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Domestic Workers, EU Working Time Law and Implementation Deficits in National Law - Change in Sight?

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**DOMESTIC WORKERS, EU WORKING TIME LAW AND IMPLEMENTATION DEFICITS IN
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Abstract

The full or partial exclusion of domestic workers from EU Working Time Directive 2003/88/EC is a longstanding practice in many Member States that has been tolerated by the Commission for a long time. Since 2017, there is some change in sight. While domestic workers remained at the margin of attention in the Commission's earlier communications and implementation reports of Directive 2003/88/EC, the issue has gradually gained visibility. This indicates a remarkable shift, which has up to now not yet attracted due attention. This article analyses the shifting position of EU institutions towards domestic worker's rights. The subsequent investigation of selected national regulation raises doubts as to its compatibility with EU law. Different ways of selected Member States (Austria, Germany, Italy, the UK) to prevent the application of the Working Time Directive to domestic workers are analysed. EU working time law and national implementation deficits for domestic workers are analysed in the context of the international scholarly discussion and the ILO's 'decent work' agenda. Although not free from contradictions, this development is retraced as a move from the invisibility of domestic workers in EU labour law towards the Commission's open demand in 2017 that Member States comply with Directive 2003/88/EC for this group of precarious workers.

Keywords

EU working time law – domestic workers – implementation deficits – comparative law – decent work agenda

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Table of contents

ABSTRACT.....

KEYWORDS

TABLE OF CONTENTS

INTRODUCTION EU INSTITUTIONS’ UNDERSTANDING OF DOMESTIC WORKERS’ RIGHTS 1

PRECARIOUS WORKING CONDITIONS OF DOMESTIC WORKERS AND THE RELEVANCE OF EU WORKING TIME LAW FOR HEALTH AND SAFETY PROTECTION..... 2

 Precarious working time patterns of domestic workers and the relevance of EU working time law.. 3

 The EU Working Time Directive – the main provision..... 3

THE EVOLUTION OF EU POLITICAL INSTITUTIONS’ UNDERSTANDING OF EXCLUSION AND INCLUSION OF DOMESTIC WORKERS FROM THE SCOPE OF THE WORKING TIME DIRECTIVE – FIRST OUTSIDERS, NOW INSIDERS? 5

THE USE OF DEROGATIONS AND EXCEPTIONS OF DIRECTIVE 2003/88/EC FOR DOMESTIC WORKERS – AN ANALYSIS OF THE COMPATIBILITY OF SELECTED NATIONAL LAWS WITH EU LAW 7

 ‘Opting out’ from maximum working hours – the broad exclusion of domestic workers in the UK.. 8

 Excluding domestic workers from the personal scope - the case of the United Kingdom..... 9

 Excursus: Is working time of domestic workers measurable? 10

 Exceptions for the particular group of ‘live in’- domestic workers – Germany and Italy..... 11

 Germany..... 11

 Italy: Longer working hours for live-in domestic employees in a collective agreement 13

 Austria’s way around the application of the EU Working Time Directive for live-in domestic workers – the new category of self-employed care persons..... 15

THE LACK OF EFFICIENT IMPLEMENTATION OF DOMESTIC WORKERS RIGHTS – IS BETTERMENT IN SIGHT?..... 15

Introduction: EU institutions' understanding of domestic workers' rights*

Domestic employment is an important economic sector worldwide; although important and socially necessary, care work and domestic labour are often undervalued activities and sometimes legally less protected than 'other work'. The social, economic and legal situation of domestic workers has attracted more attention after the adoption of the International Labour Organisation Convention 189 concerning decent work for domestic workers in 2011. The Council of Ministers authorised EU Member States to ratify the ILO Convention 189 in 2014.¹

Up to now, among the 30 ratifying countries worldwide there are just seven EU Member States (Belgium, Finland, Germany, Ireland, Italy, Portugal and Sweden). But exclusion of domestic workers from the scope of EU Working Time Directive 2003/88/EC, derogations and exceptions are a longstanding practice in many Member States that has been tolerated by the Commission for a long time. Since 2017, there is some change in sight on behalf of the EU Commission.

A focus of this article is first to analyse the shifting position of EU institutions towards domestic worker's rights under EU working time law, especially of the Commission, in its context. The subsequent investigation of selected national regulation raises doubts as to its compatibility with EU law. Different ways by selected Member States to prevent the application of the Working Time Directive to domestic workers are analysed. Although the EU Working Time Directive 2003/88/EC has been criticised sometimes for having diluted workers' rights,² EU working time law has been underestimated as a tool to implement domestic workers' rights. In some Member States it has been erroneously assumed that the Working Time Directive does not apply. However, EU employment law is an important but misunderstood resource for domestic workers.³ This article puts the discussion on EU working time law, exceptions for domestic workers in national law and their compatibility with EU law in the context of the broader international discussion on domestic workers' rights and the ILO 'decent work' agenda.

While domestic workers remained at the margin of attention of the EU Commission in its earlier communications and implementation reports of Directive 2003/88/EC concerning certain aspects of the organisation of working time, the issue has gradually gained visibility in documents of the EU Commission, especially in 2017 when some Member States were openly criticised for not implementing the Working Time Directive 2003/88/EC properly with regard to domestic workers.⁴ This indicates a remarkable shift in the EU Commission's dealing with domestic workers' rights under EU working time regulation since Directive 2003/88/EC entered into force, which has up to now not yet attracted attention of labour law scholars. Although not free from contradictions, this development will be retraced here

* The author is professor of law at Hildesheim University (Scheiwe@uni-hildesheim.de). Most of the research and writing of this paper has been done during my stay as Fernand Braudel Senior Fellow at the European University Institute in 2019. I wish to thank the EUI for this opportunity and especially Claire Kilpatrick, Joanne Scott and Bruno de Witte for inspiring discussions. This paper will be published in *Zeitschrift für ausländisches und internationales Arbeits- und Sozialrecht* (ZIAS) no. 1/2021.

¹ Council decision of 28 January 2014 authorising Member States to ratify, in the interests of the European Union, the Convention concerning decent work for domestic workers, 2011, of the International Labour Organisation (Convention No. 189) (2014/51/EU), [2014] OJ L 32/32. The decision was proposed by the Commission (COM(2013) 152 final) and endorsed by the European Parliament.

² Tonia Novitz & Phil Syrpis, *The Place of Domestic Work in Europe*, 6 Eur. Lab. L.J., 104-127 (2015).

³ Vera Pavlou, *Domestic Work in EU Law: The Relevance of EU Employment Law in Challenging Domestic Workers' Vulnerability*, 41 European Law Review 379-398 (2016).

⁴ European Commission, *Report on the implementation by Member States of Directive 2003/88/EC concerning certain aspects of the organisation of working time*, COM(2017) 254, at 4.

as a move from the invisibility of domestic workers in EU labour law towards the Commission's open demand that Member States comply with the requirements of Directive 2003/88/EC for this group of precarious workers.

In *section 2*, the relevance of EU working time law given the precarious working conditions of domestic workers is described. *Section 3* analyses in depth the development of EU institutions and especially the Commission's understanding of domestic working time rights oscillating between exclusion and invisibility up to a significant turn in 2017. *Section 4* deals with the implementation of Directive 2003/88/EC for domestic workers in selected national law (especially the UK, Germany, Italy and Austria) that leaves doubts as to its compatibility with EU law. National legal systems have chosen different ways to avoid the applicability of the directive, this ranges from broad exclusion in the *UK* over exceptions for particular groups (live-in domestic workers) in *Germany* and *Italy* to exclusion via the qualification of live-in domestic workers as self-employed in *Austria*. The lack of efficient implementation of European working time law and future prospects after the Commission's change of position towards domestic workers in 2017 are finally examined in *section 5*.

Precarious working conditions of domestic workers and the relevance of EU working time law for health and safety protection

Domestic workers are an important part of the workforce, providing valuable personal and household services and care for private households which are of increasing importance also for people in need of long-term care in their own home. In Europe, nearly 2.6 million domestic workers (calculated as full-time equivalents) were employed for domestic work in private households in 2011. The three countries with the highest numbers of domestic workers employed by private households were France, Italy, and Spain with 600,000 or more domestic employees each.⁵ Nearly 90% of domestic workers in the EU are female.⁶ Moreover, migrant workers make up a considerable and increasing group among domestic workers.⁷ This creates many problems at the intersections of migration law and labour regulation, with migrant domestic workers being particularly vulnerable.⁸ A very high share of domestic employment is undeclared and irregular. Weaker protection for domestic workers is a problem in a number of important areas of social policy.⁹

Domestic workers constitute a part of the precarious workforce.¹⁰ Excessive and long working hours are part of the picture worldwide and also in European countries; this hits particularly the rising number of

⁵ Nicholas Farvaque, *Developing personal and household services in the EU - a focus on housework activities*. Report for DG V, 18 (2013), using Eurostat Data of 2011.

⁶ In 2008, more than 90% of all domestic workers were women in Spain, Germany, Belgium, Austria, Ireland and in the Netherlands, in France it were 82% and in Italy 88%. Only Finland seems to have a more or less equal share of men and women in domestic work, and the UK reports 62% women (based on Laborsta data, see Maria Gallotti, *The gender dimension of domestic work in western Europe* (Geneva: ILO, 2009), 4 and ILO, *Domestic workers across the world: Global and regional statistics and the extent of legal protection* (Geneva: ILO, 2013), 117-121.

⁷ For data on Europe see ILO, *Domestic workers across the world*, *supra*, at 35-38; Commission Staff Working Document, *Analytical Document on a possible revision of the Written Statement Directive (Directive 91/533/EEC) in the framework of the European Pillar of Social Rights* SWD(2017) 301 final, 33-35.

⁸ See Vera Pavlou, *Migrant domestic workers in Europe. Law and the construction of vulnerability* (Oxford: Hart Publishing, 2021)

⁹ ILO, *Domestic workers across the world*, *supra*; Adelle Blackett, *Introduction; Regulating Decent Work for Domestic Workers*, 23 *Canadian Journal of Women and the Law (CJWL/RFD)*, 1-46 (2011).

¹⁰ For a discussion of conceptual and empirical aspects of precariousness, see Deirdre McCann, *Equality through precarious work regulation: lessons from the domestic work debates in defence of the Standard Employment Relationship*, 10 *International Journal of Law in Context*, 507-521 (2014); Anne Davies, *Regulating atypical work: beyond equality*, in Nicola Countouris & Mark Freedland (eds) *Resocialising Europe in a time of crisis*, 230-249 (Cambridge: CUP, 2013); Malcolm Sargeant, *Domestic Workers: Vulnerable Workers in Precarious Work*, 3 *E-Journal of International and*

live-in domestic workers residing in the employer's home. But the group of domestic workers is 'bifurcated'; there is also a group of domestic workers with part-time jobs and short working hours with one employer (possibly combining multiple jobs with different employers) who face other problems that cannot be mainly tackled by the EU Working Time Directive. But nonetheless, EU working time regulation remains an important and underestimated legal instrument for the protection of domestic workers.¹¹ A short review of working time problems faced by domestic workers underpins this argument, supplemented by a brief overview on EU working time regulation.

Precarious working time patterns of domestic workers and the relevance of EU working time law

Overlong working hours are a problem for domestic workers worldwide (especially for live-in domestic workers).¹² They generally work some of the longest and most unpredictable hours.¹³ Main problems are excessive working hours (long or open-ended hours), insufficient rest periods, long spans of hours or split shifts, long or unpredictable periods of on-call or standby duty, and on the other hand excessively short hours and the related low income, and the inadequate documentation and verification of hours actually worked.¹⁴ Especially the so-called 24-hours shifts of caregiving live-in workers impose severe problems. Some light is shed on these practices by (rare) case-law. For example, in a recent judgment of the Higher Labour Court Berlin-Brandenburg, a private employer was condemned to pay 21 hours out of 24 per day to a live-in domestic worker for some months, since the Court accepted the assertion of the employee that she had to be available in stand-by modus or actively working around the clock.¹⁵

Excessive working time, insufficient rest times and other hazardous working time practices may threaten health and safety of domestic workers, since working hours, night work, shift work and irregular distribution of working time appear to be clearly correlated with health and safety outcomes.¹⁶

The EU Working Time Directive – the main provision

Working Time Directive 2003/88/EC¹⁷ amended and consolidated the former Directive 93/104.¹⁸ The adoption of Directive 2003/88/EC was based on the 'Framework Health and Safety Directive'

Comparative Labour Studies (2014); Leah F. Vosko, *Managing the Margins: Gender, Citizenship, and the International Regulation of Precarious Employment* (Oxford: OUP, 2010).

¹¹ This argument was forcefully made by Pavlou, *Domestic Work in EU Law*, *supra*.

¹² Deirdre McCann & Jill Murray, J. *The legal regulation of working time in domestic work* (Geneva: ILO, 2010), 5; ILO, *Decent work for domestic workers*. Report IV(1), International Labour Conference, 99th Session, 2010 (Geneva: ILO, 2009), 50-55, ILO, *Working hours in domestic work*, Domestic Work Policy Brief No. 2 (Geneva: ILO, 2011); Claire Hobden, *Working Time of Live-in Domestic Workers*, ILO Domestic Work Policy Brief 7, (Geneva: ILO, 2013), 1-7; Guy Mundlak, *Re-commodifying Time: The Exemption of 'Live-Ins' From Time Regulation*, In: Joanne Conaghan and Kerry Rittich, eds., *Labour Law, Work and Family – Critical and Comparative Perspectives* (Oxford: Oxford University Press, 2005), 125-156. For an early contribution of the 1930s see Erna Magnus, *The Social, Economic, and Legal Conditions of Domestic Servants*, 30 *International Labour Review*, Part I 190–207, Part II 336–364 (1934).

¹³ ILO, *Domestic Workers Across the World: Global and regional statistics and the extent of legal protection* (Geneva: ILO, 2013).

¹⁴ McCann & Murray, *The legal regulation of working time in domestic work*, *supra*, at 5.

¹⁵ Higher Labour Court Berlin-Brandenburg, judgment of 17 August 2020, file no. 21 Sa 1900/19.

¹⁶ Philip Tucker & Simon Folkard, *Working Time, Health and Safety: A Research Synthesis Paper* (Geneva: ILO, 2012). For studies on health risks see also Eurofound, *Opting out of the European Working Time Directive* (Brussels: Publications Office of the EU, 2015).

¹⁷ Directive 2003/88/EC, [2003] OJ L299/9 replaced the former Directive 93/104/EC.

¹⁸ Council Directive 93/104 concerning certain aspects of the organization of working time, [1993] OJ L307/18.

89/391/EEC.¹⁹ A domestic worker is any person engaged in domestic work within an employment relationship; domestic work is work performed in or for a household or households, as defined in Article 1 of ILO Convention n° 189. In an early document accompanying the 1993 proposal of the Working Time Directive²⁰ it had been suggested that a worker would be ‘any person employed by an employer, (...) but excluding domestic servants’, based on the definition of worker in the 89/391/EEC Directive.²¹ But this interpretation was refuted by the ECJ in the *Isère*-case²², based on the grounds that the Working Time Directive itself made no reference to this provision of Directive 89/391/EEC.

The Working Time Directive refers in its Article 1 (purpose and scope) only to Article 2 of the Framework Directive (material scope), stating that it shall apply to all sectors of activity—public and private—with the possibility of derogating certain groups of persons and activities as mentioned in Articles 14, 17, 18, and 19 of the Framework Directive. Domestic work is not mentioned and not excluded from the material scope. With regard to the personal scope, the Working Time Directive is applicable to all workers; there is no reference made to Article 3a of the Framework Directive 89/391/EEC.²³

According to Directive 2003/88/EC, the Member States have to ensure the entitlement of every worker to a minimum rest period of 11 consecutive hours per 24-hour period, a minimum weekly rest period of an uninterrupted rest of 24 hours, a maximum weekly working time of not more than 48 hours on average, including overtime and a paid annual leave of at least four weeks, to a limitation of the length of night work, not exceeding an average of eight hours in any 24-hour-period, a right to health assessment and transfer of night workers to day work and other measures for safety and health protection.²⁴ The *Charter* grants every worker the right to working conditions which respect his or her health, safety and dignity (Article 31 CFREU), including the right to limitation of maximum working hours, to daily and weekly rest periods and to an annual period of paid leave.²⁵ Limitations may be made only if they are necessary and meet objectives of general interest recognised by the Union or the need to protect the rights and freedoms of others (Article 52 CFREU). The European Pillar of Social Rights of 2017 states in its Principle 10(a) that workers have the right to a high level of protection of their health and safety at work, but working time is not explicitly mentioned. The essential nature of this right has been strengthened by the CJEU in its case-law on working time.²⁶ The CJEU in its latest judgment of 2019 related to Directive 2003/88/EC emphasises this fundamental right of *every* worker to a limitation of maximum working hours and to daily and weekly rest periods saying that it “is also expressly enshrined in Article 31(2) of the Charter, which Article 6(1) TEU recognises as having the same legal value as the Treaties Considering the high rank and importance of these rights, an exemption of domestic workers is neither made by law (since it is not stated in the Working Time Directive) nor is it necessary and proportional.

¹⁹ Directive 89/391 on the introduction of measures to encourage improvements in the health and safety of workers at work [1989] OJ L183/1.

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

²¹ Directive 89/391/EEC, *supra*.

²² C-428/09, *Union syndicale Solidaires Isère v Premier ministre and Others*, ECLI:EU:C:2010:612, para. 27; see also European Commission, *Interpretative Communication on Directive 2003/88/ concerning certain aspects of the organisation of working time* (C/2017/2601), [2017] OJ C 165, 1–58, 9f.

²³ Article 17(1) Directive 2003/88/EEC excludes managing executives or other persons with autonomous decision-taking powers, family workers, and workers officiating at religious ceremonies from the personal scope. Further exclusions are Article 20 (mobile workers and offshore work) and Article 21 (workers on board seagoing fishing vessels).

²⁴ Articles, 3 and 5 to 9.

²⁵ Art. 31 (2) CFREU.

²⁶ See Philippa Watson, *EU Social and Employment Law* (2nd ed, Oxford: OUP, 2014), 253-275; Martin Risak, *2003/88/EC: Working Time*, in Monika Schlachter, ed., *EU labour law: a commentary* (The Hague: Kluwer Law International, 2015), 385-420.

The evolution of EU political institutions' understanding of exclusion and inclusion of domestic workers from the scope of the Working Time Directive – first outsiders, now insiders?

While the full or partial exclusion of domestic workers from coverage by the Working Time Directive was deployed by some Member States, the Commission did not react or omitted domestic workers as a group from reporting in its implementation reports or other documents for a long time. A remarkable shift happened in 2017, when domestic workers were explicitly mentioned in the Commission's Implementation Report,²⁷ and regulation of some Member States that excludes domestic workers was cited, implying that their law is not consistent with the Working Time Directive.²⁸ This was new and a remarkable shift compared to the former silence on domestic workers' rights. It happened in 2017 three years after the Council of Ministers' decision in 2014 that authorised EU Member States to ratify the ILO Convention 189 in 2014,²⁹ assuming that most of the rules under the ILO Convention 189 of 2011 were covered to a large extent by the Union law *acquis* in the areas of social policy and anti-discrimination, as the Commission had argued in 2013 in its proposal for the Council decision.³⁰ However, it is not specified what is covered by the *acquis* and what is left outside.

In this section this shift is reconstructed by way of a short review of selected EU documents.

The adoption of the Working Time Directive 2003/88/EC was based on the Framework Health and Safety Directive 89/391/EEC,³¹ which excluded domestic workers explicitly from the personal scope, since it defines in Article 3(a) as “worker any person employed by an employer, including trainees and apprentices but *excluding domestic servants*.” While this exclusion was not part of the first draft of the Commission's proposal of 1988,³² it was introduced into the final text due to pressure by some Member States. The removal of Article 3(a) Directive 89/391/EEC has been asked for by different voices, also by the European Parliament,³³ but it is still in the text. For a long time, Article 3(a) Directive 89/391/EEC has nourished the misunderstanding that it might justify the exclusion of domestic workers from the Working Time Directive. It might be part of the explanation why even EU institutions were silent on the issue for quite some time. However, the Working Time Directives 93/104³⁴ and 2003/88/EC³⁵ did not iterate this exclusionary definition of ‘worker’ from the Framework Directive 89/391/EEC. But at the level of European institutions, domestic workers were for a long time invisible,³⁶ also in the Commission's five-yearly reports on the implementation of the Working Time Directive. In the implementation reports up to 2010³⁷ there is no mention of domestic workers at all.

²⁷ Report from the Commission on the implementation of Directive 2003/88/EC, COM(2017) 254.

²⁸ *Ibid.*, p.4.

²⁹ Council decision (2014/51/EU), *supra*. The decision was proposed by the Commission (COM(2013) 152 final) and endorsed by the European Parliament.

³⁰ COM(2013) 152 final.

³¹ Directive 89/391/EEC, *supra*.

³² Proposal for a Council Directive on the introduction of measures to encourage improvements in the safety and health of workers at the workplace COM(88)73 final.

³³ Committee on Women's Rights and Gender Equality of the European Parliament, *Report on women domestic workers and carers in the EU* (2015/2094(INI)) 5.4.2016, RR/1091107En.doc p. 14f.;39.

³⁴ Council Directive 93/104 concerning certain aspects of the organization of working time [1993] OJ L307/18.

³⁵ Directive 2003/88/EC, [2003] OJ L299/9 replaced the former Directive 93/104/EC.

³⁶ They were not mentioned in the EU Commission, *White Paper on Sectors and Activities Excluded from the Working Time Directive*, COM (97) 334 final and neither in the 1998 report on excluded sectors and activities.

³⁷ COM(97) 334 final, COM(98) 662 final, COM(2000)787 final, COM(2003) 843 final, COM(2010) 802 final.

An important judgment of the CJEU that might have contributed to a shift was the *Isère case* of 2010.³⁸ It refuted the opinion that the personal scope of the Working Time Directive was restricted by Article 3(a) of Directive 89/391/EEC on the grounds that the Working Time Directive 2003/88 itself made no reference to that provision.³⁹ The *Isère case* did not deal with domestic workers, but the Court's argument applies equally to domestic workers.

The Commission mentions domestic workers only by the way in its *Interpretative Communication* of 2017 when reporting the ECJ judgement *Isère*.⁴⁰ But there was a definite shift in the Commission's *Implementation Report* of 2017.⁴¹ It includes for the first time domestic workers in its reporting; it discloses in clear words that some Member States have entirely or partially excluded domestic workers from their transposing legislation, naming explicitly Belgium, Greece, Luxembourg, Sweden and the UK. This expansive understanding of the implications of *Isère* by the political institutions is important and promising and was not foreseen in most scholarly analyses of EU law.⁴²

Even with regard to health and safety legislation, a shift in the Commission's perception of domestic workers' rights is noticeable. While the Commission Communication of 2014 on the EU Strategic Framework on Health and Safety at Work 2014-2020 was still silent on the issue of domestic workers⁴³, this changed in 2017. In the Commission's 2017 Communication on 'Safer and Healthier Work for All - Modernisation of the EU Occupational Safety and Health Legislation and Policy',⁴⁴ a programme for removing or updating outdated provisions in the Directives is announced. Although the EU Occupational Safety and Health Framework Directive 89/391/EEC does not oblige Member States to include domestic workers into their legislation (and only half of the Member States do so)⁴⁵, Member States are encouraged to ensure a broad coverage of health and safety policies, and domestic workers are explicitly mentioned as a relevant group.⁴⁶ The Commission argues that this shall help Member States to ratify ILO Convention 189 and to comply with their international duties. In this communication, the Commission points to its role as 'guardian of the treaties' and to the goal of enhancing enforcement,⁴⁷ also by infringement procedures, as stated in the Communication 'Better Results through Better Application' of 2016.⁴⁸

The emergence of domestic workers' rights in the Commission documents cited, culminating in 2017, was not only influenced by the CJEU's *Isère* judgment, but happened in the context of other developments, namely a change of the Commission's strategy to reform the Working Time Directive, the proclamation of the *European Pillar of Social Rights*, and the debates and enactment of the ILO Convention 189 'Decent work for domestic workers' in 2011 in the International Labour Conference.

³⁸ C-428/09, *Isère*, *supra*.

³⁹ C-428/09 *Isère*, *supra*, para. 27.

⁴⁰ *Interpretative Communication* C/2017/2601, *supra*, at 9.

⁴¹ European Commission, *Implementation Report* COM(2017), *supra*, at 254.

⁴² But the work of *Pavlou* of 2016, *supra*, stressed the importance and applicability of EU working time law to domestic workers.

⁴³ *Communication from the Commission on an EU Strategic Framework on Health and Safety at Work 2014-2020* COM(2014) 332 final.

⁴⁴ *Communication from the Commission, Safer and Healthier Work for All - Modernisation of the EU Occupational Safety and Health Legislation and Policy*, COM(2017)12.

⁴⁵ COM(2017)12, *supra*, at 15.

⁴⁶ COM(2017)12, *supra*, at 15; 20.

⁴⁷ COM(2017)12, *supra*, at 16.

⁴⁸ *Communication from the Commission — EU law: Better results through better application* (2017/C 18/02), [2017] *OJ C* 18, 10–20; *Better Regulation for Better Results: An EU Agenda*, SWD (2015)111 final, *Better Regulation Guidelines* COM [2015] 215 final; *EU Regulatory Fitness*, COM [2012] 746 final. For a critical discussion see Sacha Garben & Inge Govaere (eds), *The EU Better Regulation Agenda: A Critical Assessment* (Oxford: Hart Publishing, 2018).

The ILO proceedings that led to the adoption of ILO Convention 189 in 2011 have certainly raised attention for the precarious situation of domestic workers and their rights worldwide. However, the Commission's role in the proceedings of the International Labour Conference (ILC) have been criticised by some scholars. Novitz and Syrpis point to dilutions of the initial 'equal treatment approach' and to changes in the formulation initiated by the EU.⁴⁹

The proclamation of the *European Pillar of Social Rights*⁵⁰ in 2017 involved the issuing of the Commission's *Interpretative Communication C/2017/2601*,⁵¹ providing legal guidance on the application of the Working Time Directive. The *Interpretative Communication* followed a series of unsuccessful attempts by the EU institutions to renew the Working Time Directive between 2004 and 2009, and then again through the social dialogue in 2010.⁵² At the end, the Commission gave up the attempts of legislative reform of the Working Time Directive; the *Interpretative Communication 2017* marked a new strategy and a non-legislative approach of the Commission for promoting implementation and compliance by Member States. It remains to be seen how the Commission will continue this path for monitoring Member States' implementation of the Working Time Directive with regard to domestic workers.

A reason for scepticism is the somewhat ambivalent treatment of domestic workers in Directive 2019/1152 on transparent and predictable working conditions in the European Union.⁵³ It encompasses obligations of the employer to inform each worker of his or her working conditions. In general, domestic workers are covered. But Member States can exclude the individual employer of a domestic worker from certain other requirements.⁵⁴ Domestic employees can be excluded from redress mechanisms that are based on favourable presumptions if information is missing from the documentation. The latter is the most relevant potential exclusion for domestic workers with regard to (missing) information on working time of the employee. This clause in the Directive 2019/1152 is a counter-tendency to the Commission's stronger commitment to domestic workers rights.

The use of derogations and exceptions of Directive 2003/88/EC for domestic workers – an analysis of the compatibility of selected national laws with EU law

In this section, selected national regulation is discussed that contains less favourable working time rules for domestic workers than *Directive 2003/88/EC*. A comprehensive overview of all EU Member States regimes for domestic workers cannot be given here and still has to be developed in further research. The selection of national jurisdictions was first based on a review of the relevant literature on domestic workers and the law.⁵⁵ Large labour markets were chosen, while language was a filter. Regulation from

⁴⁹ Novitz & Syrpis, *The Place of Domestic Work in Europe*, *supra*, at 121.

⁵⁰ *Interinstitutional Proclamation on the European Pillar of Social Rights* (2017/C 428/09), [2017] *OJ C* 428, 10–15.

⁵¹ *Interpretative Communication C/2017/2601*, *supra*.

⁵² On the various stages of these unsuccessful attempts of reforming working time legislative activities, see Tobias Nowak *The turbulent life of the Working Time Directive*, 25 *Maastricht Journal of European and Comparative Law*, 118–129; see also Alan Bogg, *The Regulation of Working Time in Europe*, 290–295 in Alan Bogg, Cathryn Costello & Anne Davies (eds.) *Research Handbook on EU Labour Law* (Edward Elgar Publishing, 2016) 267–298.

⁵³ Directive (EU) 2019/1152 on transparent and predictable working conditions in the European Union, [2019] *OJ L* 186, 105–121; see Bartłomiej Bednarowicz, *Delivering on the European Pillar of Social Rights: The New Directive on Transparent and Predictable Working Conditions in the European Union*, 48 *Industrial Law Journal*, 604–623 (2019).

⁵⁴ Art. 1(7) Directive 201/1152. Member States may decide not to apply the obligations set out in Articles 12 and 13 and in point (a) of Article 15(1) to natural persons in households acting as employers where work is performed for those households.

⁵⁵ Adelle Blackett, *Making domestic work visible: The case for specific regulation* (Geneva: ILO, 1998), *idem*, *Introduction*, *supra*; *idem*, *Regulatory Innovation on Decent Work for Domestic Workers in the Light of International Labour Organization Convention No. 189*, 34 *IJLLIR*, 141–148 (2018), *idem*, *Everyday Transgressions: Domestic Workers' Transnational Challenge to International Labor Law* (Ithaca; London: CUP, 2019), Gallotti, *The gender dimension of*

Austria, Germany, Italy and the United Kingdom was selected which leave doubts if it is compatible with EU law.

Directive 2003/88/EC allows for a wide range of *derogations* in Articles 17 to 22 with regard to daily rest periods (Article 3), breaks during the working day (Article 4), weekly rest periods (Article 5), maximum weekly working time (Article 6), length of night work (Article 8) and reference periods for calculating rest time (Article 16). Derogation is not allowed from the right to a paid annual leave (Article 7) and from the accompanying provision that regards night work (Articles 9 to 12). Derogations from Articles 3, 4, 5, 8 and 16 (but not from Article 6 ‘maximum weekly working time’) are possible by collective agreements or agreements concluded between the two sides of industry on the condition that equivalent compensating rest periods are granted to the workers or that they are afforded appropriate protection (Article 18). The derogation rules have to be interpreted restrictively, and equivalent periods of compensatory rest have to be granted (Article 17 (2)).

How are these exceptions and derogations used by Member States with regard to domestic workers? This section starts with an analysis of broad exclusion via the ‘opt out’-clause from maximum working hours, next the broad exclusion of domestic workers from the personal scope (UK) and goes on with particular exceptions for ‘live in’-domestic workers in Italy and Germany. Finally a particular deviation from the Working Time Directive in Austria is discussed, where ‘live in’-domestic workers can be declared as self-employed which detracts them from the application of the Working Time Directive.

‘Opting out’ from maximum working hours – the broad exclusion of domestic workers in the UK

Long working hours are a notorious feature of domestic workers, particularly for ‘live in’ domestic workers who are expected to deliver so-called 24-hours-services. A number of empirical studies have shown that very long working hours may have a detrimental effect upon the physical and psychological health of employees. Therefore the broad ‘opt out’-clause⁵⁶ which allows Member States not to apply the provision on maximum weekly working hours (set at 48 hours over a seven day period, calculated as average over four months) is of particular relevance for domestic workers. 16 Member States made use of the ‘opt out’-clause, but in different ways. An ‘opt-out’ for all sectors of activity which includes domestic work was introduced in Bulgaria, Cyprus, Estonia, Malta and the UK.⁵⁷

Member States can implement the ‘opt-out’ rule by national statutes, but they have to respect the threshold of no more than weekly 48 hours on average worked over a reference period to be defined, which can also exceed 12 months, and rest periods. They have to ensure that no employer is allowed to require a worker to work more than 48 hours weekly without the prior agreement of the worker.⁵⁸

*domestic work in western Europe, supra; ILO, Domestic workers across the world, supra; ILO, Decent work for domestic workers. Report IV(1), supra; International Labour Conference, 99th Session, supra; ILO, Working hours in domestic work, supra; ILO & Hobden, Working Time of Live-in Domestic Workers, supra; ILO, Effective protection for domestic workers: a guide to designing labour laws (Geneva: ILO, 2012); ILO, Extension of social protection of migrant domestic workers in Europe (Geneva: ILO 2013); Deirdre McCann, New frontiers of regulation: Domestic workers, working conditions and the holistic assessment of nonstandard work norms. 34 *Comparative Labor Law and Policy Journal*, 101 (2012); Deirdre McCann, *New Frontiers of Regulation: Domestic Work, Working Conditions, and the Holistic Assessment of Nonstandard Work Norms*, 34 *Comparative Labor Law & Policy Journal*, 167-192 (2012); McCann & Murray, *The legal regulation of working time in domestic work, supra; Mundlak, Re-commodifying Time, supra; Novitz & Syrpis, The Place of Domestic Work in Europe, supra; Pavlou, Domestic Work in EU Law, supra; Pavlou, Migrant domestic workers in the EU, supra; Virginia Mantouvalou, Human Rights for Precarious Workers: The Legislative Precariousness of Domestic Labor*, 34 *Comparative Labor Law & Policy Journal*, 133-136 (2012). Literature that regards *Austria, Germany, Italy, the UK* is quoted below where the national legislation is discussed.*

⁵⁶ Art. 22 (1) (a).

⁵⁷ Countries which made no use of the possibility to ‘opt-out’ are Austria, Croatia, Denmark, Finland, Greece, Ireland, Italy, Lithuania, Luxembourg, Portugal, Romania and Sweden.

⁵⁸ Art. 22(1) (a) to (e).

The Commission's implementation reports⁵⁹ reveal that most Member States did not fully report to the Commission. Some Member States do not seem to provide for any monitoring or recording of working time of opted-out workers. In its report of 2010, the Commission expresses concern that, in some Member States, the health and safety objectives of the Directive may not be respected, and that the requirement of the worker's advance voluntary consent may not be properly applied,⁶⁰ Although not mentioned explicitly, this is a serious problem also for domestic workers.

The UK has opted out of maximum working hours (for domestic workers, but not only for them) in accordance with EU law, but has failed to take the necessary accompanying measures. However, the UK is not the only Member State that opted out, but did not comply with the other terms required by Article 22 Directive 2003/88/EC.⁶¹ This seems to be the case also for the other states opting out for all sectors of activity (including domestic work): Bulgaria, Cyprus⁶², Estonia and Malta.

Excluding domestic workers from the personal scope - the case of the United Kingdom

The *United Kingdom* ordains in Article 19 of Working Time Regulations 1998⁶³ that several norms are not applicable in relation to a worker employed as a domestic servant in a private household. Not applicable are regulations of maximum weekly working time (an average of 48 hours for each seven day), of the maximum length of night work (an average of eight hours for each 24 hours), regarding the free health assessment before taking up night work and transfer of night workers to day work, and the obligation of an employer to ensure adequate rest periods where the work pattern puts health and safety at risk or is particularly monotonous. The employer is also exempted from the connected obligations to take all reasonable steps to ensure these limits or opportunities to protect the health and safety of workers.

Are these exemptions within the limits allowed for *derogation* by Directive 2003/88/EC? To derogate from the limits of *maximum working hours* (on average 48 weekly working hours) is possible via the 'opt out'-clause of Article 22,⁶⁴ and the UK has made use of it. But the opt-out in Article 22(1) is not applicable in relation to other provisions of the directive such as minimum daily and weekly rest, paid annual leave, and limitation of night and shift work. Other possibilities of derogating are contained in Articles 17 to 21. A scrutiny of the different legal bases for derogation and exceptions of Articles 17 to 21 leads to the conclusion that only Article 17(1) can serve as the legal basis for the UK derogation in Article 19 of Working Time Regulations 1998.⁶⁵ However, the derogation based on Article 17(1) is possible only "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

⁵⁹ COM(97) 334 final, COM(98) 662 final, COM(2000)787 final, COM(2003) 843 final, COM(2010) 802 final., COM 2017/C 165/01. Art. 24 Directive 2003/88/EC provides reporting duties of Member States and the obligation of the Commission to report each five years. See *Interpretative Communication C/2017/2601, supra*.

⁶⁰ COM(2010) 802 final, 7f.

⁶¹ See the Commission's *implementation reports* COM(97) 334 final, COM(98) 662 final, COM(2000)787 final, COM(2003) 843 final, COM(2010) 802 final., COM 2017/C 165/01.

⁶² See Pavlou, *Migrant domestic workers in the EU, supra* for the legal situation in Cyprus.

⁶³ Working Time Regulations 1998 No. 1833 Part III Regulation 19.

⁶⁴ Art. 22(1) (a).

⁶⁵ The other derogations that are not appropriate as legal basis for the exclusion of domestic workers are the following: Art. 17(3) relates to offshore work, security and surveillance activities, activities involving the need for continuity of service or production, foreseeable surge of activity (e.g. seasonal), railway transport, as well as unusual and unforeseeable circumstances or exceptional events, accidents or imminent risks. Art. 17(4) concerns shift work activities or work split up over the day and Art. 17(5) doctors in training. Art. 18 deals with derogations by collective agreements, and Art 20 and 21 concern particular groups of workers (mobile workers and offshore work; workers on board seagoing fishing vessels).

themselves”.⁶⁶ Domestic workers are usually not comparable to the groups mentioned in Article 17(1) that are characterised by the high degree of independent decision-making power typical for upper positions in the work hierarchy (‘autonomous workers’). They do not have the same decision-taking power as high-ranking management executives. Since the exceptions for domestic workers in Article 19 can be justified only with recourse to the derogation of Article 17(1) Working Time Directive as legal basis, Article 19 of the UK Working Time Regulations 1998 has to fulfil the requirement of working time not being measurable. This is the case although UK law contains, besides Article 19, a special exception for working time that is not measurable in Article 20 Working Time Regulations 1998.

Excursus: Is working time of domestic workers measurable?

It is sometimes assumed that the working time of domestic workers is not *measurable* (especially with reference to live-in domestic workers who may spend their free time in the employer’s household and for whom working hours and on-call duty may be fluid). But this is not a convincing claim. Regular working hours (as well as stand-by times) can be fixed, measured, and controlled. When it is argued that leisure time and working time could not be, it is implicitly assumed that they should be available all around the clock. However, stand-by time is working time. Working time encompasses any period during which the worker is at the employer’s disposal and carrying out activity or duties according to Article 2(1). The CJEU stated in various judgements⁶⁷ that stand-by time during which a worker is on-call for service is working time. In *CCOO v Deutsche Bank*⁶⁸ the CJEU found that in order to ensure the effectiveness of the rights of workers to a limitation of maximum working time and minimum rest periods, the Member States must require employers to set up an objective, reliable and accessible system enabling the measurement of time worked each day by each worker. These obligations apply to employers of domestic workers in private households, too.

Further clarification has been given by the CJEU in the case of *Hälvä and Others*.⁶⁹ The CJEU had to decide whether persons employed to substitute foster parents in a Finnish ‘SOS child village’ during their absence periods were ‘autonomous workers’ who themselves decided over their working time or not, and whether this time was measurable. The question was whether ‘relief parents’ fall within the derogation of Article 17(1) of Directive 2003/88. The ‘relief parents’ were employed by a child protection association and replaced foster parents during a contractually fixed number of 24-hour periods per year in the children’s houses. The CJEU stressed that the derogation of Article 17(1) has to be interpreted in such a way so as to limit its scope to what is strictly necessary to safeguard the interests whose protection the derogation serves.⁷⁰ Article 17(1) applies 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 specific characteristics of the activity carried out.⁷¹ The Court considered the fact that, in the periods during which they are responsible for running a children’s home, the ‘relief parents’ have a certain degree of autonomy in the organisation of their time and, more specifically, in the organisation of their daily duties, their movements, and their periods of inactivity, without there appearing to be any supervision by their employer. Nonetheless, it was stated that the *working time as a whole* could be measured. The working time of ‘relief parents’ was considered to be predetermined largely by the employment contract, because the number of 24-hour periods per year was fixed. The employer’s difficulties in supervising the daily exercise of the activities of its employees are not, in general,

⁶⁶ Art. 17(1) Directive 2003/88/EC.

⁶⁷ C-151/02 *Jaeger* [2003] ECR I-8389, C-303/98 *SIMAP* [2000] ECR I-7963, C-398/01 *Pfeiffer* [2004] ECR I-08835, C-14/04 *Dellas* [2005] ECR I-10253, C-518/15 *Matzak*, ECLI:EU:C:2018:82.

⁶⁸ C-55/18, *supra* para. 59f.

⁶⁹ C-175/16 *Hälvä and Others v SOS-Lapsikyläry*, ECLI:EU:C:2017:617.

⁷⁰ C-151/02 *Jaeger*, *supra*, para. 89, C-428/09, C-428/09 *Isère*, *supra*, para. 40.

⁷¹ C-484/04, *Commission v United Kingdom*, EU:C:2006:526, para. 20, C-428/09, *Isère*, *supra*, para. 41.

sufficient for finding that their working time as a whole is not measured or predetermined or may be determined by the workers themselves because the employer stipulates in advance both the beginning and the end of the working time.⁷²

Furthermore, periods of inactivity of ‘relief parents’ within the 24-hour periods during which they were in charge of the children’s home were part of their duties and therefore working hours. The Court concluded that these ‘relief parents’ did not fall under the ‘autonomous workers derogation’ of Article 17(1). They did not fall under the exemption for ‘family workers’ either. Therefore, the conditions of the exemptions of Article 17(1) of Directive 2003/88 were not fulfilled, and the Working Time Directive applied.

This leads to the *conclusion* that the derogations made in Article 19 of the UK Working Time Regulations 1998 are not covered by the provision in Article 17(1) Directive 2003/88/EC. Working time is defined as any period during which the worker is working, at the employer’s disposal and carrying out his activity or duties.⁷³ The case law of the CJEU has specified the definition of ‘working time’ including ‘stand-by periods’⁷⁴, and the Case CCOO⁷⁵ has emphasized the necessity that employers provide the necessary documentation in order to enable workers to make use of the provision designed to protect health and safety of workers. Thus, working hours (including stand-by time) of domestic workers can be measured and documented, therefore the precondition for derogations based on Article 17(1) Directive 2003/88/EC is not fulfilled.⁷⁶

Exceptions for the particular group of ‘live in’- domestic workers – Germany and Italy

A special group – so-called ‘live in’-domestic workers – is particularly vulnerable and disadvantaged. Broadly speaking, ‘live in’-domestic workers are exempted from the application of the Working Time Act in *Germany*, while in *Italy* maximum working hours are longer for them than for other domestic workers (54 hours instead of 40 hours per week). These two cases are discussed now.

Germany⁷⁷

In *Germany*, the Working Time Statute of 1994⁷⁸ that transposed the Working Time Directive into national law is applicable to all workers, thus equally to domestic workers. In the first draft of the statute, an exclusion of domestic employees engaged in households from the personal scope of the regulation was provided for with the argument that such an exception was required by the particular circumstances prevailing in households (as it was the case in the former Working Time Decree, § 1 Abs.1 *Arbeitszeitordnung*).⁷⁹ After the opposition of the *Bundesrat*, the second Chamber of Parliament, the general exclusion of domestic employees from the personal scope of the Working Time Act was withdrawn. The *Bundesrat* argued that the general exclusion of domestic employees would have discriminatory effects; this group had the same right to protection as other employees, and the law was

⁷² C-175/16 *Hälvä*, *supra*, para 36.

⁷³ Definition in Art. 2(1) Directive 2003/88/EC.

⁷⁴ Cases *Jaeger*, *Simap*, *Pfeiffer*, *Dellas*, *Matzak*, *supra*.

⁷⁵ Case C-55/18, *supra*.

⁷⁶ This is also the conclusion of Pavlou, *Migrant domestic workers in the EU*, *supra*, Chap.4.

⁷⁷ For *Germany* see Eva Kocher, *Hausangestellte im deutschen Arbeitsrecht*, 20 *Neue Zeitschrift für Arbeitsrecht* 929-934 (2013); Kirsten Scheiwe & Verena Schwach, *Decent work for domestic workers – das Übereinkommen 189 der Internationalen Arbeitsorganisation*, 26 *ZIAs*, 317, 342f. (2012); Kirsten Scheiwe & Verena Schwach, *Das Arbeitszeitrecht für Hausangestellte nach Ratifizierung der ILO-Konvention 189*, 20 *Neue Zeitschrift für Arbeitsrecht* 1116–1120 (2013), Anne Trebilcock, *Challenges in Germany’s Implementation of the ILO Decent Work for Domestic Workers Convention*, 34 *IJCLLIR*, 149 (2018).

⁷⁸ German Working Time Act 1994 (BGBl. I S. 1170, 1171), last amendment 11 November 2016 (BGBl. I S. 2500).

⁷⁹ Parliamentary documents, *Bundestags-Drucksache* 12/5888, 11, 32.

already flexible enough to cope with the particular circumstances in households.⁸⁰ While the Working Time Statute is now applicable to domestic employees in general, one exception was introduced for employees who live in domestic community with persons confided to them and who educate, nurse or attend them, having sole responsibility⁸¹; they fall outside the statute's personal scope. In the parliamentary documents, nothing is said about the legal basis of this exclusion; no reference to the derogations of the Working Time Directive is made. From the wording of this exception and its systematic position one can deduce that the legal basis is Article 17(1) Working Time Directive.

The cited exception of the German Working Time Act is contested, and often (wrongly) understood as excluding 'live in'-domestic workers in general from the scope of the law, thus allowing for the so-called '24-hours-care' for persons in need of care in their home. How to interpret this clause in German law? It was introduced at the last minute in the legislative procedure of the enactment of the 1994 Working Time Statute that implemented the Directive 93/104/EC after a petition of the SOS Kinderdorf association, an NGO that provides institutional foster care for children in family-like settings with employed foster parents who live permanently with the children; they feared that this particular pedagogical model of foster care would be endangered by working time regulation.⁸² It is said in the parliamentary document that the particular living and working arrangements of such employees, for example foster parents in SOS children's villages, do not allow for a distinction between working time and leisure time, which is mandatory by working time regulation law, and therefore the Working Time Act could not be applied.⁸³

This very particular rule (a sort of a 'lex SOS Kinderdörfer'⁸⁴) has to be interpreted restrictively in the light of EU law. First, it has to be checked carefully if, 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 Article 17(1) Working Time Directive presupposes (*see section 4.2*). Most often, live-in domestic workers cannot determine the working time themselves, but receive instructions from their employer as to when they have to deliver services, when they have to be available (stand-by times), or when they should not leave the premises, for example during the night.

Contrary to the position suggested here, the German Government seems to interpret the exception from the scope by para. 18(1) no.3 German Working Time Act very broadly. When Germany ratified the ILO-Convention 189 'Decent work for domestic workers', it made use of the possibility of Article 2(2)(b) of the Convention to exclude certain groups of domestic workers from the personal scope and declared that Convention 189 does not apply to those domestic employees mentioned in para. 18(1) no.3 German Working Time Act (employees living in domestic community with persons confided to them and who educate, nurse or attend them, while having sole responsibility for them).⁸⁵ A clear distinction between free time and working time, as required by Article 10(1) Convention 189 and by imperative working time law, would not be possible for this group. This exclusion would not leave domestic workers unprotected, since the general provision of para. 618(2) German Civil Code obliges the employer of live-in domestic workers with regard to working and rest times to take those measures which are necessary in deference to health, morality and religion of the employee.⁸⁶ This exclusion of

⁸⁰ *Ibidem*, at 46.

⁸¹ Para. 18(1) no.3 Working Time Act.

⁸² Parliamentary documents, *Bundestags-Drucksache* 12/6990, 44; for details on the history and interpretation of this clause, *see* Scheiwe/Schwach, *Das Arbeitszeitrecht für Hausangestellte*, *supra*, 1118f.

⁸³ Parliamentary documents, *Bundestags-Drucksache* 12/6990, 44.

⁸⁴ *See* Kirsten Scheiwe, *Arbeitszeitregulierung für Beschäftigte in Privathaushalten*, in Kirsten Scheiwe & Johanna Krawietz, ed., (K)Eine Arbeit wie jede andere? Die Regulierung von Arbeit im Privathaushalt, (Berlin: De Gruyter), 60–84 (2014),

⁸⁵ *Memorandum of the German Government (Denkschrift)*, BT-Drucks. 17/12951, p.18. It is common that exceptions are formulated in memoranda during the legislative process, which are binding for the domestic implementation and interpretation of an international law convention.

⁸⁶ *Ibidem*, p.18.

live-in domestic workers from the Working Time Statute by German law has been supervised critically in a direct request of 2016 from the Committee of Experts on the Application of Conventions and Recommendations (CEACR)⁸⁷ of the ILO with regard to ILO Convention 189, ratified by Germany. The Committee requested the Government to provide further information explaining in detail the reasons for the exclusion as well as information on prior consultations held with the most representative organizations of employers and workers in this context.

To be in conformity with EU law, the German derogation has to correspond with the conditions of Article 17(1) Directive 2003/88/EU. The working time of ‘live in’-domestic workers is regularly defined in the contract and by directives of the employer, either as active working time or as ‘stand-by duty’. It can be delimited from non-working time or rest time, therefore it is measurable (see the excursus *supra*). *Summing up*, the German derogation in Article 18(1) no.2 Working Time Act has to be interpreted restrictively.⁸⁸ A general exclusion of ‘live in’-domestic workers is not covered by the derogation of Article 17(1) Directive 2003/88/EC.

Italy: Longer working hours for live-in domestic employees in a collective agreement

Italy is one of the EU countries with the highest number of domestic workers among the EU Member States. The domestic work sector has with over 70% a very high share of migrant workers, most of them coming from Eastern Europe. In 2017, migrant workers accounted for 77% of the care-assistants (*badanti*) and 69% of domestic-assistants (*colf*).⁸⁹ Italy was the first EU Member State to ratify ILO Convention 189 in 2013. Nowadays, collective agreements at the national level play an important role in regulating working time, working conditions and the pay of domestic employees.

The first comprehensive regulation of domestic work that abolished various, but not all former inequalities⁹⁰ between ‘normal’ employees and domestic workers was Statute no 339 of 1958⁹¹. With regard to working time regulation, Statute 339 did not regulate maximum weekly working hours, but fixed minimum rest times for domestic workers at eight consecutive hours during the night and of a ‘convenient duration’ during the day. This regulation carried on the disadvantageous treatment of domestic workers, who formerly were excluded from statutory regulation in the 1920s and 1930s⁹² that fixed maximum working hours at eight hours daily and 48 hours weekly. Until 1969, domestic work was excluded from collective bargaining on the basis of a provision of the Italian Civil Code.⁹³ In 1969, the Supreme Court declared this to be unconstitutional and discriminating.⁹⁴ This opened the road for collective agreements regulating domestic work.

⁸⁷ Direct Request (CEACR) adopted 2016, published 106th ILC session 2017 https://www.ilo.org/dyn/normlex/en/f?p=1000:13100:0::NO:13100:P13100_COMMENT_ID:3300808:NO.

⁸⁸ See Scheiwe & Schwach, *Das Arbeitszeitrecht für Hausangestellte*, 2013, *supra*.

⁸⁹ Massimo De Luca & Fondazione Leone Moressa, *The socio-economic impact of domestic work in countries of origin* (Rome: Osservatorio Nazionale sul Lavoro Domestico, 2017), 6. On Italy see also Francesca Degiuli, *A job with no boundaries: home eldercare work in Italy*, 14 *European Journal of Women's Studies*, 193–207 (2007); Giovanni Lamura et.al., *Migrant workers in the long-term care sector: lessons from Italy*, 22 *Health and Ageing*, 8–12 (2010).

⁹⁰ See Raffaella Sarti, *Promesse mancate e attese deluse*, in Ariella Verrocchio & Elizabetta Vezzosi (ed.), *Il lavoro cambia* (Trieste: EUT, 2014), 55-77, 73.

⁹¹ Legge 2 April 1958, no. 339. This statute is applicable only if the domestic employee works at least four hours daily for the same employer.

⁹² R.d.l. 15/3/1923, no. 692, Art.1, comma 2 e l. 17/4/1925, n. 473; r.d.l. 29/5/1937, no. 1768, Art.3, letter ‘a’ and l. 13/1/1938, n. 203, see Sarti *supra*, 73.

⁹³ Art. 2068, second comma, Italian Civil Code.

⁹⁴ Corte Costituzionale, sentenza no. 68/1969, DL, 1970, II, 58.

Nowadays, collective agreements comprise the most detailed regulation of domestic work. The ‘National collective labour contract on the employment relationship of domestic work’ (CCNL⁹⁵) is applicable to employees providing domestic services that enhance the functioning of family life and of living together like a family and covers both, domestic assistants (*colf*) and care-assistants (*badanti*).⁹⁶ The provisions of the CCNL apply if the collective agreement is referred to in the individual employment contract. The CCNL is a very interesting example of a nation-wide collective agreement, including the definition of different professional categories, regulation of minimum wages, salary scales, sick pay, maternity and other rights to paid leave, social insurance contributions, and on the employment of third country nationals as domestic employees (after a regularization of irregular domestic employment of non-EU citizens in 2009 and another round of regularization in 2020 during the corona crisis).⁹⁷

The maximum weekly working time for domestic workers is set by the CCNL at 40 hours weekly, distributed over five or six days. However, it is set at 54 hours weekly for live-in domestic employees engaged for full service, consisting of maximum daily working hours of 10 non-consecutive hours.⁹⁸ A different limit is set for (part-time) live-in workers (a maximum of 30 hours per week for ‘reduced services’). While the working time limit for non-resident full-time domestic employees (40 hours weekly) is equal to the normal limit of employees in other sectors, the particular limit of 54 hours for live-in domestic employees is highly problematic.⁹⁹

It is highly questionable that the 54 hours weekly maximum working time for ‘live-ins’ is compatible with EU law, since Directive 2003/88/EC sets a maximum of weekly 48 working hours (including overtime) within a reference period of four months, which might be prolonged according to Article 19. Although various derogations through collective agreements are possible in principle (Directive Article 18), this does not include derogation from maximum weekly working hours (Directive Article 6), which is possible only through ‘opting out’ by Member States based on Article 17 (*see above*) or by individual opt-out according to Article 22. Italy did not declare any use of the ‘opting out’ clauses. The special 54-hours working time threshold for live-in domestic employees appears to be contrary to EU law; it endangers health and safety of employees and is discriminatory.

A consequence of the differences in maximum working hours under the CCNL is the different treatment of overtime work and overtime pay to the disadvantage of live-in workers. The CCNL establishes rates for overtime work (extra pay of 25% between 6 a.m. and 10 p.m., 50% during the night between 10 p.m. and 6 a.m., and 60% for work on Sundays and public holidays)¹⁰⁰. But since this extra pay is granted only for work beyond the hours fixed by the contract, it will be granted to live-in domestic workers only if working hours exceed 54 hours weekly (for non-resident domestic employees this starts beyond the 40-hours-maximum). Working hours during the night (from 10 p.m. to 6 a.m.) are considered as normal night work and compensated by an increment of 20%, while overtime work during this period is compensated by an increase of 25%.

⁹⁵ Contratto collettivo nazionale di lavoro sulla disciplina del rapporto di lavoro domestico (CCNL), renewed and adapted various times; *see* www.ebilcoba.it or www.filcams.cgil.it/tag/lavoro-domestico (accessed 1 September 2020).

⁹⁶ Art.1 L.no. 339/1958; Art. 1(2) CCNL. While the application of the Statute 339/1958 presupposes a minimum working time of four hours daily, the collective agreement CCNL has no time threshold for its application.

⁹⁷ For a critical review of Italian domestic labour and migration policies *see* Gianluca Bascherini, Silvia Niccolai, *Regolarizzare Mary Poppins*, 10 *Rivista del Diritto della Sicurezza Sociale*, 499-533 (2010).

⁹⁸ Art.16 C.C.N.L.

⁹⁹ *See* Sarti, *Promesse mancate e attese deluse*, *supra*.

¹⁰⁰ Art.17 CCNL.

Austria's way around the application of the EU Working Time Directive for live-in domestic workers – the new category of self-employed care persons

A disputable path for excluding domestic personnel from the application of working time regulation is to categorise them as self-employed, not as workers. *Austria* has chosen this option and has introduced a double track in its 2007/2008 Home Care Act (*Hausbetreuungsgesetz*).¹⁰¹ It allows the organisation of care work and domestic support for a person in the private home to be based either an employment contract (in which case working time regulation applies) or on self-employment. A new professional category has been created for the so-called 24 hours care, the 'carer for persons' (*Personenbetreuerin*), and the tasks have been defined in the Trade, Commerce and Industry Act (*Gewerbeordnung*), including some paramedical and nursing tasks if delegated to the care worker by doctors or nurses. Self-employment falls outside the scope of the Austrian Working Time Act, and no minimum wage regulation applies (however, solo self-employed persons are covered by all social insurance schemes except unemployment insurance in Austria). The Home Care Act allows for the so-called '24-hours-care' for a person severely in need of care in her home under certain conditions, and has legalised a considerable portion of irregular employment. Not surprisingly, most private contractors choose self-employment of care workers (amounting to 99 per cent of 24-hours-care arrangements).¹⁰² Without going into the details of the Austrian regulation, it is very questionable whether these care workers would be categorised as self-employed under EU law if working under the detailed instruction of one employer for long hours (up to 24 hours as a live-in) on the premises of the person in need. No case from Austria has reached the CJEU up to now, but there are strong indications that this represents bogus self-employment, and such a person would be categorised as a worker under EU law.

The lack of efficient implementation of domestic workers rights – is betterment in sight?

There are a number of problems of efficient implementation of working time law at the European and at the national level. At the European level, the EU Commission seems to be rather reluctant to initiate infringement procedures against Member States that do not comply fully with the requirements of Directive 2003/88/EC. Although there are various clues in the Commission's implementation reports that Member States do not fully comply with their reporting duties or other obligations, there were hardly any infringement procedures against Member States dealing with labour law issues in the last years. It has been the CJEU that has played the major role in defining and defending working time limits and health issues in its case law. There have been no cases regarding working time issues of domestic employees before the CJEU up to now.¹⁰³

However, there are multiple factors that may hinder an efficient implementation of domestic workers' employment rights. These workers usually work in isolation, and the sector of private household services displays a low degree of organization or unionisation on both sides, of employers and employees. Control by labour inspectorates and other inspecting authorities is made difficult by the legal protection

¹⁰¹ Andrea Kretschmann, *Mit Recht regieren? Zur Verrechtlichung transmigrantischer 24-Stunden-Carearbeit in österreichischen Privathaushalten*, in Kirsten Scheiwe, Johanna Krawietz (eds) *Transnationale Sorgearbeit. Rechtliche Rahmenbedingungen und gesellschaftliche Praxis*, (Wiesbaden: VS Verlag, 2010), 199–226; Andrea Kretschmann, 'Die Legalisierung hat uns überhaupt keine Vorteile gebracht. Die Vorteile gibt's nur für Österreicher. Effekte national strukturierter Rechts in der transmigrantischen 24-Stunden-Care-Arbeit', in Erna Appelt (ed.) *Who Cares? Betreuung und Pflege in Österreich. Eine geschlechterkritische Perspektive* (Wien, Innsbruck: Studienverlag, 2010), 187–96; August Österle & Gudrun Bauer, *The Legalization of Rotational 24-hour Care Work in Austria*, 23 *Social Politics*, 192–213 (2016).

¹⁰² Bundesministerium für Arbeit, Soziales und Konsumentenschutz, *24-Stunden-Betreuung zu Hause* (Wien: BMASK, 2013).

¹⁰³ There have been cases concerning part-time work and the exclusion of 'minor employment' (typical for cleaners in private households) from social security before the Court. But disappointingly the exclusion of minor employment from compulsory invalidity and old-age insurance was not considered to be in breach of the equal treatment directive in matters of social security (79/7/EEC); the Court granted a broad discretion to Member States to safeguard the social security systems, Case C-444/93 *Megner and Scheffel* [1995] ECR I-4741, Case C-317/93 *Nolte* [1995] ECR I-4625.

of privacy and the inviolability of the home, and sanctions are rare. Individual employers often lack awareness of their role and obligations as employer or refuse to comply with their duties with regard to registration of the employment, payment of social security contributions or documentation of working time and others. Administrative procedures are often very complicated for individual employers; this requires institutional support, simple and transparent procedures or standard employment contracts. Irregularity is a dominant feature of employment in private households that conceals the frequent breach of labour law, social security provision and tax law. This is often based on collusive behaviour of both parties in spite of the unequal power relationship; irregular migrants with an insecure residence status are the most vulnerable group of employees. Public institutions often ignore the problems related to ‘dirty work’ and domestic employment and, speaking more broadly, do not overtly face the care crisis.

A general problem that can be observed also at the EU level of employment and social policy is the omission of paid domestic work and care work in the design of equality policies¹⁰⁴ and work-life-balance strategies.¹⁰⁵ For many women (and men) with care obligations employment is made feasible only through the help of domestic workers, especially in countries where public care services for children or long-term care services are not available to a sufficient degree or at affordable costs. The frequent invisibility of domestic workers makes it easier for policy makers to downplay the care crisis and to assign the tasks to the private sphere, thus mainly to women in different roles and with asymmetric power resources. This reduces pressure upon and costs for welfare states at the expense of the most vulnerable employees and of those in need of care services. Instead, the project of a ‘Social Europe’ as well as the ‘decent work’-strategy of the ILO should provide guidelines on how to face the broader challenges of decent work, equality and work-life-balance policies for all (also for domestic workers) and on how to counteract the care crisis and provide affordable, high quality care services for those in need. This is more than an issue for the creation of jobs in the low wage sector.

It is desirable that the Commission pays more attention to the violation of domestic workers’ rights under existing EU law. This means inter alia that at the EU level Article 3a) of the Framework Directive on Health and Safety (89/391/EEC) which mentions the exclusion of domestic workers from the concept of the ‘worker’ should be removed from the Directive. But it also means that the Commission should take action where Member States are not respecting the rights of domestic workers defined by the Working Time Directive and other minimum requirements of EU law. After a long period of silence on domestic workers, the shift in the Commission’s position especially in the *Implementation Report* of 2017 and the focus on enforcement and implementation in the other documents cited, connected to debates on the *European Pillar of Social Rights* give hope for some betterment and an explicit policy for monitoring and enforcing domestic workers’ rights by means of EU law.

¹⁰⁴ Anne Davies, *Regulating Atypical Work: Beyond Equality*, in Nicola Countouris and Mark Freedland (eds.), *Resocialising Europe in a Time of Crisis*, 230–249 (Oxford: OUP 2013); Vera Pavlou, *Whose equality? Paid domestic work and EU gender equality law*, *European Equality Law Review* (2020), 36–46; Ania Zbyszewska, *Reshaping EU Working-time Regulation: Towards a more sustainable regime*, 7 *European Labour Law Journal* (2016) 331–347.

¹⁰⁵ See *Directive (EU) 2019/1158 on work-life balance for parents and carers*, OJ L 188, 12.7.2019, 79–93.

