rest period between 13.00 and 24.00 or on the contrary resting from 00.00 until 11.00 and working from 11.00 until 24.00.

However, by establishing a framework of 24-hour periods, the Directive imposes a certain regularity in daily rest periods. In this respect, the Court has ruled that ‘*in order to ensure the effective protection of the safety and health of the worker provision must as a general rule be made for a period of work regularly to alternate with a rest period*’¹²⁵. The purpose of daily rest is to allow workers to remove themselves from their working environment for a number of hours. These must be consecutive and ‘*directly follow a period of work in order to enable him to relax and dispel the fatigue caused by the performance of his duties*’¹²⁶.

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

B. Breaks

Article 4 provides that:

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

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

1. Duration of the break

Recital 5 of the Directive states that rest periods, to which breaks pertain, must be expressed in units of time, i.e. in days, hours and/or fractions thereof, and that workers must be granted ‘adequate breaks’¹²⁷.

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

2. Timing of the break

Similarly, although the Directive leaves it to collective agreements or legislation to define the terms under which the break is granted, the break should effectively allow workers to rest

¹²⁵ Judgment in case C-151/02, *op. cit.*, para. 95.

¹²⁶ Judgment in case C-151/02, *op. cit.*, para. 95.

¹²⁷ This latter notion of ‘adequate breaks’ has also been referred to by the Court for example in judgment of 14 October 2010, *Günter Fuß v Stadt Halle*, C-243/09, ECLI:EU:C:2010:609, para. 32.

during their working day where the latter is longer than 6 hours. Its timing should therefore be adapted to the workers' schedule and it should take place at the latest after 6 hours.

3. Conditions of the break

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

In light of the definitions of 'working time' and 'rest period', this means that workers should not be obliged to remain at their workstations, at the employer's disposal or carrying out their activity or duties. Such breaks where workers are allowed to manage their time without major constraints and to pursue their own interests do not constitute working time¹²⁸. The breaks therefore do not need to be counted as 'working time' as they constitute 'rest periods'. National law can nevertheless differ as, as stressed [above](#), Member States are allowed to apply provisions which are more favourable to the protection of the health and safety of workers, for example by counting breaks during a working day as 'working time'.

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

4. Transposition obligations on Member States

The Directive allows collective agreements to establish the duration and terms of the break. Nevertheless, the duty to transpose the Directive resides with the Member States¹²⁹. It is therefore their responsibility to ensure that all workers, including those who may not be covered by collective agreements, are entitled to a break.

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

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.'

¹²⁸ Judgment in case C-266/14, *op. cit.*, paras. 36-37; Judgment in case C-303/98, *op. cit.*, para. 50.

¹²⁹ Article 288 of the Treaty on the Functioning of the European Union provides that: 'A directive shall be binding, as to the result to be achieved, upon each Member State to which it is addressed, but shall leave to the national authorities the choice of form and methods.'

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

In addition, Article 16 establishes that:

'Member States may lay down:

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

The previous Directive 93/104/EC¹³⁰ had a somewhat different wording in Article 5 as it included the following sentence: *'The minimum rest period referred to in the first subparagraph shall in principle include Sunday'*. However, this provision was annulled by the Court, which considered that the obligation to fix Sunday rather than any other day of the week as a rest day was not justified in the light of the legal basis used for this Directive, which relates to the protection of the health and safety of workers¹³¹. The sentence was then deleted during the Directive's amendment by way of Directive 2000/34/EC¹³².

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

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

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

This amounts to a continuous rest period of 35 hours.

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

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

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

This Article means that periods of 7 days are to be defined. The Commission considers that, within each of these periods, workers should be entitled to a weekly rest. However, the Directive does not appear to require the weekly rest to be granted on the same day of the week in each period of 7 days. Again, although Member States may introduce more protective provisions, the Directive does not preclude a system under which the weekly rest is granted to

¹³⁰ Council Directive 93/104/EC of 23 November 1993 concerning certain aspects of the organisation of working time, OJ L 307, 13.12.1993, p. 18-24.

¹³¹ Judgment in case C-84/94, *op. cit.*

¹³² Directive 2000/34/EC of the European Parliament and of the Council of 22 June 2000 amending Council Directive 93/104/EC concerning certain aspects of the organisation of working time to cover sectors and activities excluded from that Directive, OJ L 195, 1.8.2000, p. 41-45.

a worker on Tuesday during Week 1, then on Thursday in Week 2, and on Sunday in Week 3 etc.

The requirement is that, in each period of 7 days, a worker must be entitled to a period of weekly rest. It is possible that those days vary according to the periods concerned, perhaps also leading to consecutive periods of work of up to 12 days, discontinued through daily rest periods¹³³.

3. Weekly rest over a reference period of 14 days

Beyond the flexibility described above on the fixing of weekly rest periods during each period of 7 days, Article 16 of the Working Time Directive allows a reference period of 14 days to be set for weekly rest. In this respect, the Commission's proposal¹³⁴ indicated that the rest periods proposed constituted '*reasonable minima which take account of economic requirements and shift work cycles, since the weekly rest period may be averaged over a period of two weeks. This takes account of the necessary flexibility, as exemplified by the multiplication of 'productivity deals' agreed upon by both sides of industry.*'¹³⁵

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

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

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

4. A shortened period of weekly rest in certain cases

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

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

Firstly, this provision was introduced in the common position with the aim to cover the possible problem of shift workers working the late shift on Saturday and the early shift on

¹³³ A ruling of the Court on this issue can be expected in Case C-306/16.

¹³⁴ Explanatory memorandum concerning the proposal for a Council Directive concerning certain aspects of the organisation of working time, 20 September 1990, COM(90)317 final — SYN 295.

¹³⁵ Explanatory memorandum concerning the proposal for a Council Directive concerning certain aspects of the organisation of working time, 20 September 1990, COM(90)317 final — SYN 295.

Monday, i.e. receiving only 24 hours of rest consecutively¹³⁶. Secondly, the Court has repeatedly held that, in light of objective of the Directive, the exclusions to its scope and derogations to its provisions have to be interpreted restrictively¹³⁷.

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

VI. Maximum weekly working time

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

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

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

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

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

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

‘Member States may lay down:

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

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

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

¹³⁶ As reported in the Explanatory Memorandum concerning the re-examined proposal for a Council Directive concerning certain aspects of the organisation of working time, 16 November 1993, COM(93)578 final – SYN 295, page 3, amendment No 5.

¹³⁷ On the exclusions to the scope, see: Judgment in case C-303/98, *op. cit.*, paras. 35; Judgment in case C-428/09, *op. cit.*, para 24. On the derogations, see: Judgment in case C-151/02, *op. cit.*, para. 89; Judgment in case C-428/09, *op. cit.*, para. 40.

The special status of the limitation of weekly working time has been further emphasised by the Court, which has repeatedly held that *‘in view of both the wording of [the Directive] and its purpose and scheme, the various requirements it lays down concerning maximum working time and minimum rest periods constitute rules of Community social law of particular importance from which every worker must benefit as a minimum requirement necessary to ensure protection of his safety and health’*¹³⁸.

A. Maximum weekly working time

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

The maximum weekly limit applies to the [notion of working time](#) presented above and used by the Court¹³⁹.

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

2. A maximum established at 48 hours

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

3. An unconditional maximum

Throughout its case-law, the Court has stressed that Member States cannot unilaterally determine the scope of the provisions of the Working Time Directive so that Member States cannot attach conditions or restrictions to the implementation of the worker’s right under Article 6(2) of the Directive not to work more than 48 hours per week¹⁴⁰.

The Court has held that the effectiveness of that provision should be ensured by Member States. It concluded for example that applying a measure under which a worker is subject to a compulsory transfer to a different service for having requested compliance with the maximum weekly working time negates the effectiveness of the provision since *‘fear of such a reprisal measure, where no legal remedy is available against it, might deter workers who considered themselves the victims of the measure taken by their employer from pursuing their claims by*

¹³⁸ Judgment in joined cases C-397/01 to C-403/01, *op. cit.*, para. 100; Judgment in case C-14/04, *op. cit.*, para. 49; Order in case C-437/05, *op. cit.*, para. 23.

¹³⁹ See notably Judgment in joined cases C-397/01 to C-403/01, *op. cit.*, paras. 93-95; Judgment in case C-14/04, *op. cit.*, para. 50.

¹⁴⁰ Judgment in joined cases C-397/01 to C-403/01, *op. cit.*, para. 99; Judgment in case C-243/09, *op. cit.*, para. 52; Judgment in case C-429/09, *op. cit.*, para. 34.

judicial process, and would consequently be liable seriously to jeopardise implementation of the aim pursued by the Directive'¹⁴¹.

In addition, the Court has also held that exceeding that maximum constituted is, in itself, an infringement of that provision, without it being necessary to show that a specific detriment had been suffered¹⁴².

B. A maximum which can be averaged

1. How long is the reference period?

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

By way of derogation, the reference periods can be extended in certain cases subject to Article 19. Further details on the conditions and extent of the derogations are presented in Chapter IX. In any event, in light of the limitations to derogations from the reference period, the Court has acknowledged that '*the reference period may in no circumstances exceed 12 months*' and that it was '*therefore possible to determine the minimum protection which must be provided in any event*' to workers¹⁴³.

2. What is not included in the reference period

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

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

As for paid annual leave, this relates to the 4 weeks granted by the Directive. However, in terms of the right to sick leave, its '*conditions for exercise [...] are not, as Community law now stands, governed by that law*'¹⁴⁴. It is therefore necessary to refer to the national definition(s) of sick leave to know which periods should be excluded or be neutral in the calculation of the average weekly working time.

¹⁴¹ Judgment in case C-243/09, *op. cit.*, para 65-66.

¹⁴² Judgment in case C-243/09, *op. cit.*, para. 53.

¹⁴³ Judgment in case C-303/98, *op. cit.*, para. 69.

¹⁴⁴ Judgment of 20 January 2009, *Gerhard Schultz-Hoff v Deutsche Rentenversicherung Bund and Stringer and Others v Her Majesty's Revenue and Customs*, joined cases C-350/06 and C-520/06, ECLI:EU:C:2009:18, para. 27.

3. What can be included in the reference period

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

C. A provision with direct effect

The Court has considered Article 6(2), in conjunction with the provisions on the reference period, as fulfilling all the conditions necessary to produce direct effect¹⁴⁵.

Despite the possible adjustments of the reference period applicable to the maximum weekly working time, the Court stated that ‘[t]he latitude allowed does not make it impossible to determine minimum rights’ and that the provisions were precise and unconditional¹⁴⁶. As a consequence, the Court held that Article 6(2) of the Directive confers a ‘right on individuals whereby the reference period for the implementation of the maximum duration of their weekly working time must not exceed 12 months’¹⁴⁷.

Nevertheless, the Directive cannot in itself impose obligations on an individual and therefore cannot be applied in proceedings exclusively between private parties (‘horizontal direct effect’)¹⁴⁸.

However, it is in any event the responsibility of the national courts to provide the legal protection which an individual derives from that rule and therefore to interpret national law, as far as possible, in the light of the wording and the purpose of the Directive, in order to achieve the desired result¹⁴⁹.

In addition, the direct effect of a provision also enables citizens to rely directly on it in actions against the state or public bodies which are ‘emanations of the state’ such as regional authorities, cities and towns or communes¹⁵⁰, including in their capacity as employers, where they have failed to transpose a provision into national law or transposed it incorrectly¹⁵¹ (‘vertical direct effect’). This may in turn lead to the application of the principle of State liability for loss or damage caused to individuals as a result of breaches of EU law. The State can then be held responsible and have to grant individuals a right to reparation under certain conditions, which have to be examined by the national courts¹⁵².

It should be pointed out that an exception would remain where the Member State concerned has used a relevant derogation such as that for autonomous workers, the specific provisions on

¹⁴⁵ Judgment in joined cases C-397/01 to C-403/01, *op. cit.*, paras.104-106; Judgment in case C-243/09, *op. cit.*, para. 59; Judgment in case C-429/09, *op. cit.*, para. 35.

¹⁴⁶ Judgment in case C-303/98, *op. cit.*, para. 68.

¹⁴⁷ Judgment in case C-303/98, *op. cit.*, para. 70.

¹⁴⁸ Judgment in joined cases C-397/01 to C-403/01, *op. cit.*, paras.108-109.

¹⁴⁹ Judgment in joined cases C-397/01 to C-403/01, *op. cit.*, para. 110-113.

¹⁵⁰ Judgment in case C-243/09, *op. cit.*, para. 61; Judgment in case C-429/09, *op. cit.*, para. 38.

¹⁵¹ Judgment in case C-243/09, *op. cit.*, para. 56; Judgment in case C-429/09, *op. cit.*, paras. 38-39.

¹⁵² Judgment in case C-429/09, *op. cit.*, paras. 45-48.

workers on board seagoing fishing vessels or the individual opt-out. However, this is subject to compliance with all the conditions set out for the concerned derogations under the Directive¹⁵³.

VII. Paid annual leave

The Court has considered the right to paid annual leave very closely and notably held that it was a particularly important principle of Community and European Union social law¹⁵⁴.

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

A. The right to paid annual leave of every worker

Article 7(1) provides that

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

The Directive does not permit any derogation from Article 7(1)¹⁵⁵. The Court has determined that this leave has a dual purpose: to enable the worker both to rest and to enjoy a period of relaxation and leisure¹⁵⁶.

¹⁵³ See notably judgment in case C-243/09, *op. cit.*, paras. 58-59 on the opt-out.

¹⁵⁴ Judgment of 26 June 2001, *The Queen v Secretary of State for Trade and Industry, ex parte Broadcasting, Entertainment, Cinematographic and Theatre Union (BECTU)*, C-173/99, ECLI:EU:C:2001:356, para. 43; Judgment in case C-342/01, *op. cit.*, para 29; Judgment of 16 March 2006, *C. D. Robinson-Steele v R. D. Retail Services Ltd and Michael Jason Clarke v Frank Staddon Ltd and J. C. Caulfield and Others v Hanson Clay Products Ltd*, joined cases C-131/04 and C-257/04, ECLI:EU:C:2006:177, para. 48; Judgment of 6 April 2006, *Federatie Nederlandse Vakbeweging v Staat der Nederlanden*, C-124/05, ECLI:EU:C:2006:244, para. 28; Judgment in jointed cases C-350/06 and C-520/06, *op. cit.*, para. 22; Judgment in case C-277/08, *op. cit.*, para. 18; Judgment of 22 April 2010, *Zentralbetriebsrat der Landeskrankenhäuser Tirols v Land Tirol*, C-486/08, ECLI:EU:C:2010:215, para. 28; Judgment of 15 September 2011, *Williams and Others v British Airways plc*, C-155/10, ECLI:EU:C:2011:588, para. 17; Judgment of 22 November 2011, *KHS AG v Winfried Schulte*, C-214/10, ECLI:EU:C:2011:761, para. 23; Judgment in case C-282/10, *op. cit.*, para. 16; Judgment in case C-337/10, *op. cit.*, para. 28; Judgment of 21 June 2012, *Asociación Nacional de Grandes Empresas de Distribución (ANGED) v Federación de Asociaciones Sindicales (FASGA) and Others*, C-78/11, ECLI:EU:C:2012:372, para. 16; Judgment of 8 November 2012, *Alexander Heimann and Konstantin Toltschin v Kaiser GmbH*, joined cases C-229/11 and C-230/11, ECLI:EU:C:2012:693, para. 22; Order of 21 February 2013, *Concepción Maestre García v Centros Comerciales Carrefour SA*, C-194/12, ECLI:EU:C:2013:102, para. 16; Order of 13 June 2013, *Bianca Brandes v Land Niedersachsen*, C-415/12, ECLI:EU:C:2013:398, para. 27; Judgment of 22 May 2014, *Z.J.R. Lock v British Gas Trading Limited*, C-539/12, ECLI:EU:C:2014:351, para. 14; Judgment of 12 June 2014, *Gülay Bollacke v K + K Klaas & Kock BV & Co. KG*, C-118/13, ECLI:EU:C:2014:1755, para. 15; Judgment of 11 November 2015, *Kathleen Greenfield v The Care Bureau Ltd*, C-219/14, ECLI:EU:C:2015:745, para.26; Judgment of 30 June 2016, *Alicja Sobczyszyn v Szkoła Podstawowa w Rzeplinie*, C-178/15, ECLI:EU:C:2016:502, para. 19; Judgment of 20 July 2016, *Hans Maschek v Magistratsdirektion der Stadt Wien - Personalstelle Wiener Stadtwerke*, C-341/15, ECLI:EU:C:2016:576, para. 25.

¹⁵⁵ Judgment in case C-173/99, *op. cit.*, para 41-43; Judgment in jointed cases C-350/06 and C-520/06, *op. cit.*, para. 24; Judgment in case C-78/11, *op. cit.*, para. 16. See also judgment in case C-124/05, *op. cit.*, para. 34. The

The Court has ruled that the entitlement to annual leave cannot be interpreted restrictively¹⁵⁷ and that its implementation by the competent national authorities must be confined within the limits expressly laid down by Directive 2003/88¹⁵⁸.

1. Minimum paid annual leave of 4 weeks

Four weeks of paid annual leave per year is a minimum provision. During that period, ‘a worker must normally be entitled to actual rest, with a view to ensuring effective protection of his health and safety’¹⁵⁹.

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

When converting the four weeks of paid annual leave into a number of working days during which the worker is freed from his work obligations, ‘the entitlement to minimum paid annual leave, within the meaning of Directive 2003/88, must be calculated by reference to the days, hours and/or fractions of days or hours worked and specified in the contract of employment’¹⁶⁰.

The Court has ruled that ‘as regards the accrual of entitlement to paid annual leave, it is necessary to distinguish periods during which the worker worked according to different work patterns, the number of units of annual leave accumulated in relation to the number of units worked to be calculated for each period separately’¹⁶¹.

Where workers change from full to part-time employment, the Court has ruled that it would be incompatible with the Directive to apply the *pro rata temporis* principle retrospectively to the right to annual leave accumulated during a period of full-time work as this would entail a loss of some accumulated rights¹⁶². So a reduction in working hours cannot reduce the right to annual leave that the worker has already accumulated¹⁶³. In the contrary situation where a

Court added in its judgment in joined cases C-131/04 and C-257/04, *op. cit.*, para. 52, that derogations from this right may not be made by contractual arrangement.

¹⁵⁶ Judgment in joined cases C-350/06 and C-520/06, *op. cit.*, para. 25; Judgment in case C-277/08, *op. cit.*, para. 21; Judgment in case C-486/08, *op. cit.*, para. 30; Judgment in case C-214/10, *op. cit.*, para. 31; Judgment in case C-78/11, *op. cit.*, para. 19; Judgment in case C-194/12, *op. cit.*, para. 18; Judgment in case C-178/15, *op. cit.*, para. 23; Judgment in case C-341/15, *op. cit.*, para. 34.

¹⁵⁷ Judgment in case C-486/08, *op. cit.*, para. 29; Judgment in case C-78/11, *op. cit.*, para. 18; Judgment in joined cases C-229/11 and C-230/11, *op. cit.*, paras. 22-23; Judgment in case C-194/12, *op. cit.*, para. 16; Judgment in case C-415/12, *op. cit.*, para. 29; Judgment in case C-219/14, *op. cit.*, para. 28.

¹⁵⁸ Judgment in case C-173/99, *op. cit.*, para. 43; Judgment in case C-342/01, *op. cit.*, para. 29; Judgment in joined Cases C-131/04 and C-257/04, *op. cit.*, para. 48; Judgment in case C-277/08, *op. cit.*, para. 18; Judgment in case C-155/10, *op. cit.*, para. 17; Judgment in case C-341/15, *op. cit.*, para. 19.

¹⁵⁹ Judgment in case C-173/99, *op. cit.*, para. 44; Judgment in case C-342/01, *op. cit.*, para. 30; Judgment in case C-124/05, *op. cit.*, para. 29.

¹⁶⁰ Judgment in case C-219/14, *op. cit.*, para. 32.

¹⁶¹ Also referred to in judgment in case C-219/14, *op. cit.*, para. 35.

¹⁶² Judgment in case C-486/08, *op. cit.*, paras. 32-34; Judgment in joined Cases C-229/11 and C-230/11, *op. cit.*, para. 35; Judgment in case C-219/14, *op. cit.*, para. 37.

¹⁶³ Judgment in case C-486/08, *op. cit.*, para. 32; Judgment in joined Cases C-229/11 and C-230/11, *op. cit.*, para. 35; Judgment in case C-415/12, *op. cit.*, para. 30; Judgment in case C-219/14, *op. cit.*, para. 34.

worker moves from part to full-time, a new entitlement must in any case be calculated for the period after the increase in working hours, following the *pro rata temporis* principle¹⁶⁴.

The Directive does not affect the Member States' right to apply provisions that would be more favourable to the protection of the safety and health of workers¹⁶⁵, including granting workers more than four weeks of paid leave per year. In such cases, the Member State may establish different conditions for entitlement to and granting of the additional leave¹⁶⁶.

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

Article 7(1) states that the right to paid annual leave is granted to every worker. The Court has stated that 'every worker' includes workers who are absent from work on sick leave, whether short or long term, regardless of whether they have in fact worked in the course of the leave year¹⁶⁷.

The Directive provides that paid annual leave is granted '*in accordance with the conditions for entitlement to, and granting of, such leave laid down by national legislation and/or practice*'. Nevertheless, the Court has held that the Directive precludes Member States from unilaterally limiting the entitlement to paid annual leave conferred on all workers by applying preconditions which would in practice prevent certain workers from benefiting from it¹⁶⁸. For example, the Court has held that Member States may not impose on workers the condition of a period of 13 weeks of uninterrupted employment with the same employer before accruing leave¹⁶⁹. Similarly, Member States cannot impose conditions that make it impossible for certain workers to exercise the right to paid annual leave¹⁷⁰.

Member States nevertheless have some scope to regulate the way in which the right to paid annual leave may be exercised. This could include, for example, '*the planning of holiday periods, the obligation, if any, for the worker to give his employer advance notice of when he intends to take leave, the requirement that a minimum period of employment must be completed before leave can be taken, the criteria governing the pro-rata calculation of annual leave entitlement where the employment relationship is of less than one year, and so forth*'¹⁷¹.

- Entitlement to and granting of leave in the early period of employment

¹⁶⁴ Judgment in case C-219/14, *op. cit.*, paras. 38 and 44.

¹⁶⁵ Judgment in case C-342/01, *op. cit.*, para. 43.

¹⁶⁶ Judgment in case C-282/10, *op. cit.*, paras. 47-48; Judgment in case C-337/10, *op. cit.*, paras. 34-37.

¹⁶⁷ Judgment in joined cases C-350/06 and C-520/06, *op. cit.*, para. 40.

¹⁶⁸ Judgment in case C-173/99, *op. cit.*, paras. 48-53; Judgment in joined cases C-350/06 and C-520/06, *op. cit.*, para 28.

¹⁶⁹ Judgment in case C-173/99, *op. cit.*, paras. 64; Judgment in joined cases C-350/06 and C-520/06, *op. cit.*, para 28.

¹⁷⁰ Judgment in joined cases C-350/06 and C-520/06, *op. cit.*, para. 48; Judgment in case C-155/10, *op. cit.*, para. 26; Judgment in case C-539/12, *op. cit.*, para. 17; Judgment in case C-118/13, *op. cit.*, para. 16.

¹⁷¹ Commission's submission in case C-173/99 to which reference is made in Opinion of Advocate General Tizzano of 8 February 2001, *The Queen v Secretary of State for Trade and Industry, ex parte Broadcasting, Entertainment, Cinematographic and Theatre Union (BECTU)*, C-173/99, ECLI:EU:C:2001:81, para. 34 and in Opinion of Advocate General Trstenjak of 16 June 2011, *Williams and Others v British Airways plc*, C-155/10, ECLI:EU:C:2011:403, para. 37.

While Member States may, for example, organise ‘*the manner in which workers may take the annual leave to which they are entitled during the early weeks of their employment*’¹⁷², they may not impose a minimum period of uninterrupted work for the same employer before workers are entitled to paid annual leave¹⁷³.

- Scheduling of leave

The Directive does not regulate the scheduling of paid annual leave. This is left to national law, collective agreements or practices. However, as explained below, it provides that a worker who is unable to take planned leave due to another conflicting period of leave (sick leave, maternity leave or another period of leave whose purpose is different from that of the right to annual leave) is entitled to take that annual leave at another time, if necessary outside the corresponding reference period¹⁷⁴, with certain limits to the carry-over period in the event of long-term sick leave¹⁷⁵.

- Carry-over and possible loss of leave

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

As concerns carry-over, the Court has held that ‘*while the positive effect of paid annual leave for the safety and health of the worker is deployed fully if it is taken in the year prescribed for that purpose, namely the current year, the significance of that rest period in that regard remains if it is taken during a later period*’¹⁷⁶.

The Court has elaborated on the need to provide for carry-over if the worker whose right to annual leave is lost has not had the opportunity to exercise that right¹⁷⁷. The Court took the view that carry-over is inevitable where periods of leave guaranteed by EU law¹⁷⁸ overlap, and in the case of sick leave¹⁷⁹.

Loss of leave entitlement is consequently limited to cases in which the worker has actually had the opportunity to exercise that right. For instance, it cannot lapse at the end of the reference period laid down by national law if the worker was on sick leave for the whole or part of the leave year and has not had the opportunity to take annual leave¹⁸⁰, save for the exception admitted by the Court that allows the carry-over period to be limited in the case of long-term sick leave (see Part C).

¹⁷² Judgment in case C-173/99, *op. cit.*, para. 61.

¹⁷³ Judgment in case C-173/99, *op. cit.*, para. 64.

¹⁷⁴ Judgment in case C-194/12, *op. cit.*

¹⁷⁵ Judgment in case C-214/10, *op. cit.*

¹⁷⁶ Judgment in case C-178/15, *op. cit.*, para. 33; see also judgment in case C-124/05, *op. cit.*, para. 30; Judgment in joined cases C-350/06 and C-520/06, *op. cit.*, para. 30; Judgment in case C-277/08, *op. cit.*, para. 24.

¹⁷⁷ Judgment in case C-277/08, *op. cit.*, para. 19; Judgment in case C-178/15, *op. cit.*, para. 22.

¹⁷⁸ Judgment in case C-124/05, *op. cit.*, para. 24.

¹⁷⁹ Judgment in joined cases C-350/06 and C-520/06, *op. cit.*

¹⁸⁰ Judgment in joined cases C-350/06 and C-520/06, *op. cit.*, paras. 43 and 55; Judgment in case C-277/08, *op. cit.*, para. 19.

3. Payment during annual leave

The Court has underlined that ‘*the Directive treats entitlement to annual leave and to a payment on that account as being two aspects of a single right*’, as the aim of the payment during annual leave is ‘*to enable the worker actually to take the leave to which he is entitled*’¹⁸¹. As a consequence it considered that ‘*the purpose of the requirement of payment for that leave is to put the worker, during such leave, in a position which is, as regards remuneration, comparable to periods of work*’¹⁸².

Workers ‘*must receive their normal remuneration for that period of rest*’¹⁸³ and ‘*a reduction in a worker’s remuneration in respect of his paid annual leave, liable to deter him from actually exercising his right to take that leave, is contrary to the objective pursued by Article 7*’¹⁸⁴, the timing of the reduction is irrelevant¹⁸⁵.

The Court has held that payments for annual leave in the form of part payments staggered over the annual period of work are incompatible with the Directive. It has stressed that the payments should be made for a specific period in which the worker actually takes rest¹⁸⁶: the point at which the payment for annual leave is made must put the worker during that leave in a position that is comparable to periods of work as regards remuneration¹⁸⁷.

Where pay is made up of various components, the Court has considered that a specific analysis is needed to determine ‘*the normal remuneration to which the worker in question is entitled during his annual leave*’¹⁸⁸. The Court has held that the components of total remuneration relating to the professional and personal status of the worker have to be paid during the paid annual leave. It gave the example of allowances relating to seniority, length of service and to professional qualification¹⁸⁹.

If allowances are linked intrinsically to performing tasks required by the worker’s contract of employment and are calculated as part of the worker’s total remuneration they must be taken into account in the remuneration to which the worker is entitled during annual leave¹⁹⁰. Similarly, commission received for performing tasks required by the contract of employment, such as a commission on sales, must be taken into account in calculating remuneration¹⁹¹. It is for national courts to assess the reference period considered representative for the calculation of the average component payable for annual leave¹⁹².

¹⁸¹ Judgment in joined cases C-131/04 and C-257/04, *op. cit.*, paras. 49 and 58; Judgment in joined cases C-350/06 and C-520/06, *op. cit.*, para. 60; Judgment in case C-539/12, *op. cit.*, para. 17.

¹⁸² Judgment in joined cases C-131/04 and C-257/04, *op. cit.*, paras. 58-59.

¹⁸³ Judgment in joined cases C-131/04 and C-257/04, *op. cit.*, para. 50; Judgment in joined cases C-350/06 and C-520/06, *op. cit.*, para. 58; Judgment in case C-539/12, *op. cit.*, para. 16.

¹⁸⁴ Judgment in case C-155/10, *op. cit.*, para. 21; Judgment in case C-539/12, *op. cit.*, para. 23.

¹⁸⁵ Judgment in case C-539/12, *op. cit.*, para. 23.

¹⁸⁶ Judgment in joined cases C-131/04 and C-257/04, *op. cit.*, para. 63.

¹⁸⁷ Judgment in joined cases C-131/04 and C-257/04, *op. cit.*, paras 59-63.

¹⁸⁸ Judgment in case C-155/10, *op. cit.*, para. 22; Judgment in case C-539/12, *op. cit.*, para. 27.

¹⁸⁹ Judgment in case C-155/10, *op. cit.*, para. 27; Judgment in case C-539/12, *op. cit.*, para. 30.

¹⁹⁰ Judgment in case C-155/10, *op. cit.*, para. 24; Judgment in case C-539/12, *op. cit.*, para. 29.

¹⁹¹ Judgment in case C-539/12, *op. cit.*, paras. 32-33.

¹⁹² Judgment in case C-155/10, *op. cit.*, para. 26; Judgment in case C-539/12, *op. cit.*, para. 34.

It is not, however, necessary to take into account components of remuneration intended to cover exclusively ‘occasional or ancillary costs arising at the time of performance of the tasks which the worker is required to carry out under the contract of employment’¹⁹³.

4. Direct effect of the right to paid annual leave

The Court has held that Article 7 satisfies the criteria for direct effect, being unconditional, unequivocal and precise¹⁹⁴. This means that, if a Member State has failed to transpose this provision into national law or has transposed it incorrectly, an individual can go to the national courts to enforce the entitlement to paid at least four weeks’ annual leave against the State or public bodies, in their capacity either as employers or as public authorities¹⁹⁵.

While it is normally not possible to invoke the ‘direct effect’ of a directive in proceedings between private parties, national judges remain under an obligation to interpret national legislation, as far as possible, in accordance with the right to annual leave established in the Directive¹⁹⁶.

The Commission points to the fact that ‘horizontal direct effect’, i.e. ‘direct effect’ in proceedings between private parties, might still be upheld by the Court having regard to Article 31(2) of the Charter of Fundamental Rights of the European Union and to the qualification of the right to paid annual leave as a particularly important principle of Community and European Union social law¹⁹⁷. This would impose on national courts the obligation to ensure the full effectiveness of that principle, including by disapplying if need be any provision of national legislation contrary to that principle¹⁹⁸.

In any event, the party injured as a result of domestic law not complying with the Directive could ask for reparation of the loss or damage caused by the State and obtain a right to compensation for the loss sustained under certain conditions to be examined by the national courts¹⁹⁹.

¹⁹³ Judgment in case C-155/10, *op. cit.*, para 25; Judgment in case C-539/12, *op. cit.*, para. 31.

¹⁹⁴ Judgment in case C-282/10, *op. cit.*, paras 33-35.

¹⁹⁵ Judgment in case C-282/10, *op. cit.*, paras. 34-39.

¹⁹⁶ Judgment of 19 January 2010, *Seda Küçükdeveci v Swedex GmbH & Co. KG*, C-555/07, ECLI:EU:C:2010:21, paras. 47-48.

¹⁹⁷ Judgment in case C-173/99, *op. cit.*, para. 43; Judgment in case C-342/01, *op. cit.*, para 29; Judgment in joined cases C-131/04 and C-257/04, *op. cit.*, para. 48; Judgment in case C-124/05, *op. cit.*, para. 28; Judgment in jointed cases C-350/06 and C-520/06, *op. cit.*, para. 22; Judgment in case C-277/08, *op. cit.*, para. 18; Judgment in case C-486/08, *op. cit.*, para. 28; Judgment in case C-155/10, *op. cit.*, para. 17; Judgment in case C-214/10, *op. cit.*, para. 23; Judgment in case C-282/10, *op. cit.*, para. 16; Judgment in case C-337/10, *op. cit.*, para. 28; Judgment in case C-78/11, *op. cit.*, para. 16; Judgment in joined cases C-229/11 and C-230/11, *op. cit.*, para. 22; Order in case C-194/12, *op. cit.*, para. 16; Order in case C-415/12, *op. cit.*, para. 27; Judgment in case C-539/12, *op. cit.*, para. 14; Judgment in case C-118/13, *op. cit.*, para. 15; Judgment in case C-219/14, *op. cit.*, para.26; Judgment in case C-178/15, *op. cit.*, para. 19; Judgment in case C-341/15, *op. cit.*, para. 25.

¹⁹⁸ Judgment in case C-555/07, *op. cit.*, paras. 50-51.

¹⁹⁹ Judgment in case C-282/10, *op. cit.*, para 43, directly referring to judgment of 19 November 1991, *Andrea Francovich and Danila Bonifaci and others v Italian Republic*, joined cases C-6/90 and C-9/90, ECLI:EU:C:1991:428.

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

Article 7(2) provides that:

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

1. The entitlement to an allowance in lieu

The Directive allows an allowance in lieu of paid annual leave to which a worker was entitled on the date employment ended and which has not been taken²⁰⁰.

The purpose of the allowance in lieu of outstanding entitlements to annual leave is to avoid that the termination of the employment relationship, by making it no longer possible to take paid annual leave, would lead to *‘a situation in which the worker loses all enjoyment of that right, even in pecuniary form’*²⁰¹.

Two conditions are laid down for entitlement to an allowance in lieu: *‘first, that the employment relationship has ended and, second, that the worker has not taken all annual leave to which he was entitled on the date that that relationship ended’*²⁰². The Directive does not impose any additional condition. In particular, the Court has ruled that no prior application should be required²⁰³.

As the Court emphasised, it is only where employment has ended that Article 7(2) allows an allowance in lieu of paid annual leave: a worker must normally be entitled to actual rest, with a view to ensuring effective protection of health and safety²⁰⁴. By contrast, *‘the possibility of financial compensation in respect of the minimum period of annual leave carried over would create an incentive, incompatible with the objectives of the Directive, not to take leave or to encourage employees not to do so’*²⁰⁵.

If the contract has not ended, an allowance in lieu cannot be paid. It is irrelevant whether the worker was prevented from taking annual leave for reasons to do with production or the organisation of the undertaking²⁰⁶.

If the contract has ended, the reason it ended is irrelevant²⁰⁷. To ensure the effectiveness of this provision of the Directive, an allowance in lieu of paid annual leave is due also if the worker has asked to end the employment relationship²⁰⁸, retires²⁰⁹ or even dies²¹⁰.

²⁰⁰ Judgment in case C-118/13, *op. cit.*, para. 23; Judgment in case C-341/15, *op. cit.*, para. 27.

²⁰¹ Judgment in joined cases C-350/06 and C-520/06, *op. cit.*, para. 56; Judgment in case C-337/10, *op. cit.*, para. 29; Judgment in case C-118/13, *op. cit.*, para. 17; Judgment in case C-341/15, *op. cit.*, para. 26.

²⁰² Judgment in case C-118/13, *op. cit.*, para. 23; Judgment in case C-341/15, *op. cit.*, para. 27.

²⁰³ Judgment in case C-118/13, *op. cit.*, paras. 27-28.

²⁰⁴ Judgment in case C-173/99, *op. cit.*, para. 44; Judgment in case C-342/01, *op. cit.*, paras. 29-30; Judgment in case C-124/05, *op. cit.*, para. 29; Judgment in joined cases C-350/06 and C-520/06, *op. cit.*, para. 23; Judgment in case C-277/08, *op. cit.*, para. 20; Judgment in case C-486/08, *op. cit.*, para. 31.

²⁰⁵ Judgment in case C-124/05, *op. cit.*, para. 32.

²⁰⁶ Judgment in case C-194/12, *op. cit.*, paras. 28-29.

²⁰⁷ Judgment in case C-341/15, *op. cit.*, para. 28.

²⁰⁸ Judgment in case C-341/15, *op. cit.*, para. 29.

²⁰⁹ Judgment in case C-337/10, *op. cit.*, para. 31.

2. The amount of the allowance

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

The Court has nevertheless ruled that Member States must ensure that the conditions laid down by national law take account of the limits derived from the Directive itself. They must require that the allowance in lieu ‘*be calculated so that the worker is put in a position comparable to that he would have been in had he exercised that right during his employment relationship*’²¹¹. This means that the worker’s normal remuneration, which must normally continue during annual leave, is decisive²¹² in calculating the allowance in lieu of annual leave not taken by the end of the employment relationship²¹³.

3. Additional leave entitlement

If Member States provide for an additional period of annual leave exceeding the 4 weeks required by the Directive, they can decide whether or not to provide workers who have been prevented from taking that leave during their employment relationship with an allowance in lieu and they may lay down the conditions of that additional entitlement²¹⁴.

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

The Court has held that ‘*a period of leave guaranteed by Community law cannot affect the right to take another period of leave guaranteed by that law*’²¹⁵, including eventually, in the event of the aggregation of several periods of leave, the inevitable carrying forward of annual leave or part thereof to the following year²¹⁶.

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

1. Maternity leave

The Court has held that the purposes of maternity leave and paid annual leave are different: the first aims to protect a woman’s biological condition during and after pregnancy and to protect the special relationship between a woman and her child in the period which follows childbirth²¹⁷. This interpretation was deemed necessary ‘*in order to guarantee observance of*

²¹⁰ Judgment in case C-118/13, *op. cit.*, para. 24.

²¹¹ Judgment in joined cases C-350/06 and C-520/06, *op. cit.* paras. 57-60.

²¹² Judgment in joined cases C-229/11 and C-230/11, *op. cit.*, para. 25.

²¹³ Judgment in joined cases C-350/06 and C-520/06, *op. cit.*, para. 61.

²¹⁴ Judgment in case C-337/10, *op. cit.*, paras. 36-37; Judgment in case C-341/15, *op. cit.*, para. 39.

²¹⁵ Judgment of 14 April 2005, *Commission of the European Communities v Grand Duchy of Luxembourg*, C-519/03, ECLI:EU:C:2005:234, para. 33; Judgment in joined cases C-350/06 and C-520/06, *op. cit.*, para. 26.

²¹⁶ Judgment in case C-519/03, *op. cit.*, para. 33; Judgment in joined cases C-350/06 and C-520/06, *op. cit.*, para. 26.

²¹⁷ Judgment in case C-342/01, *op. cit.*, para. 32.

*the rights connected with the employment contract of a worker in the event of maternity leave*²¹⁸.

Therefore ‘a worker must be able to take her annual leave during a period other than the period of her maternity leave, including in a case in which the period of maternity leave coincides with the general period of annual leave fixed, by a collective agreement, for the entire workforce’²¹⁹. This wording suggests that it is an absolute principle, and that, unlike the situation of sick leave (see below), the carry-over of paid annual leave cannot be limited. Indeed, the Court has insisted that ‘a period of leave guaranteed by Community law cannot affect the right to take another period of leave guaranteed by that law’²²⁰.

In the light of the directive protecting pregnant workers and workers who have recently given birth or are breastfeeding²²¹, the Court added that this applies not only to the minimum paid annual leave of four weeks, but also to any additional leave provided for by national law²²².

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

Should other forms of leave be introduced in EU law, the Commission considers that the principle established by the Court that ‘a period of leave guaranteed by Community law cannot affect the right to take another period of leave guaranteed by that law’²²³ would apply. If periods of different types of leave protected by EU law coincide, this could entail carrying forward annual leave, or part of it, to the following year.

3. Sick leave

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

This builds on the different purposes of the two. The purpose of the right to paid annual leave is to enable the worker to rest and to enjoy a period of relaxation and leisure. The purpose of the right to sick leave is to enable the worker to recover from an illness that has caused him or her to be unfit for work²²⁴.

a. *Entitlement in case of sick leave*

²¹⁸ Judgment in joined cases C-350/06 and C-520/06, *op. cit.*, para. 27.

²¹⁹ Judgment in case C-342/01, *op. cit.*, para. 41.

²²⁰ Judgment in case C-342/01, *op. cit.*, paras. 32-33; Judgment in case C-519/03, *op. cit.*, para. 33; Judgment in joined cases C-350/06 and C-520/06, *op. cit.*, para. 26; Judgment in case C-124/05, *op. cit.*, para. 24.

²²¹ Council Directive 92/85/EEC of 19 October 1992 on the introduction of measures to encourage improvements in the safety and health at work of pregnant workers and workers who have recently given birth or are breastfeeding, OJ L 348, 28.11.1992, p. 1-7.

²²² Judgment in case C-342/01, *op. cit.*, para. 45.

²²³ Judgment in case C-519/03, *op. cit.*, para. 33; Judgment in joined cases C-350/06 and C-520/06, *op. cit.*, para. 26.

²²⁴ Judgment in joined Cases C-350/06 and C-520/06, *op. cit.*, para. 25; Judgment in case C-277/08, *op. cit.*, para. 21; Judgment in case C-78/11, *op. cit.*, para. 19; Judgment in case C-194/12, *op. cit.*, para. 19; Judgment in case C-178/15, *op. cit.*, para. 25.

As stated above, workers on sick leave remain entitled to accrue paid annual leave, since it is not a condition of paid annual leave that the worker must have worked during the reference period²²⁵.

b. Exercise of the right in the event of sick leave

The Court has clearly held that it is open to the Member State to authorise or prohibit the taking of annual leave during a period of sick leave²²⁶.

Nonetheless, if the worker does not wish to take annual leave during that period, annual leave must be granted for a different period²²⁷. This means, in particular, that a worker who is on sick leave during a period of planned annual leave has the right to take that annual leave at a different time, at his or her request²²⁸, whether sick leave begins before or during the planned paid annual leave²²⁹.

While the employer's interests can be taken into account when scheduling the worker's leave, the entitlement to annual leave at a later date cannot be called into question²³⁰. So the employer must grant the worker a different period of annual leave compatible with those interests, without excluding in advance a period outside the reference period for the annual leave in question²³¹.

c. Carry-over in case of sick leave

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

As stated above, while the Court has held that '*the positive effect of paid annual leave for the safety and health of the worker is deployed fully if it is taken in the year prescribed for that purpose, namely the current year*', it has nevertheless taken the view that that period did not lose his interest in this respect if it is taken during a later period²³². Therefore, where a worker who has been on sick leave for all or part of the leave year has not had the opportunity to take the paid annual leave, the Court has held that the right to paid annual leave cannot lapse at the end of the reference period²³³ but that the worker should be allowed to carry it over, by scheduling it if necessary outside the reference period for annual leave²³⁴.

²²⁵ Judgment in joined cases C-350/06 and C-520/06, *op. cit.*, para. 41; Judgment in case C-282/10, *op. cit.*, para. 20; Judgment in joined cases C-229/11 and C-230/11, *op. cit.*, para. 24.

²²⁶ Judgment in joined cases C-350/06 and C-520/06, *op. cit.*, para. 28-31; Judgment in case C-277/08, *op. cit.*, para. 25.

²²⁷ Judgment in case C-277/08, *op. cit.*, para. 25.

²²⁸ Judgment in case C-277/08, *op. cit.*, para. 22; Judgment in case C-78/11, *op. cit.*, para. 20; Judgment in case C-194/12, *op. cit.*, para. 19; Judgment in case C-178/15, *op. cit.*, para. 26.

²²⁹ Judgment in case C-78/11, *op. cit.*, para. 21.

²³⁰ Judgment in case C-194/12, *op. cit.*, para. 24.

²³¹ Judgment in case C-78/11, *op. cit.*, para. 23; Judgment in case C-277/08, *op. cit.*, para. 23; Judgment in case C-194/12, *op. cit.*, para. 23.

²³² Judgment in Case C-124/05, *op. cit.*, para. 30.

²³³ Judgment in joined Cases C-350/06 and C-520/06, *op. cit.*, paras. 38-49; Judgment in case C-277/08, *op. cit.*, para. 19.

²³⁴ Judgment in case C-78/11, *op. cit.*, para. 23; Judgment in case C-277/08, *op. cit.*, para. 23.

Member States may limit the period in which paid annual leave can be carried over²³⁵. The Court has acknowledged that the right to the accumulation of entitlements to paid annual leave acquired during incapacity for work is not unlimited²³⁶.

However, the Court has also held that ‘any carry-over period must be substantially longer than the reference period in respect of which it is granted’²³⁷. It has therefore held that a carry-over period of 9 months, i.e. shorter than the reference period to which it relates, did not ensure the positive effect of paid annual leave as a rest period and therefore could not be used to determine the expiry of the entitlement to paid annual leave²³⁸. By contrast, it accepted a carry-over period of 15 months²³⁹.

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

In the case of a worker being on sick leave for all or part of the leave year and/or of a carry-over period until employment ends, the Court has held that it is incompatible with Article 7(2) to preclude the payment of allowance in lieu of paid annual leave not taken²⁴⁰.

4. Other types of leave at national level

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

In the case of ‘convalescence leave’, the Court held that the considerations held for sick leave were applicable, and established the principle that where the purposes of the leave granted at national level and that of paid annual leave differ, there is an obligation to grant the worker concerned a different period of annual leave²⁴¹.

Nevertheless the Court considered that in the case of a specific type of leave granted by national law, it was for the national courts to determine whether the purpose of that right was different from the purpose of the right to paid annual leave, as interpreted by the Court and in light of its guidance and the factors at national level governing the granting of the leave²⁴².

VIII. Night work, shift work and patterns of work

The Working Time Directive acknowledges the particular nature of night work and of certain burdensome forms of work organisation²⁴³. In addition to general provisions on rest periods

²³⁵ Judgment in case C-214/10, *op. cit.*, paras. 28-35.

²³⁶ Judgment in case C-214/10, *op. cit.*, paras. 28-35.

²³⁷ Judgment in case C-214/10 *op. cit.*, paras. 38-40.

²³⁸ Judgment in case C-337/10, *op. cit.*, paras. 41-43; Judgment in case C-214/10, *op. cit.*, para. 38.

²³⁹ Judgment in case C-214/10, *op. cit.*, para. 44.

²⁴⁰ Judgment in joined cases C-350/06 and C-520/06, *op. cit.*, para. 62; Judgment in case C-337/10, *op. cit.*, para. 30; Judgment in case C-341/15, *op. cit.*, para. 31.

²⁴¹ Judgment in case C-178/15, *op. cit.*, para. 32.

²⁴² Judgment in case C-178/15, *op. cit.*, paras. 24-31.

²⁴³ 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, Recital 7: ‘Research has shown that the human body is more sensitive at night to environmental disturbances and also to certain burdensome forms

and maximum weekly working time, the Directive therefore contains specific provisions on night work, shift work and other work patterns which are detailed below.

A. The length of night work

Article 8 of the Directive lays down that:

‘Member States shall take the measures necessary to ensure that:

(a) normal hours of work for night workers do not exceed an average of eight hours in any 24-hour period;

(b) night workers whose work involves special hazards or heavy physical or mental strain do not work more than eight hours in any period of 24 hours during which they perform night work.

For the purposes of point (b), work involving special hazards or heavy physical or mental strain shall be defined by national legislation and/or practice or by collective agreements or agreements concluded between the two sides of industry, taking account of the specific effects and hazards of night work.’

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

1. The average limit on night work

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

a. The limit on ‘working time’

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

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

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

of work organisation and that long periods of night work can be detrimental to the health of workers and can endanger safety at the workplace’.

b. The average over a 'reference period'

The original proposal to establish a reference period of maximum 14 days²⁴⁴ does not appear in the Directive as adopted. The reference period is determined by Member States and/or social partners without any express limit.

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

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

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

a. Absolute limit

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

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

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

b. Work involving special hazards

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

²⁴⁴ Proposal for a Council Directive concerning certain aspects of the organisation of working time, 20 September 1990, COM(90)317 final — SYN 295.

The Directive provides that, in whatever way work involving special hazards or heavy physical or mental strain is defined, it should take account of the specific effects and hazards of night work. As a guide, reference may be made to Recital 7, which points to ‘environmental disturbances’ and ‘certain burdensome forms of work organisation’ as liable to have a detrimental effect on the health of the workers concerned. The Commission’s original proposal referred to ‘*piece work, assembly-line work or work at a pre-established pace*’ as examples in this respect²⁴⁵.

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

Article 9 imposes on Member States the following obligations:

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

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

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

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

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

1. The right of night workers to health assessments

a. Health assessment before assignment

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

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

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

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

²⁴⁵ Proposal for a Council Directive concerning certain aspects of the organisation of working time, 20 September 1990, COM(90)317 final — SYN 295.

b. Health assessment at regular intervals

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

In the adoption process for the 1993 Working Time Directive, the European Parliament²⁴⁶ proposed one check-up per year until the age of 40 and two per year after that age. This was taken up by the Commission²⁴⁷ but was not adopted in the final text²⁴⁸.

c. The health assessments must be free

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

d. Medical confidentiality

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

Unlike the ILO Convention, the Directive makes no explicit exception for a ‘*finding of unfitness for night work*’²⁴⁹.

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

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

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

This provision is comparable with Article 6 of ILO Convention 171²⁵⁰ and requires that, where workers suffer from health problems connected with their night work, they are transferred whenever possible to day work to which they are suited.

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

²⁴⁶ European Parliament, Decision on the common position established by the Council with a view to the adoption of a directive concerning certain aspects of the organization of working time (C3- 0241/93 - SYN 295), OJ C 315 1993, 22.11.1993.

²⁴⁷ Commission amendment to the Proposal for a Council Directive concerning certain aspects of the organisation of working time, 23 April 1991, COM(91)130 final - SYN 295.

²⁴⁸ Council Directive 93/104/EC of 23 November 1993 concerning certain aspects of the organisation of working time, OJ L 307, 13.12.1993, p. 18-24.

²⁴⁹ International Labour Organization, Convention concerning Night Work, C171, 26 June 1990, Article 4(2).

²⁵⁰ International Labour Organization, Convention concerning Night Work, C171, 26 June 1990, Article 6.

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

Unlike the ILO Convention²⁵¹, the Directive does not detail situations where transfer would not be possible, nor does it specify benefits or protection against dismissal for workers for whom no transfer proves possible despite health problems linked to night work.

C. Guarantees for night time working

Article 10 provides that:

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

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

Information from the adoption file for the Directive suggests that the European Parliament’s intention for this provision was to allow protection of pregnant women or mothers in the first 6 months after giving birth or adopting a child²⁵². The wording of Article 10, however, is open and Member States may freely decide on the categories subject to such guarantees and the nature of the guarantees.

D. Notification of regular use of night workers

Article 11 sets out that:

‘Member States shall take the measures necessary to ensure that an employer who regularly uses night workers brings this information to the attention of the competent authorities if they so request.’

The original proposal²⁵³ required employers to systematically inform the health and safety authorities of the regular use of night workers, in the light of the adverse effects of night work on health²⁵⁴.

²⁵¹ International Labour Organization, Convention concerning Night Work, C171, 26 June 1990, Article 6.

²⁵² European Parliament, Decision on the common position established by the Council with a view to the adoption of a directive concerning certain aspects of the organization of working time (C3- 0241/93 - SYN 295), OJ C 315 1993, 22.11.1993.

²⁵³ Proposal for a Council Directive concerning certain aspects of the organisation of working time, 20 September 1990, COM(90)317 final — SYN 295.

²⁵⁴ Explanatory memorandum concerning the proposal for a Council Directive concerning certain aspects of the organisation of working time, 20 September 1990, COM(90)317 final — SYN 295, para. 28.

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

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

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

E. Safety and health protection

Article 12 of the Directive establishes that:

‘Member States shall take the measures necessary to ensure that:

(a) night workers and shift workers have safety and health protection appropriate to the nature of their work;

(b) appropriate protection and prevention services or facilities with regard to the safety and health of night workers and shift workers are equivalent to those applicable to other workers and are available at all times.’

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

The first indent requires that workers who carry out night and shift work benefit from appropriate measures tailored to the nature of their work. Recital 7 points to the fact that ‘*the human body is more sensitive at night to environmental disturbances and also to certain burdensome forms of work organisation*’. The Commission’s proposal also stated that the aim was to take into account ‘*the more demanding nature of these forms of work and the problems which usually occur when shift work cycles change*’²⁵⁵. In this light, Article 12 means that the protection granted to the workers should take account both of the fact that the workers carry out night or shift work, and of the conditions in which they carry-out their work. As to what protective measures could be taken, the Commission’s Explanatory Memorandum gave the example of scheduling rest periods and breaks²⁵⁶, but the Directive does not specify.

The second indent can be linked to Recital 10, which states that ‘*the organisation and functioning of protection and prevention services and resources should be efficient*’. The

²⁵⁵ Explanatory memorandum concerning the proposal for a Council Directive concerning certain aspects of the organisation of working time, 20 September 1990, COM(90)317 final — SYN 295, para. 29.

²⁵⁶ Explanatory memorandum concerning the proposal for a Council Directive concerning certain aspects of the organisation of working time, 20 September 1990, COM(90)317 final — SYN 295, para. 29.

methods that Member States adopt to fulfil their obligations may be linked to those set out in Article 5 of ILO Convention 171, which states: *‘Suitable first-aid facilities shall be made available for workers performing night work, including arrangements whereby such workers, where necessary, can be taken quickly to a place where appropriate treatment can be provided.’* However, the Directive is broader, since it not only covers protection but also refers to prevention services and facilities. The exact extent of the requirements will depend on the protection and prevention facilities established for day-work in the Member States and other EU directives on the safety and health of workers²⁵⁷.

F. Pattern of work

Article 13 establishes that:

‘Member States shall take the measures necessary to ensure that an employer who intends to organise work according to a certain pattern takes account of the general principle of adapting work to the worker, with a view, in particular, to alleviating monotonous work and work at a predetermined work-rate, depending on the type of activity, and of safety and health requirements, especially as regards breaks during working time.’

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

IX. Derogations

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

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

²⁵⁷ Notably Council Directive 89/391/EEC of 12 June 1989 on the introduction of measures to encourage improvements in the safety and health of workers at work, OJ L 183, 29.6.1989, p. 1-8 and Council Directive 89/654/EEC of 30 November 1989 concerning the minimum safety and health requirements for the workplace, OJ L 393, 30.12.1989, p.1.

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

First, they must be validly transposed in order to be used. The Court has held that: ‘*Since the derogations available under the derogating provisions in question are optional, European Union law does not require Member States to implement them in domestic law.*’²⁵⁸ It has ruled that in order to make use of an option to derogate from certain provisions, ‘*the Member States are required to make a choice to rely on it*’²⁵⁹.

The Court has nevertheless taken the view that ‘*provided that, even in the absence of express measures transposing [The Working Time Directive], the national law applicable to a given activity observes the conditions laid down in Article 17 thereof, that law conforms to the directive and there is nothing to prevent national courts from applying it.*’²⁶⁰. This means that where national law meets the conditions of the derogation, it may be applied even if it does not expressly present itself as transposing the derogations provided for in the Directive. Member States should, however, ensure that the general principles of EU law are obeyed, including the principle of legal certainty and, as a consequence, that the provisions permitting optional derogations display the ‘*precision and clarity necessary to satisfy the requirements flowing from that principle*’²⁶¹.

Second, ‘*as exceptions to the European Union system for the organisation of working time put in place by Directive 2003/88, those derogations must be interpreted in such a way that their scope is limited to what is strictly necessary in order to safeguard the interests which those derogations enable to be protected*’²⁶². This means not only that derogations are limited to the cases in which they are expressly granted by the Directive but also that the scope of each derogation is limited to the provisions exhaustively listed in it²⁶³.

Third, the derogations are to be implemented ‘*subject to strict conditions intended to secure effective protection for the safety and health of workers*’²⁶⁴.

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

A. The derogation for ‘autonomous workers’

Article 17(1) sets out the following derogation:

²⁵⁸ Judgment in case C-227/09, *op. cit.*, para. 51.

²⁵⁹ Judgment in case C-227/09, *op. cit.*, para. 51.

²⁶⁰ Judgment in case C-303/98, *op. cit.*, para. 44.

²⁶¹ Judgment in case C-227/09, *op. cit.*, para. 55.

²⁶² Judgment in case C-227/09, *op. cit.*, para. 58; Judgment in case C-428/09, *op. cit.*, para. 40.

²⁶³ Judgment in case C-151/02, *op. cit.*, para. 89; Judgment in joined cases C-397/01 to C-403/01, *op. cit.*, para. 77.

²⁶⁴ Judgment in joined cases C-397/01 to C-403/01, *op. cit.*, para. 77; Judgment in case C-243/09, *op. cit.*, para. 34.

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

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

(b) family workers; or

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

1. The scope of the ‘autonomous workers’ derogation

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

As pointed out above, Article 17(1) must be interpreted in such a way that its scope is limited to what is strictly necessary in order to safeguard the interests which those derogations enable to be protected²⁶⁵.

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

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

In respect of both qualification criteria, the Court has held that it was apparent from its wording that it *‘applies only to workers whose working time as a whole is not measured or predetermined or can be determined by the workers themselves on account of the kind of activity concerned’*²⁶⁶ (Commission's emphasis). This means that the derogation is not applicable to workers whose working time is only partially not measured or predetermined or can only partially be determined by the workers themselves.

In its *Isère* case, the Court considered whether this derogation applied to *‘workers employed in holiday and leisure centres under an educational commitment contract’*. It based its assessment on the absence of information indicating that the workers concerned were *‘able to decide the number of hours which they are to work’* as well as on the fact that there were no

²⁶⁵ Judgment in case C-428/09, *op. cit.*, paras. 39-40.

²⁶⁶ Judgment in case C-484/04, *op. cit.*, para. 20; Judgment in case C-428/09, *op. cit.*, para. 41. While the Court remained silent on the precise elements leading to this interpretation, the Opinion of Advocate-General Kokott in the same case analysed the wording, context as well as objectives of the Directive in order to reach the conclusion that the derogation cannot apply to cases in which only part of the working time is not measured, predetermined or can be determined by the workers themselves. See Case C-484/04, Opinion of Advocate General Kokott, 9 March 2006, *Commission of the European Communities v United Kingdom of Great Britain and Northern Ireland*, ECLI:EU:C:2006:166, paras. 22-32.

elements indicating that the workers were ‘*not obliged to be present at their place of work at fixed times*’ and concluded that they did not fall within the scope of the derogation²⁶⁷. The ability of the workers to decide on both the quantity and the scheduling of their working hours therefore appears essential.

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

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

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

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

Workers who are not in these categories may also qualify if, on account of the specific characteristics of the activity concerned, their working time is not measured and/or predetermined or can be determined by them. There is no case-law yet on how the ‘autonomous worker’ derogation could apply to workers in new forms of employment such as the digital platform economy who fall under scope of this Directive. The principles set out here may assist in determining this question as it arises in the future.

2. The consequences of the ‘autonomous workers’ derogation

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

- daily rest (Article 3);
- breaks (Article 4);
- weekly rest period (Article 5);
- maximum weekly working time (Article 6);
- the length of night work (Article 8);

²⁶⁷ Judgment in case C-428/09, *op. cit.*, paras. 41-43.

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

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

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

B. Derogations requiring equivalent compensatory rest or appropriate protection

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

All of these derogations are, however, subject to the condition set out in Article 17(2) (and in Article 18), i.e. *‘that the workers concerned are afforded equivalent compensatory rest or that, in exceptional cases in which it is not possible, for objective reasons, to grant such equivalent periods of compensatory rest, the workers concerned are afforded appropriate protection’*²⁶⁸.

1. The derogation for ‘certain activities’ under Article 17(3)

Article 17(3) provides that:

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

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

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

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

²⁶⁸ The wording in the English version of Article 18 differs slightly and states that the condition is that *‘equivalent compensating rest periods are granted to the workers concerned or, in exceptional cases where it is not possible for objective reasons to grant such periods the workers concerned are afforded appropriate protection’*. This slight difference in the wording does not appear to the same extent in the FR, DE or IT versions of the Directive.

- (i) services relating to the reception, treatment and/or care provided by hospitals or similar establishments, including the activities of doctors in training, residential institutions and prisons;
- (ii) dock or airport workers;
- (iii) press, radio, television, cinematographic production, postal and telecommunications services, ambulance, fire and civil protection services;
- (iv) gas, water and electricity production, transmission and distribution, household refuse collection and incineration plants;
- (v) industries in which work cannot be interrupted on technical grounds;
- (vi) research and development activities;
- (vii) agriculture;
- (viii) workers concerned with the carriage of passengers on regular urban transport services;

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

- (i) agriculture;
- (ii) tourism;
- (iii) postal services;

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

- (i) whose activities are intermittent;
- (ii) who spend their working time on board trains; or
- (iii) whose activities are linked to transport timetables and to ensuring the continuity and regularity of traffic;

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

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

a. The sectors and activities concerned

Most elements contained in Article 17(3) relate to specific sectors and activities. However, it can be noted that this derogation may also be used in cases of accident or imminent risk of accident (point g) or in the circumstances ‘*where occurrences are due to unusual and unforeseeable circumstances, beyond the employers' control, or to exceptional events, the consequences of which could not have been avoided despite the exercise of all due care*’²⁶⁹ (point f).

The Court considered that the list of sectors and activities in Article 17(3) was not exhaustive²⁷⁰.

In particular, it held that the following activities may be covered by the derogations provided for in Article 17(3): activities of medical and nursing staff in primary care teams²⁷¹,

²⁶⁹ Article 5(4) of Council Directive 89/391/EEC of 12 June 1989 on the introduction of measures to encourage improvements in the safety and health of workers at work, OJ L 183, 29.6.1989, p. 1-8

²⁷⁰ Judgment in case C-428/09, *op. cit.*, para. 48.

²⁷¹ Judgment in case C-303/98, *op. cit.*, paras. 42-45; Order in case C-241/99, *op. cit.*, paras. 29-32.

ambulance services²⁷², activities at holiday and leisure centres which require continuity of service²⁷³, and firefighting²⁷⁴.

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

b. Provisions from which derogations are permitted

The derogations relate to the following provisions:

- daily rest (Article 3);
- breaks (Article 4);
- weekly rest period (Article 5);
- the length of night work (Article 8);
- the reference periods for application of the weekly rest period, the maximum weekly working time and the length of night work (Article 16).

The other provisions of the Directive continue to apply and the Court has stressed that this derogation *‘does not allow derogations from the definitions of the concepts of working time and rest period in Article 2 of the Directive’*²⁷⁵.

2. The derogation for shift and split work

Article 17(4) sets out that:

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

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

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

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

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

3. The derogation for all sectors by collective agreement

Article 18 establishes that:

²⁷² Judgment in joined cases C-397/01 to C-403/01, *op. cit.*, para. 97.

²⁷³ Judgment in case C-428/09, *op. cit.*, para. 49.

²⁷⁴ Judgment in case C-243/09, *op. cit.*, para. 49.

²⁷⁵ Judgment in case C-151/02, *op. cit.*, para 91.

‘Derogations may be made from Articles 3, 4, 5, 8 and 16 by means of collective agreements or agreements concluded between the two sides of industry at national or regional level or, in conformity with the rules laid down by them, by means of collective agreements or agreements concluded between the two sides of industry at a lower level.

Member States in which there is no statutory system ensuring the conclusion of collective agreements or agreements concluded between the two sides of industry at national or regional level, on the matters covered by this Directive, or those Member States in which there is a specific legislative framework for this purpose and within the limits thereof, may, in accordance with national legislation and/or practice, allow derogations from Articles 3, 4, 5, 8 and 16 by way of collective agreements or agreements concluded between the two sides of industry at the appropriate collective level.

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

Member States may lay down rules:

(a) for the application of this Article by the two sides of industry; and

(b) for the extension of the provisions of collective agreements or agreements concluded in conformity with this Article to other workers in accordance with national legislation and/or practice.’

In its proposal for the 1993 Directive²⁷⁶, the Commission emphasised that, given the differences arising from national practices, the subject of working conditions in general fell under the autonomy of the two sides of industry, who act in the public authorities’ stead and/or complement their action. It was however stressed that, although collective agreements can make a contribution to the application of directives, these do not release the Member States concerned from the responsibility for attaining the objectives sought via the directives.

a. When the derogation can be used

The Court has ruled that Article 18 is independent in scope from Article 17(3), which limits derogations to a number of sectors or activities (see section 1²⁷⁷).

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

²⁷⁶ Explanatory memorandum concerning the proposal for a Council Directive concerning certain aspects of the organisation of working time, 20 September 1990, COM(90)317 final — SYN 295, p. 4.

²⁷⁷ Judgment in case C-227/09, *op. cit.*, paras. 32-36.

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

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

The Commission therefore considers that these concepts must be defined by national law and practice. In doing so, Member States shall nevertheless take into account existing international standards on collective bargaining and collective agreements²⁷⁸ as, similarly to the stance taken by the Court for other notions used by EU law and the Working Time Directive, the sole title of ‘collective agreement’ given to a document would not suffice²⁷⁹.

b. What the derogation permits

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

- daily rest (Article 3);
- breaks (Article 4);
- weekly rest period (Article 5);
- the length of night work (Article 8);
- the reference periods for the application, of the weekly rest period, the maximum weekly working time and the length of night work (Article 16).

The other provisions of the Directive continue to apply.

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

Article 17(2) establishes that:

‘2. Derogations provided for in paragraphs 3, 4 and 5 may be adopted by means of laws, regulations or administrative provisions or by means of collective agreements or agreements between the two sides of industry provided that the workers concerned are afforded equivalent periods of compensatory rest or that, in exceptional cases in which it is not possible, for objective reasons, to grant such equivalent periods of compensatory rest, the workers concerned are afforded appropriate protection.’

²⁷⁸ See notably: International Labour Organization, Recommendation concerning Collective Agreements, R091, 29 June 1951; Recommendation concerning the Promotion of Collective Bargaining, R163, 19 June 1981; Convention concerning the Application of the Principles of the Right to Organise and to Bargain Collectively, C098, 1 July, 1949, Convention concerning the Promotion of Collective Bargaining, C154, 3 June 1981. See also International Labour Organization, Convention concerning Protection of the Right to Organise and Procedures for Determining Conditions of Employment in the Public Service, C151, 27 June 1978, Article 7, in which the International Labour Organization recognised not only ‘negotiation of terms and conditions of employment between the public authorities concerned and public employees’ organisations’ but also ‘such other methods as will allow representatives of public employees to participate in the determination of these matters’.

²⁷⁹ In particular, the Court has constantly held that the *‘sui generis legal nature of an employment relationship in national law can in no way whatsoever affect whether or not the person is a worker for the purposes of European Union law’*, see in particular the judgment in case C-316/13, *op. cit.*, para. 31.

Article 18 also stipulates that:

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

Despite slight differences in the wording in certain language versions, the two provisions require the same conditions to be applied to derogations implemented under Article 17(3) and (4) and Article 18²⁸⁰.

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

a. Requirement to provide equivalent compensatory rest

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

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

In light of the Court’s case-law, the equivalent compensatory rest is ‘*characterised by the fact that during such periods the worker is not subject to any obligation vis-à-vis his employer which may prevent him from pursuing freely and without interruption his own interests in order to neutralise the effects of work on his safety or health*’ (Commission’s emphasis)²⁸¹. Indeed, the Court has stressed that ‘*the worker must be able to remove himself from his working environment*’ and that this should ‘*enable him to relax and dispel the fatigue caused by the performance of his duties*’²⁸².

The Commission understands that the absence of obligation vis-à-vis the employer also means that the worker cannot be on ‘stand-by’ during that period, despite the fact that stand-by is considered as a rest period (see Chapter IV). Indeed, during compensatory rest, the worker shall be able to pursue without interruption his own interests.

As regards the time when the equivalent compensatory rest has to be granted, the Court has clarified this obligation as regards daily rest, stating that it must follow on immediately from the working time which it is supposed to counteract²⁸³ since the periods of rest ‘*must not only*

²⁸⁰ Judgment in case C-151/02, *op. cit.*, para. 90.

²⁸¹ Judgment in case C-151/02, *op. cit.*, para. 94; Judgment in case C-428/09, *op. cit.*, para. 50.

²⁸² Judgment in case C-151/02, *op. cit.*, para. 95.

²⁸³ Judgment in case C-151/02, *op. cit.*, para. 94.

*be consecutive but must also directly follow a period of work*²⁸⁴. Indeed, ‘*in order to ensure the worker’s safety and to protect his health effectively, provision must as a general rule be made for a period of work regularly to alternate with a rest period*’²⁸⁵. On the contrary, ‘*a series of periods of work completed without the interpolation of the necessary rest time may, in a given case, cause damage to the worker or at the very least threaten to overtax his physical capacities, thus endangering his health and safety with the result that a rest period granted subsequent to those periods is not such as correctly to ensure the protection of the interests at issue*’²⁸⁶.

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

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

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

As regards weekly rest, the Commission considers that the situation as is somewhat different from that of daily rest, both considering the physiological needs of the workers concerned and the existing reference period of 2 weeks for granting weekly rest. It therefore considers that compensation for missed weekly rest periods does not need to be granted ‘immediately’ but within a timeframe that ensures that the worker can benefit from regular rest in order to protect his safety and health, also since the regular alternation of work and rest periods is already ensured through daily or compensatory rest periods.

b. The ‘appropriate protection’ exception

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

As noted by the Court, ‘*it is only in entirely exceptional circumstances that Article 17 enables appropriate protection to be accorded to the worker where the grant of equivalent periods of compensatory rest is not possible on objective grounds*’²⁸⁷.

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

In that judgment, the Court ruled that the workers concerned in the case, i.e. members of staff carrying out casual and seasonal activities designed to educate and occupy children at holiday

²⁸⁴ Judgment in case C-151/02, *op. cit.*, para. 95.

²⁸⁵ Judgment in case C-151/02, *op. cit.*, para. 95; Judgment in case C-428/09, *op. cit.*, para. 51.

²⁸⁶ Judgment in case C-151/02, *op. cit.*, para. 96.

²⁸⁷ Judgment in case C-151/02, *op. cit.*, para. 98; Judgment in case C-428/09, *op. cit.*, para. 55.

and leisure centres and ensuring continual supervision of those children may be covered by the second level of derogation established by Article 17(2)²⁸⁸.

The Court therefore appears to consider that the ‘particular nature of the work’ or the ‘particular circumstances in which that work is carried out’ could, exceptionally, justify derogations from both the daily rest periods and the obligation to ensure regular alternation between a period of work and a period of rest²⁸⁹.

Besides workers in holiday and leisure centres, the Commission considers that this could, for example, apply to military staff during operations away from their usual workplace.

However, even in such situations, the Court considered that, if Article 17(2) allows: ‘*Member States and, where appropriate, the two sides of industry, some latitude when establishing, in exceptional cases, an appropriate protection for the workers concerned, the position remains that the objective of that protection, which concerns the health and safety of those workers, is exactly the same as that of the minimum daily rest period provided for in Article 3 of that directive or the equivalent period of compensatory rest provided for in Article 17(2), namely to enable those workers to relax and dispel the fatigue caused by the performance of their duties*’²⁹⁰.

The Court consequently held that solely imposing an annual ceiling on the number of days worked cannot in any circumstances be regarded as ‘appropriate protection’ within the meaning of Article 17(2)²⁹¹.

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

5. Derogations from the reference periods

Article 19 limits the option to derogate from the reference period for maximum weekly working time in the following way:

‘The option to derogate from Article 16(b), provided for in Article 17(3) and in Article 18, may not result in the establishment of a reference period exceeding six months.

However, Member States shall have the option, subject to compliance with the general principles relating to the protection of the safety and health of workers, of allowing, for objective or technical reasons or reasons concerning the organisation of work, collective agreements or agreements concluded between the two sides of industry to set reference periods in no event exceeding 12 months.

²⁸⁸ Judgment in case C-428/09, *op. cit.*, paras. 45 and 57.

²⁸⁹ Judgment in case C-428/09, *op. cit.*, para. 60.

²⁹⁰ Judgment in case C-428/09, *op. cit.*, para. 59.

²⁹¹ Judgment in case C-428/09, *op. cit.*, para. 58.

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

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

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

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

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

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

'1. A Member State shall have the option not to apply Article 6, while respecting the general principles of the protection of the safety and health of workers, and provided it takes the necessary measures to ensure that:

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

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

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

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

(e) the employer provides the competent authorities at their request with information on cases in which agreement has been given by workers to perform work exceeding 48 hours over a

period of seven days, calculated as an average for the reference period referred to in Article 16(b).

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

1. Requirement to transpose this provision

Similarly to other derogations presented above, in order to be applicable this provision must be transposed into national law. The Court held that without national law giving effect to it, the derogation did not apply and was therefore irrelevant to the resolution of a particular case²⁹². So the 48-hour maximum average working time for each seven-day period, including overtime, remained applicable to the workers concerned.

2. The conditions attached

The Article imposes a number of specific conditions which must be applied cumulatively²⁹³.

a. The agreement of the worker

The Court has ruled in several instances that this provision requires the consent of the individual worker²⁹⁴.

In particular, the Court has held that '*the consent given by trade-union representatives in the context of a collective or other agreement is not equivalent to that given by the worker himself*'²⁹⁵. This is supported by the absence of Article 6 from the list of Articles from which derogations are allowed by collective agreements under Article 18²⁹⁶.

The Court has also stated that '*if the worker concerned is encouraged to relinquish a social right which has been directly conferred on him by the directive, he must do so freely and with full knowledge of all the facts*'²⁹⁷ and that his consent should also be given expressly²⁹⁸.

The Court has held that '*those conditions are not met where the worker's employment contract merely refers to a collective agreement authorising an extension of maximum weekly working time. It is by no means certain that, when he entered into such a contract, the worker concerned knew of the restriction of the rights conferred on him by Directive 93/104.*'²⁹⁹

²⁹² Judgment in case C-243/09, *op. cit.*, paras. 36-38.

²⁹³ Judgment in case C-243/09, *op. cit.* para. 50.

²⁹⁴ Judgment in case C-303/98, *op. cit.*, para. 74; Judgment in joined cases C-397/01 to C-403/01, *op. cit.*, para. 80.

²⁹⁵ Judgment in case C-303/98, *op. cit.*, para. 74; Judgment in joined cases C-397/01 to C-403/01, *op. cit.*, para. 80.

²⁹⁶ Judgment in case C-303/98, *op. cit.*, para. 73.

²⁹⁷ Judgment in joined cases C-397/01 to C-403/01, *op. cit.*, para. 82.

²⁹⁸ Judgment in joined cases C-397/01 to C-403/01 *op. cit.*, para. 82.

²⁹⁹ Judgment in joined cases C-397/01 to C-403/01, *op. cit.*, para. 85.

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

The Court insisted that '*Those requirements are all the more important given that the worker must be regarded as the weaker party to the employment contract and it is therefore necessary to prevent the employer being in a position to disregard the intentions of the other party to the contract or to impose on that party a restriction of his rights without him having expressly given his consent in that regard.*'³⁰⁰.

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

b. No detriment

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

The Commission considers that the notion of detriment protects the concerned worker not only against dismissal but includes other forms of harm or disadvantages, for example, compulsory transfer to another department or position³⁰¹. The Commission also considers this obligation to protect the worker from any detriment to apply to the worker's withdrawal of agreement.

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

c. Record keeping

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

d. Availability of such records to the authorities

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

a. Availability of information on opted-out workers

³⁰⁰ Judgment in joined cases C-397/01 to C-403/01, *op. cit.*, para. 82.

³⁰¹ Judgment in case C-243/09, *op. cit.*, paras. 41-55. It must nevertheless be pointed out that this case concerned a worker who was not subject to an opt-out provision since it was not transposed into national law. Still, the Court hinted that the compulsory transfer of that worker to another service after his request to comply with the maximum limit of 48 hours on average meant that the worker had suffered a detriment.

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

3. Consequences of the ‘opt-out’

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

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

- full derogation from Article 6 and Article 16(b): a worker may work over 48 hours on average over a reference period to be defined, which can also exceed 12 months;
- limited derogations alternatively or concurrently from Article 6 or from Article 16(b). Possible examples are:
 - allowing workers to work over 48 hours per week on average over the same reference period as applicable for other workers, by setting a higher maximum limit to the worker's weekly working time, taking into account the provisions on rest periods;
 - allowing workers to exceed the maximum of 48 hours on average over 4 months while imposing that this limit is respected over a longer reference period — this amounts to a derogation from the reference period for calculating the maximum weekly working time.

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

As stated above, Article 22 specifies that use of the opt-out is subject to ‘*respecting the general principles of the protection of the safety and health of workers*’ and expressly envisages that even workers who have agreed to opt out may be prevented or restricted from exceeding an average 48-hour week by intervention of the competent authorities ‘*for reasons concerned with the safety and/or health of workers*’. The precise limits required by health and safety reasons may depend on the exact facts and the nature of the activities involved but may well be below the theoretical 78 hours maximum³⁰².

³⁰² Looking only at the daily and weekly rest periods, out of the total 168 hours (24 hours x 7 days) contained in each week, the minimum daily and weekly rests required by the Directive already add up to 90 rest hours on average (6 days x 11 hours of daily rest + 24 hours of weekly rest). Accordingly, working hours could not exceed an average of 78 hours per week, without taking into account breaks and the possible tighter limits applicable in case of night work.

D. Specific derogation for mobile workers and offshore work

Article 20 sets out the following:

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

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

2. Subject to compliance with the general principles relating to the protection of the safety and health of workers, and provided that there is consultation of representatives of the employer and employees concerned and efforts to encourage all relevant forms of social dialogue, including negotiation if the parties so wish, Member States may, for objective or technical reasons or reasons concerning the organisation of work, extend the reference period referred to in Article 16(b) to 12 months in respect of workers who mainly perform offshore work.

3. Not later than 1 August 2005 the Commission shall, after consulting the Member States and management and labour at European level, review the operation of the provisions with regard to offshore workers from a health and safety perspective with a view to presenting, if need be, the appropriate modifications.’

This provision — and the next, concerning workers on board seagoing fishing vessels — was inserted when the Directive was amended by Directive 2000/34. The aim of the amending Directive was *‘to apply all the provisions of the Directive to as many workers as possible, including non-mobile workers, all mobile and non-mobile railway workers and offshore workers; to extend to certain mobile workers the Directive’s provisions on 4 weeks’ paid annual leave and certain provisions in relation to night work and shift work (including health assessments); and to provide for these workers a guarantee of adequate rest and a limit on the number of hours to be worked annually. This last provision will also apply to offshore workers’*³⁰³. The resulting text therefore includes mobile and offshore workers in the scope of the Working Time Directive but provides for specific derogations.

1. Mobile workers

If mobile workers do not come within the scope of one of the sector-specific Directives, as an alternative to the derogations provided under Article 17(3) and Article 18 (see Part B), the Directive permits their exclusion from the rules on daily rest, breaks, weekly rest and length of night work without requiring equivalent compensatory rest or appropriate protection.

The Directive nevertheless requires not only compliance with the general principles relating to the protection of the safety and health of workers but also that workers are entitled to ‘adequate rest’ (See Chapter IV above) except in circumstances of accident or imminent risk

³⁰³ Explanatory Memorandum of the Communication from the Commission on the organisation of working time in the sectors and activities excluded from Directive 93/104/EC of 23 November 1993, 18 November 1998, COM(1998)662 final, para. 13.

of accident. Despite the original Commission proposal³⁰⁴, the adopted text does not permit additional derogations from the reference period for calculating mobile workers' maximum weekly working time.

2. Offshore workers

For offshore workers, Member States may use the derogations provided in Article 17(3), since they are available for '*activities where the worker's place of work and his place of residence are distant from one another, including offshore work*'. In such cases, the workers remain entitled to equivalent compensatory rest periods or appropriate protection, as outlined in part B.

However, in addition to these derogations and as an exception to Article 19 on the derogations from the reference period for calculating the maximum weekly working time, Article 20 also allows for a reference period of 12 months for workers who mainly perform offshore work. Member States may set this extended reference period for objective or technical reasons or reasons concerning the organisation of work, on condition that employers' and employees' representatives are consulted and that the general principles relating to the protection of the safety and health of workers are complied with.

This flexible approach to rest periods for offshore workers aimed in particular to allow '*shift systems based on 2 shifts x 12 hours x 14 days to continue and to give adequate recognition to the international and seasonal nature of the industry's working patterns by allowing an annualised calculation of working hours*'³⁰⁵. An assessment of these specific provisions was carried out in 2006 and concluded that they were adequate for this sector³⁰⁶.

E. Specific derogation for workers on board seagoing fishing vessels

Article 21 provides that:

'1. Articles 3 to 6 and 8 shall not apply to any worker on board a seagoing fishing vessel flying the flag of a Member State.

Member States shall, however, take the necessary measures to ensure that any worker on board a seagoing fishing vessel flying the flag of a Member State is entitled to adequate rest and to limit the number of hours of work to 48 hours a week on average calculated over a reference period not exceeding 12 months.

2. Within the limits set out in paragraph 1, second subparagraph, and paragraphs 3 and 4 Member States shall take the necessary measures to ensure that, in keeping with the need to protect the safety and health of such workers:

³⁰⁴ Explanatory Memorandum of the Communication from the Commission on the organisation of working time in the sectors and activities excluded from Directive 93/104/EC of 23 November 1993, 18 November 1998, COM(1998)662 final, para. 13.

³⁰⁵ White Paper on sectors and activities excluded from the Working Time Directive, 15 July 1997, COM(97)334, para. 60.

³⁰⁶ Report from the Commission on the operation of the provisions of Directive 2003/88/EC applicable to offshore workers, 22 December 2006, COM(2006) 853 final.

- (a) the working hours are limited to a maximum number of hours which shall not be exceeded in a given period of time; or*
- (b) a minimum number of hours of rest are provided within a given period of time.*

The maximum number of hours of work or minimum number of hours of rest shall be specified by law, regulations, administrative provisions or by collective agreements or agreements between the two sides of the industry.

3. The limits on hours of work or rest shall be either:

- (a) maximum hours of work which shall not exceed:*
 - (i) 14 hours in any 24-hour period; and*
 - (ii) 72 hours in any seven-day period;*
- or*
- (b) minimum hours of rest which shall not be less than:*
 - (i) 10 hours in any 24-hour period; and*
 - (ii) 77 hours in any seven-day period.*

4. Hours of rest may be divided into no more than two periods, one of which shall be at least six hours in length, and the interval between consecutive periods of rest shall not exceed 14 hours.

5. In accordance with the general principles of the protection of the health and safety of workers, and for objective or technical reasons or reasons concerning the organisation of work, Member States may allow exceptions, including the establishment of reference periods, to the limits laid down in paragraph 1, second subparagraph, and paragraphs 3 and 4. Such exceptions shall, as far as possible, comply with the standards laid down but may take account of more frequent or longer leave periods or the granting of compensatory leave for the workers. These exceptions may be laid down by means of:

- (a) laws, regulations or administrative provisions provided there is consultation, where possible, of the representatives of the employers and workers concerned and efforts are made to encourage all relevant forms of social dialogue; or*
- (b) collective agreements or agreements between the two sides of industry.*

6. The master of a seagoing fishing vessel shall have the right to require workers on board to perform any hours of work necessary for the immediate safety of the vessel, persons on board or cargo, or for the purpose of giving assistance to other vessels or persons in distress at sea.

7. Member States may provide that workers on board seagoing fishing vessels for which national legislation or practice determines that these vessels are not allowed to operate in a specific period of the calendar year exceeding one month, shall take annual leave in accordance with Article 7 within that period.'

Like mobile and offshore workers, where workers on board seagoing fishing vessels do not come within the scope of more specific provisions³⁰⁷ they are subject to the general Working

³⁰⁷ In particular of Council Directive 1999/63/EC of 21 June 1999 concerning the Agreement on the organisation of working time of seafarers concluded by the European Community Shipowners' Association (ECSA) and the Federation of Transport Workers' Unions in the European Union (FST), OJ L 167, 2.7.1999, p. 33-37. This directive applies to 'seafarers', i.e. 'any person who is employed or engaged or works in any capacity on board a ship to which this Agreement applies', 'on board every seagoing ship, whether publicly or privately owned,

Time Directive, which also contains specific provisions for workers on board a seagoing fishing vessel flying the flag of a Member State.

Article 21 allows Member States to derogate from the provisions on daily rest, breaks, weekly rest, maximum weekly working time and length of night work for such workers.

Nevertheless, Member States are required to take measures to ensure that the workers concerned are entitled to 'adequate rest' (see Chapter IV) and to limit maximum weekly working time to 48 hours on average over a reference period of up to 12 months.

In addition, the workers concerned must be subject either to maximum working hours or to a minimum number of hours of rest for which reference limits are set in Article 21(3). The Directive also establishes that hours of rest may be divided into no more than two periods, that one of them must last for at least 6 hours and that the interval between rest periods must not exceed 14 hours. These provisions reflect those of Directive 1999/63/EC³⁰⁸.

Derogations from these accommodating provisions are still permitted by law, regulations or collective agreements under two conditions: (i) the exceptions must be in accordance with the general principles of health and safety protection; and (ii) they can be granted only for objective or technical reasons or for reasons concerning the organisation of work. In such cases, derogations must as far as possible comply with the standards laid down but may give rise to '*more frequent or longer leave periods or the granting of compensatory leave*'.

In addition, the master of a seagoing fishing vessel must have the right to waive the rules on working time and minimum rest periods for the immediate safety of the vessel, persons on board or cargo or for the purpose of giving assistance to other vessels or persons in distress at sea.

Article 21(7) also allows the Member States to stipulate that workers must take their annual leave within a specific period of the calendar year of one month or more during which the vessel(s) is(are) not allowed to operate.

X. Conclusion

The Working Time Directive is a complex instrument. Its aim is to protect the health and safety of workers by establishing minimum health and safety requirements for the organisation of working time and it should not be subordinated to purely economic considerations.

The Directive remains a flexible instrument since, as shown in this document, it offers possibilities for flexible application of its main standards as well as a number of derogations

which is registered in the territory of any Member State and is ordinarily engaged in commercial maritime operations'. In respect of one of the applicability criteria, the Directive provides that '*in the event of doubt as to whether or not any ships are to be regarded as seagoing ships or engaged in commercial maritime operations for the purpose of the Agreement, the question shall be determined by the competent authority of the Member State. The organisations of shipowners and seafarers concerned should be consulted.*'

³⁰⁸ Council Directive 1999/63/EC of 21 June 1999 concerning the Agreement on the organisation of working time of seafarers concluded by the European Community Shipowners' Association (ECSA) and the Federation of Transport Workers' Unions in the European Union (FST), OJ L 167, 2.7.1999, p. 33-37.

which allow the specificities of particular sectors or certain categories of workers to be accommodated while protecting workers against the adverse effects of excessively long hours or inadequate rest.

Importantly, the Working Time Directive, as is the case for all EU Directives, is binding on the Member States but its provisions have to be transposed into national law. It is therefore first and foremost the responsibility of the EU Member States to develop their legal frameworks in order to apply the protective rules of the Directive, to take up as appropriate the elements of flexibility it offers or to introduce provisions that are more favourable to the protection of the safety and health of workers.

In the light of the complex architecture of the Directive, the aim of this Communication is to give as much guidance as possible on the interpretation of the Directive based first and foremost on its case-law. It does not intend to create new rules and the elements presented herein therefore remain subject to further developments and complements by the Court.