The Dutch autonomous workers derogation from the European Working Time Directive: ready for changing times?

Student: M. (Marc) Smout
Student number: 1263564 – 786906
Department: Labour Law and Social Policy, Tilburg Law School, Tilburg University
Date: 2 October 2020
Supervisor: Mr. dr. N.Z. (Nuna) Zekić
Second reader: Dr. S. (Sonja) Bekker

Table of contents

List of abbreviations

CCOO	Comisiones Obreras
CHD	Coronary Heart Disease
CFREU	Charter of Fundamental Right of the European Union
CJEU	Court of Justice of the European Union
EC	European Commission
ECHP	European Community Household Panel
EU	European Union
EWTD	European Working Time Directive (Directive 2003/88/EC)
SAH	Self-assessed health
TFEU	Treaty on the Functioning of the European Union

Preface

This thesis is written to complete the master program Labour Law and Employment Relations at Tilburg University. This master program combines labour law and related areas such as human resource management, the labour market and social policy, all from international and European perspectives. I have chosen to write my master thesis about a Dutch derogation on the European Working Time Directive and the effects of long working hours on the health of a worker. Just like the master program, this thesis combines law and social sciences.

First of all, I would like to thank my supervisor mr. dr. Nuna Zekić of Tilburg Law School at Tilburg University for her guidance, enthusiasm, motivation and valuable comments during the process of writing this master thesis. It was a great pleasure to work together and discuss Dutch and European labour law. I also would like to acknowledge dr. Sonja Bekker of Tilburg Law School at Tilburg University as the second reader of this thesis, and I am grateful for her valuable comments on this thesis.

Finally, I must express my very profound gratitude to my family and friends for providing me with unfailing support and continuous encouragement throughout my years of study and through the process of writing this thesis. This accomplishment would not have been possible without them.

I hope you enjoy reading this thesis!

Marc Smout
Tilburg, 2 October 2020

1. Introduction

Employees are protected against excessive working hours and are entitled to sufficient break and rest time based on national and European regulations. At the same time, due to technological developments and scarcity on the labour market, the call for further flexibilisation of the way in which work is done is becoming increasingly louder. Many employers nowadays have flexible working hours and give their employees the possibility to work at home. Flexibilisation of work can lead to problems if an employee claims that the rules regarding working time have been violated or claims compensation for overtime.

1.1. CJEU: CCOO[1] v. Deutsche Bank

In its judgment of 14 May 2019, the Court of Justice of the European Union (CJEU) ruled that the European Working Time Directive (EWTD) and the Directive on the safety and health of workers at work, combined with the Charter of Fundamental Rights of the European Union, preclude national legislation in which employers are not obliged to set up a system that records the daily working time of every employee.[2] The CJEU considers that the right to limit working time and to break and rest periods is a fundamental social right to protect the safety and health of employees. European regulations require Member States and employers to take measures to prevent violation of this fundamental right. These rules apply to protect employees, as a weaker party within the employment relationship, and to ensure that they can exercise their fundamental social right.[3]
The protection of this right is only possible if employers use a system that objectively and reliably establishes working hours. Other means of proof, such as witness evidence, submission of e-mails or investigation of mobile phones and computers, are less suitable and moreover reverse the burden of proof. In practice, it is difficult for employees to prove that the regulations on working time, work breaks and rest periods have been violated. It is therefore up to Member States and ultimately to employers to ensure the effectiveness of European legislation.[4] The argument that such a system leads to costs for the employer is ignored by the CJEU, because the protection of fundamental rights cannot be made subordinate to purely economic considerations.[5]

At first sight, this ruling has no large consequences for the law in practice in the Netherlands. Since 1996 the Working Time Act (*Arbeidstijdenwet*)[6] in the Netherlands already obliges employers to record the daily working and rest time of every employee.[7] If it is also, as stated by the CJEU,[8] an objective, reliable and accessible system might be a new question. Based on article 31(2) Charter

[1] CCOO or Comisiones Obreras is the largest trade union in Spain with almost one million members.
[2] CJEU 14 May 2019, ECLI:EU:C:2019:402 (*CCOO v. Deutsche Bank*), para. 71.
[3] CJEU 14 May 2019, ECLI:EU:C:2019:402 (*CCOO v. Deutsche Bank*), para. 36-39; 44.
[4] CJEU 14 May 2019, ECLI:EU:C:2019:402 (*CCOO v. Deutsche Bank*), para. 40-42.
[5] CJEU 14 May 2019, ECLI:EU:C:2019:402 (*CCOO v. Deutsche Bank*), para. 66.
[6] Article 4:3(1) Arbeidstijdenwet (Dutch Working Time Act)
[7] Van Drongelen 2019, 1647; Zekić 2019, 39 ref. to explanatory memorandum: *Kamerstukken II* 1993/94, 23 646, nr. 3, 96.
[8] CJEU 14 May 2019, ECLI:EU:C:2019:402 (*CCOO v. Deutsche Bank*), para. 65.

of the Fundamental Rights of the EU (CFREU) 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. But the Working Time Decree (*Arbeidstijdenbesluit*) makes an exception to the applicability of the Working Time Act for every employee who is older than 18 years old and earns at least three times the minimum wage (and holiday allowance).[9] Over the last decade, it has become a social problem in the Netherlands that higher educated employees suffer more and more from work-related mental fatigue (burnout). For example in 2007, 12.1% of the higher educated employees answered that they have burnout-related health complaints. In 2019, this has become 19.3% of the higher educated employees.[10] Compared to lower educated employees (15.1%), higher educated employees are more likely to report burn-out related health complaints.[11] In 2019, 17.0% of the more than 58.000 employees (of all types of sector and income) that responded, answered that they have burn-out related health complaints.[12]

The Dutch autonomous workers derogation in the Working Time Decree excludes employees with a higher salary than three times the minimum wage from the protection of important provisions of the Working Time Act and EWTD. Because these employees are largely not covered by the protection of the Working Hours Act, the Labour Inspectorate (*Inspectie SZW*) is not authorized to enforce the provisions of the Working Time Act. Therefore, these employees have to protect themselves from working long hours. The exception on the Working Time Act might be in accordance with the EWTD. However, the presumption that an employee with a higher annual wage than three times the minimum wage is also an employee with autonomous decision-taking powers might not be true in all cases. This research might influence the social policy of the government of the Netherlands, the decisions of judges, the capabilities of the Labour Inspectorate regarding administrative enforcement and the way in which social partners, employers and employees make agreements about working and rest periods. The ruling of the CJEU of 14 May 2019 (CCOO v. Deutsche Bank) is the incentive to perform a legal research regarding how legitimate the derogation on the European Working Time Directive (Directive 2003/88/EC)/Working Time Act as laid down in article 2.1:1(1)(a) of the Working Time Decree in the Netherlands is in the light of the European Working Time Directive. Beside this question, this thesis also will give an answer to the question: what are the effects of long working hours on the health of high wage workers?

1.2. Research questions

My goal in the legal part of this research is to examine whether a general derogation on important provisions of the Working Time Act through an annual wage limit, as known in the Netherlands, is

[9] Article 2:1:1(1)(a) Arbeidstijdenbesluit (Dutch Working Time Decree)
[10] Hooftman et al. 2019 via NEA Benchmarktool (https://www.monitorarbeid.tno.nl/cijfers/nea-benchmarktool).
[11] Hooftman et al. 2019 via NEA Benchmarktool (https://www.monitorarbeid.tno.nl/cijfers/nea-benchmarktool).
[12] Hooftman et al. 2019, 67.

in line with the EWTD. The exception as above described is an interpretation of the derogation opportunities of the Working Time Directive (article 17). An employee that earns more than three times the minimum wage has in general enough autonomous decision-taking powers. Is this general exception allowed? The research question will be: how legitimate is the exception of article 2.1:1(1)(a) of the Working Time Decree in the Netherlands in the light of the Directive 2003/88/EC (European Working Time Directive)?

Due to technological developments, it is in some occupations possible to work everywhere and every time. Flexible working hours and working at home arrangements might be an improvement of the working conditions of an employee. However, according to Statistics Netherlands (CBS) there have been more and more employees that are higher educated and complained to suffer from work-related mental fatigue (burnout) and other related (mental) health problems in the last decade.[13] Employees with a higher education also work more overtime.[14] That is why my social science research goal will be examining the effects of long working hours on the health of workers, with a focus on higher educated/high wage workers.

My main research question is: how legitimate is the exception of article 2.1:1(1)(a) of the Working Time Decree in the Netherlands in the light of the Directive 2003/88/EC (European Working Time Directive) and what are the effects of long working hours on the health of workers with a higher annual wage than three times the minimum wage?

In order to answer my main research question, I divided the question in three sub research questions:

- In what way does the Working Time Act and -Decree in the Netherlands derogate from the Working Time Directive and what are the reasons for this derogation?
- What are the main aims of the European Working Time Directive and which possibilities does the regulation provide to a Member State of the European Union to derogate from it?
- What is the current state of knowledge on the effects of long working hours on the health of high wage workers?

1.3. Methodology

1.3.1. Law

In order to give an answer to the main research question and the sub research questions 1 and 2 a legal analysis has been performed. The first step of the legal analysis was locating the general law that governs the question. The legal framework in case of this thesis is the European Working Time Directive, the Dutch Working Time Act and the Dutch Working Time Decree. In order to know how the general law should be applied to a specific situation, case law and parliamentary history were located. The case law study has been performed by searching for relevant cases via curia.europa.eu and eur-lex.europa.eu for the rulings of the CJEU and rechtspraak.nl for the rulings

[13] Hooftman et al. 2016, 2017, 2018, 2019.
[14] Hooftman et al. 2019 via NEA Benchmarktool (https://www.monitorarbeid.tno.nl/cijfers/nea-benchmarktool).

of the Dutch courts. The infringement procedures were found via ec.europa.eu. Keywords for finding case law are: arbeidstijden(richtlijn), arbeidstijden(wet), (artikel 2.1:1) arbeidstijdenbesluit, (article 17) working time directive and working time. Also the handbooks European Union Law written by Robert Schütze[15] and European Labour Law (chapter 8) written by the authors Jaspers, Pennings and Peters provided me with relevant case law.[16] Finally, legal literature as legal handbooks and articles in legal journals were located to clarify the legal interpretation of the general law, case law and parliamentary history. The use of legal literature ensures that the sources I have used, has not been amended, modified or otherwise changed.

1.3.2. Social sciences

In addition to a legal analysis of the EWTD and the Dutch Working Time Act/Decree, the above described subject is combined with a qualitative literature review. The literature review focuses on the effects of long working hours on the health of workers and the variations, mainly reductions, of the statutory working week by examining meta-analyses and quasi-experimental research. Meta-analyses provide a more objective summary of the existing evidence than individual studies. Individual studies that I found were mainly very limited via a lack of data or the research design. Individual studies also focus mainly on a single profession in a country[17] or employees of a certain company.[18] This makes them less suitable to examine because several specific factors within a country or company play a role. For the purpose of this thesis, the results with regard to high wage workers are highlighted. However, the literature often does not distinguish between low and high wage or lower and higher educated workers. But the authors made a distinction between blue- and white-collar workers or no distinction. If available, the results for white-collar workers are considered as results for high wage workers, because white-collar workers are more similar to high wage workers than blue-collar workers. The results for blue-collar workers are not excluded from the discussion because they provide a good picture and explanation of the difference between the effects of long working hours between blue- and white-collar workers. In order to perform the literature review I have used several search engines (Google Scholar, WorldCat and SSRN). The keywords used for finding literature are: Working Time (Directive), (long) working hours, reduction of working time, (shorter) workweek, higher-educated employees/workers, white-collar workers, (occupational) health, wellbeing, burnout, stroke, diabetes and depression. Netherlands Statistics reported an increase of burnouts amongst higher-educated employees from the year 2007.[19] That is why this research mainly focuses on literature from the year 2007 up to 2020. Literature written by legal scholars or peer-reviewed authors have been considered as main sources. Via the snowball method a few publications by other authors have been found.

[15] Schütze 2015.
[16] Jaspers et al. 2019.
[17] For example Italian physicians: Gnerre et al. 2017.
[18] Kyungjin et al. 2017.
[19] CBS 2011.

1.4. Structure

Firstly, in chapter 2 the current regulations of working time in the Netherlands and specifically article 2.1:1(1)(a) Working Time Decree will be discussed. In chapter 3, I will discuss the European Working Time Directive. What is the Working Time Directive? What does the directive exactly regulate and which derogations are possible? In the conclusion of chapter 3, I will discuss how legitimate the derogation in the Dutch Working Time Decree is in light of the European Working Time Directive and which changes could be made in order to guarantee the principles of protecting the safety and health of workers. Besides the legal aspect, the research focuses in chapter 4 on the effects of long working hours on the health of workers. Finally, I will write an overall conclusion

2. The Netherlands: the Working Time Act and Decree

2.1. Introduction: the history of working time in the Netherlands

In the 19th century, child labour and working excessive hours was necessary in order to make a living. Across Europe, various people began writing about these abuses. That is why regulation of working time of employees was one of the first issues that was regulated by legislation.[20] It is part of the basis that has become the legal area of labour law. The first law in the Netherlands that ended the unlimited use of child labour was the so-called "Van Houten's Children's Act" (*Kinderwetje van Houten*). This act was named after the Member of Parliament Samuel van Houten who introduced the bill. The act of 19 September 1874 limited the working time of children younger than 12 years old.[21] On 5 May 1889 the Labour Act (*Arbeidswet*) legally restricted the hours of work for children younger than 16 years old and for women.[22] The first Labour Act that limited the working time of employees, irrespective of their age or sex, came into force on 24 October 1920. This Labour Act was more a framework act, because the meaning of the act had to be realised by (Royal) Decrees. The act made a distinction between different sectors. Therefore, 11 Decrees with for each sector different norms were needed.[23] The Labour Act 1919 limited the working time to 8 hours per day and 45 hours per week. But not for long. An amendment of 20 May 1922 already changed the limits to 8.5 hours per day and 48 hours per week.[24] Other important changes of the Labour Act were in 1955 (working time regulation in the agriculture was introduced) and in 1989 (all sex-distinguishing provisions were changed).[25] The current Working Time Act came into force on 1 January 1996 and was a fundamental revision of the Labour Act of 1919. Since then, the rules regarding working time apply to all sectors, the private and public ones.[26] Over time, there have been several changes of the Labour Act. However, these changes were less fundamental.[27]

In this chapter, I will discuss the Dutch Working Time Act and –Decree and the derogation opportunities (2.2). Hereafter, the annual wage limit derogation of article 2.1:1(1)(a) Working Time Decree and relevant case law and literature will be discussed (2.3). Finally, a (interim) conclusion.

2.2. The Working Time Act and -Decree

2.2.1. The Working Time Act and –Decree in general

According to the preamble, the purpose of the Working Time Act (*Arbeidstijdenwet*) is the protection of the safety, the health and well-being of employees. The Working Time Act contains general provisions regarding definitions (chapter 1 art. 1:1-1:7), scope and general obligations (chapter 2

[20] Ales & Popma 2019, 477; Bouwens et al. 2015, 27.
[21] Schenkeveld 2003, 6. Jaspers et al. 2013, 330.
[22] Sloot 1997, 529.
[23] Sloot 1997, 529.
[24] Sloot 1997, 529.
[25] *Kamerstukken II* 1993/94, 23 646, nr. 3, 9.
[26] Sloot 1997, 530.
[27] Overview of the changes of the Working Time Act: https://wetten.overheid.nl/BWBR0007671/2020-01-01/0/informatie#tab-wijzigingenoverzicht.

art. 2:1-2:9). In chapter 3 the law also contains provisions regarding prohibitions of child labour and work performed by children (art. 3:1-3:5). Chapter 4 starts with provisions concerning the working time and resting periods policy of the employer and the obligation of the employer to communicate the working time policy to the employees and register the working time of the employees (art. 4:1-4:3). In addition, specific regulations apply with regard to the work of youth (art. 4:4) and women during the delivery period (art. 4:5-4:8). Rules regarding the maximum working and minimum rest periods, night work and Sunday work are laid down in chapter 5 (art. 5:1-5:16). Chapter 6 regulates the consultation and information rights of employees (art. 6:1-6:3). In the chapters 7 to 12 the Working Time Act lays down rules regarding: the administrative aspects (chapter 7), administrative supervision (chapter 8), competent bodies (chapter 9), administrative enforcement (chapter 10), criminalization provisions (chapter 11) and a few final "technical" provisions (chapter 12).

2.2.2. Working time standards

Chapter 5 of the Working Time Act contains regulations regarding maximum work and minimum rest periods. Some of them are specifically about work performed by young employees. The other provisions apply in principle to all employees. In 2007, the Working Time Act was changed, which led to a great relaxation of the rules.[28] The background to the amendment of the law was the wish to create more room for flexible agreements on working and resting times. The Dutch government had the hope that it positively contributes to the competitiveness of the economy and the business climate in the Netherlands.[29] The provisions that focus on employees under 18 years old will not be discussed, because the EWTD does not differentiate between youth and adults.

The minimum requirements as laid down in chapter 5 of the Working Time Act are:

- a minimum daily rest of 11 consecutive hours in every 24 hours, which once in a seven-day period may be shortened to 8 hours;
- a rest break of 30 minutes during working hours if the working day is longer than 5,5 hours and 45 minutes if the working day is longer than 10 hours;
- a minimum weekly uninterrupted rest period of 36 hours for each seven-day period or 72 hours for each 14-day period;
- a minimum of 13 days of Sunday work per 52 weeks exempt from work;
- a maximum weekly working hours: the average working time, including overtime must not exceed 12 hours per shift, 60 hours per week, 55 hours for each 4-week period and 48 hours for each 16-week period;
- extra protection in case of night work
    - normal hours of work for night workers do not exceed an average of 10 hours per shift and 40 hours for each 16-week period;

[28] Law of 30 November 2006, *Stb.* 2006, 632.
[29] Bock 2007, 3-4.

- a maximum of seven consecutive night shifts;
- extra resting periods if a night shift ends after 02.00 am.

2.2.3. Definitions and scope

Most provisions of the law are addressed to the employer. However, the prohibition of child labour is addressed to the responsible person (art. 3:2). The Working Time Act, in article 1:1, contains a broad definition of the terms employer and employee. This shows that the law does not only apply to a strict definition of the employment contract. Also, other persons who perform work under authority fall under the scope of the law. For example, the Working Time Act also applies to interns and the company that provides the internship. To ensure that other persons are protected against serious danger against their safety or health, the law may also apply to the self-employed. A (governmental) decree is necessary to make the law applicable (art. 2:7).

Article 2:1 provides the possibility to derogate from the provisions of the Working Time Act via a (governmental) decree. In fact the Working Hours Degree made an exception for employees with a wage of three times the statutory minimum wage (increased by the holiday allowance) and managers of employees who perform mining work or work at a windfarm (art. 2.1:1), volunteers, voluntary firefighter, scientific research, performing artists, professional athletes, medical specialists and school and holiday camp supervisors (art. 2.1:2). These derogations mainly concern the maximum working hours and minimum resting periods. The provisions of the Working Time Act also do not apply during disasters and certain major accidents (art. 2:2). The Working Time Act is in principle limited to Dutch territory. However, there are some exceptions. For example, the work for a Dutch employer on board of an aircraft and in or on other (motor) vehicles (art. 2:8).

2.2.4. Derogations by collective agreements

Chapter 5 of the Working Time Act allows collective agreements to derogate from a few provisions. According to the Working Time Act a collective agreement is a collective labour agreement or a decision to declare a collective labour agreement generally binding (art. 1:3). In addition, for the purposes of the Working Time Act a collective agreement is equated with an arrangement regarding which the employer has reached an agreement in writing with an employee participation body (art. 1:4). An employee participation body means a works council or an employee representative body (art. 1:6).

Provisions in collective agreements that derogate from the minimum daily rest (art. 5:3), the weekly rest (art. 5:5) and on-call services (art. 5:9) are always void. Regarding the rest break during work (art. 5:4), Sunday work (art. 5:6), the maximum weekly working hours (art. 5:7) and night work (art. 5:8) derogations are permitted. The above provisions may only be derogated from by collective agreements. However, the law sets limits in which collective agreements must remain. Provisions in collective agreements that go beyond these limits are also void.

2.3. Article 2.1:1(1)(a) Working Time Decree

2.3.1. Introduction

At first, a derogation based on the role of senior managers (and their substitutes), management advisors (*staffunctionarissen)* in combination with an annual wage limit and managers of twenty or more employees in combination with an annual wage limit was proposed by the Dutch government.[30] In 1995, an annual wage limit, as an exception of the applicability of the Working Time Act, was included in article 2.1:5 of the Working Time Decree.[31] According to the government's explanatory statement of the provision, the justification for this exception from the applicability of the law lies in sufficient regulation opportunities for the employee to organize the work independently.[32] Also, these employee have sufficient independence from his employer to prevent overburdening. This requires a relatively strong position of the employee in the work organization and/or on the labour market. Instead of an extensive list of executive officers that are excluded from the applicability of the law, the Dutch government has opted for an annual wage limit because of the reason that a wage limit is a more manageable criterion than the term (senior) manager or management advisor (*staffunctionaris*), as previously proposed.[33] It also excludes those employees who are not managers and who are not staff officers, but who, according to the government, can be left free given their economic position. However, the effects of this provision would remain limited because only (approximately) the top 7% of incomes in the Netherlands are exempted from the applicability of the law.[34] For this, the government refers to calculations by the Ministry of Social Affairs and Employment based on data from Statistics Netherlands (*Centraal Bureau voor de Statistiek*).[35] From the explanatory statement could be concluded that the manageability and simplicity of the provision are the reasons for the Dutch government for opting for a wage limit and not for a certain criterion, term or concept that still needs interpretation.

2.3.2. Article 2.1:1(1)(a) Working Time Decree

In 2007, the provision was simplified and changed to article 2.1:1 Working Time Decree. A separate derogation on the Working Time Act for managers disappeared in the new Working Time Decree.[36] Since then, the annual wage limit is the criterion for almost every group of workers, except workers who, on behalf of the employer, exclusively or mainly directs employees who work for that employer on a mining work or since 2018[37] a wind farm[38] and certain groups of workers as stated in article

[30] Explanatory memorandum: *Kamerstukken II* 1993/94, 23646, nr. 3, 80 (*MvT*)
[31] Article 2.1:5(1)(d) Governmental decree (AMvB) of 4 December 1995, *Stb.* 1995, 599.
[32] Explanatory statement, 37-38, Governmental decree (AMvB) of 4 December 1995, *Stb.* 1995, 599.
[33] Explanatory statement, 38, Governmental decree (AMvB) of 4 December 1995, *Stb.* 1995, 599.
[34] Explanatory statement, 38, Governmental decree (AMvB) of 4 December 1995, *Stb.* 1995, 599.
[35] Explanatory statement, 38, Governmental decree (AMvB) of 4 December 1995, *Stb.* 1995, 599 ref. to CBS, Arbeid en lonen van werknemers 1993 en Enquête Beroepsbevolking 1993.
[36] Governmental decree (AMvB) of 26 February 2007, *Stb.* 2007, 88.
[37] Governmental decree (AMvB) of 27 August 2018, *Stb.* 2018, 300.
[38] Art. 2.1:1(1)(b) Working Time Decree.

2.1:2 Working Time Decree.[39]

Article 2.1:1(1)(a) states that articles 4:2 and 4:3 and Chapters 5 and 6 of the Working Time Act and the provisions based thereon do not apply to work performed by an employee of 18 years or older if the annual wage (determined in cash) is at least 3 times the amount determined in accordance with the third paragraph. This means that if an employee earns more than the annual wage limit the employer does not have the obligation to notice working and rest periods (art. 4:2), to register working and rest periods (art. 4:3), to follow the regulations regarding maximum work and minimum rest periods (chapter 5) and to give a right of say regarding working and rest periods (chapter 6). However, according to article 2.1:1(2) the provisions of the Working Time Act remain applicable if the employee performs work: on or from a mining work, on night shifts or carries out work that (directly) involves serious hazards to the safety or health of persons.

The amount, in accordance with the third paragraph, consists of twelve times the statutory minimum wage as determined on the 1st of January of that year (January 2020: € 1,653.60) increased by the holiday allowance percentage (8%) and is rounded up or down to the nearest multiple of € 50.00, whereby an amount of € 25.00 is rounded up. The amount is calculated as follows (12 x 1,653.60) x 1.08 = € 21,430.66. Which has to be rounded up to the nearest multiple of € 50,-: € 21,450. The amount of the annual wage determined in cash, as referred to in Article 2.1:1(1)(a) Working Time Decree, is for the year 2020: € 64,350 (3 x 21,450). The statutory minimum wage will be changed every half year. Most of the time this results in an increase of the statutory minimum wage. Therefore, the annual wage limit also will be changed and most of the time increased every year on the 1st of January. Because the derogation applies to employees with a higher salary than € 64,350, it are mainly higher-educated employees or, more in general, white-collar workers that are excluded from the protection of the Working Time Act.

2.3.3. Case law

The case law regarding article 2.1:1(1)(a) Working Time Decree is scarce. However, it shows that this provision is strictly applied by judges. An employee of the *Partij Voor de Vrijheid (PVV)*, a Dutch political party, had to be available outside working hours until 11 p.m. every working day and between 9.00 a.m. and 11 p.m. in the weekends for over one and a half year.[40] She has asked several times to be allowed to be less available. However, her employer always refused the requests, even after she showed advice of her doctor.[41] Unfortunately, the employee got sick and after termination of the employment contract she demanded that the overtime she had worked should be paid during illness. However, because she had a higher wage than article 2.1:1 Working Time Decree stated, the judges ruled that the Working Time Act was not applicable and that from the employer could not be expected to register the working time of this employee.[42] Therefore, she

[39] See 2.3.3. Definitions and scope.
[40] Court of Appeal the Hague 21 May 2019, ECLI:NL:GHDHA:2019:1121, para. 3.38.
[41] Court of Appeal the Hague 21 May 2019, ECLI:NL:GHDHA:2019:1121, para. 3.38.
[42] Court of Appeal the Hague 21 May 2019, ECLI:NL:GHDHA:2019:1121, para. 3.21.

had the burden of proof that she had worked overtime.[43]

In another case, upon termination of the employment relationship, the employee of a foundation demands payment of unused vacation days. The employee does have autonomous-decision making power regarding his working hours, but has a lower wage than article 2.1:1(1)(a) Working Time Decree stated. The court in this case rules that the Working Time Act is applicable and the employer has the obligation to register the working time of this employee.[44]

2.3.4. Literature

The literature regarding article 2.1:1(1)(a) Working Time Decree is also scarce. However, Zekić questions the legitimacy of the Dutch wage limit exception to the EWTD.[45] In her view, the Dutch government seems to have made use of the derogation opportunities provided by the EWTD.[46] After all, the ETWD offers ample room for Member States to make exceptions on all kinds of minimum requirements. Article 17 of the EWTD stipulates that if the general principles of the protection of the safety and health of workers are respected, Member States may derogate from a number of important articles of the EWTD if the duration of working time is not determined due to the special characteristics of the activity performed measured and/or predetermined, or by the employees themselves can be determined, especially when it comes to management personnel or other persons with autonomous decision-making powers. Zekić explains that it can be argued that workers who earn at least three times the minimum wage will have autonomous decision-making powers with regard to their working hours.[47] The formulation of article 17 of the EWTD leaves plenty of room for exceptions like this. But on the other hand, the limit of three times the minimum wage is arbitrary. It is questionable whether every employee who earns more than three times the minimum wage always can determine his/her own working hours. From the highly protective nature of the EWTD could be argued and concluded that there is a limit on the diversity of possible exceptions.[48] Finally, Zekić argues that the general principles of protection of workers' health and safety should apply also to workers with a higher salary than three times the minimum wage.[49]

2.4. Conclusion

The Working Time Act (*Arbeidstijdenwet*) protects the safety, the health and well-being of employees in the Netherlands. One important exception that excludes certain employees from the protection of important provisions of the Working Time Act, such as a maximum working week and minimum resting periods, is article 2.1:1(1)(a) Working Time Decree. This provision determines that employees with a salary of more than three times the minimum wage including holiday allowance

[43] Court of Appeal the Hague 21 May 2019, ECLI:NL:GHDHA:2019:1121, para. 3.22.
[44] Subdistrict court Middelburg 9 January 2012, ECLI:NL:RBMID:2012:BV5144, para. 5.3.
[45] Zekić 2019, 40.
[46] Zekić 2019, 40.
[47] Zekić 2019, 40.
[48] Zekić 2019, 40.
[49] Zekić 2019, 40.

are excluded from the protection of articles 4:2 and 4:3 and chapters 5 and 6 of the Working Time Act. Article 2.1:1(3) Working Time Decree is important for the calculation of the annual salary. Instead of an extensive list of specific occupations in combination with a wage limit that are excluded from the applicability of important provisions of the Working Time Act, the Dutch government has opted for an annual wage limit because of the reason that a wage limit is a more manageable criterion. A competitive economy and a good business climate in the Netherlands are underlying reasons for the Dutch government for such a derogation.

The case law regarding article 2.1:1(1)(a) is scarce. However, it shows that the provision must be applied very strictly. If an employee earns more than the annual salary as calculated by the Working Time Decree, the employee is not protected by the Working Time Act. If an employee earns less, he must receive protection. From the scarce literature can be concluded that article 2.1:1(1)(a) Working Time Decree might not be fully in line with article 17 EWTD. It is questionable whether all workers that earn more than three times the minimum wage (and holiday allowance) have the freedom to determine fully their own working hours. In chapter 3, I will examine and conclude whether article 2.1:1(1)(a) Working Time Decree is in line with article 17 EWTD.

3. The European Union: the Working Time Directive

3.1. Introduction: the history of the Working Time Directive

In 1989, the Directive 89/391/EEC (Framework Directive) introduced measures to encourage improvements in safety and health of workers in the European Union (EU). The Framework Directive establishes a framework that is generally applicable and refers in article 16 to subsequent specific directives.[50] After two recommendations in 1975[51] and 1982[52], the first proposal for a directive concerning the organisation of working time was made by the European Commission (EC) on 3 August 1990.[53] The aim of this proposal was to implement article 7 and 8 of the Community Charter of the Fundamental Social Rights of Workers of 9 December 1989.[54] The proposal concerned basic rules regarding:

- daily, weekly and annual rest;
- night work, shift work;
- the protection of the health and safety of employees in the event of changes in working patterns resulting from working-time adjustments.[55]

The EWTD is a directive that directly or indirectly regulates the health and safety of workers.[56] De la Vega explains: "*there is no doubt that work and rest times have an effect on the health of workers, and for this reason the legal basis chosen at the pertinent time for the drafting of Directive 93/104/EC was Article 118A of the EC Treaty.*"[57] Unfortunately, the United Kingdom did not accept the Treaty basis of the Directive, article 118A, concerning the proposal. Therefore, no general consensus could be reached. With a qualified majority vote the first Working Time Directive (Directive 93/104/EC) was adopted on 23 November 1993.[58] Because of the demands of the United Kingdom the Directive had become (and still is) a complex instrument. Some argue even that in the EWTD priority has been given to *"considering working as a matter of business organization and as an instrument of employment policy, rather than considering it as an instrument for the protection of the health and safety of workers."*[59]

Member States do have many options to derogate from the Directive. This has led to differences in the applicable rules between Member States. This means that there is no full harmonization of the rules within the EU.[60] The fierce debates between Member States around the new and later proposed revision of the EWTD (2003/88EC) have been dissipating the call for the eight-hour

[50] Art. 1(2) Directive 89/391/EEC.
[51] Official Journal of the European Communities, L 199, 30 July 1975.
[52] Official Journal of the European Communities, L 357, 18 December 1982.
[53] Blanpain & Engels 1997, 129.
[54] Blanpain & Engels 1997, 129.
[55] Blanpain & Engels 1997, 129.
[56] De la Vega 2013, 23.
[57] De la Vega 2013, 23.
[58] Official Journal of the European Communities, L 307, 13 December 1993.
[59] De la Vega 2013, 24 ref. to N. Martínez Yáñez, 'Tiempo de trabajo y periodo de descanso en la Directiva 03/88/CE y en la jurisprudencia del Tribunal de Justicia de las Comunidades Europeas', *Revista de Derecho Social*, no. 25 (2004): 150.
[60] Blanpain & Engels 1997,130.

working day and/or decent working hours. In several Member States the need is felt to arrange more flexibility on the labour market, which contributes to the competitiveness of an economy within and outside the EU.[61] Attempts of the EC in 2004 and 2010 to make amendments to the directive did not succeed. In 2010, there have been consultation rounds in which social partners could participate. However, they did not succeed in presenting a shared proposal for changes. Both sides had and still have opposed views on how to regulate working time via European directives.[62] However, this should be put in perspective. At the time, Member States where busy with recovering from the economic crisis that started in 2008. This has pushed further developments of the EWTD to the background.

At the present time, the Working Time Act and the EWTD still are the most important regulations regarding working time in the Netherlands. However, collective agreements almost always contain other arrangements regarding working hours. Collective agreements often set the daily working time to 7.2 to 8 hours per day and 36 to 40 hours per week. In this chapter, I will first discuss the status of a directive in the European Union (3.2). Secondly, the European Working Time Directive and the derogation opportunities will be discussed (3.3). Hereafter, relevant case law of the CJEU and the view of the EC regarding article 17(1) EWTD will be discussed (3.4). Finally, a conclusion follows whether article 2.1:1(1)(a) Working Time Decree is in line with the European Working Time Directive (3.5).

3.2. The status of a European (Union) directive

There are various sources of law within the European Union. The primary source of European law are the European Treaties.[63] Secondary law is designed based on the competences and procedures as stated in Part III of the TFEU. The forms of secondary law are defined in article 288 TFEU. Besides regulations and decisions, directives are one of the three binding legal instruments within the European Union.[64] However, directives are indirect Union law, because in principle directives need to be implemented or incorporated via national legislation in the national legal order.[65] According to the definition of article 288(3) TFEU, a directive is binding solely on the Member State to which it is addressed.[66] Therefore, one could say that only after implementation of a directive by the Member State individuals have rights that they could claim in national courts. However, in the case Van *Duyn v. Home Office* the CJEU accepted that directives – under certain circumstances – have the direct effect of giving rights to individuals that could be claimed before

[61] Ales & Popma 2019, 478-479.
[62] Ales & Popma 2019, 479.
[63] Schütze 2015, 81.
[64] Schütze 2015, 82.
[65] Schütze 2015, 95.
[66] Article 288(3) TFEU defines a directive as follows: *"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."*

the national courts.[67] The legal arguments of the CJEU for this decision were not very convincing.[68] In a later case, the CJEU came up with another argument. The CJEU ruled in the *Ratti* case that a Member State that fails to implement the measures required by the directive on time, may not invoke that failure as a defence against individuals.[69] In the *Kolpinghuis Nijmegen BV* case the CJEU recalls that it is established case-law that if provisions of a directive are unconditional and sufficiently precise individuals may rely on those provisions against the State, if the State fails to implement the directive in national law by the end of the period prescribed or where it fails to implement the directive correctly.[70] In a vertical situation (individuals against States) a directive could have direct effect. This is not the same in a horizontal situation (e.g. employee against employer). The fact that directives do not have direct horizontal effect was first mentioned in the *Marshall* case[71] and confirmed by the court in the *Faccini Dori* case.[72] There have been exceptions to this rule. However, in these cases the CJEU ruled on a dispute between two companies about a commercial contract.[73]

Although a directive itself cannot be invoked because, for example, a provision does not have direct effect, a directive may still have indirect effects on the interpretation of a national law.[74] The CJEU has ruled in the *Von Colson* case that national courts have the duty to interpret national law as far as possible in the light of the wording and the purpose of the directive.[75] The doctrine of consistent interpretation or the *Von Colson* doctrine is a duty to achieve the result in an indirect way. If a directive is not sufficiently precise and a Member State has failed to concretise the content of the directive within the national law the task is transferred partly to the national court.[76] It does not matter whether the provisions of the national law in question were adopted before or after the directive, the duty of consistent interpretation exist in both situations.[77] However, national courts are not required to interpret national law in the light of a directive before the implementation deadline has expired. Unless, the domestic provisions "*have been specifically enacted for the purpose of transposing a directive intended to confer rights on individuals."*[78] In that case, the national court must presume that the Member State "*had the intention of fulfilling entirely the obligations arising from the directive concerned."*[79] The indirect effect of directives does have two

[67] CJEU 4 December 1974, C-41/74, ECLI:EU:C:1974:133 (*Van Duyn v. Home Office*); Schütze 2015, 96.
[68] Schütze 2015, 96-97.
[69] CJEU 5 April 1979, C-148/78, ECLI:EU:C:1979:110 (*Ratti*), para. 22.
[70] CJEU 8 October 1987, C-80/86, ECLI:EU:C:1987:431 (*Kolpinghuis Nijmegen BV*), para. 7.
[71] CJEU 26 February 1986, C-152/84, ECLI:EU:C:1986:84 (*Marshall*), para. 48.
[72] CJEU 14 July 1994, C-91/92, ECLI:EU:C:1986:84 (*Faccini Dori v. Recreb*), para. 24-25.
[73] Schütze 2015, 101-103.
[74] Schütze 2015, 103.
[75] CJEU 10 April 1984, C-14/83, ECLI:EU:C:1984:153 (*Sabine von Colson en Elisabeth Kamann v. Land Nordrhein-Westfalen*), para. 26.
[76] Schütze 2015, 104.
[77] CJEU 13 November 1990, C-106/89, ECLI:EU:C:1990:395 (*Marleasing SA v. La Comercial Internacional de Alimentacion SA*), para. 8.
[78] CJEU 4 July 2006, C-212/04, ECLI:EU:C:2006:443(*Konstantinos Adeneler and others v. Ellinikos Organismos Galaktos (ELOG)*), para. 115.
[79] CJEU 5 October 2004, Joined cases C-379/01 to C-403/01, ECLI:EU:C:2004:584 (*Pfeiffer et al. v. eutsches Rotes Kreuz, Kreisverband Waldshut*), para. 112.

limits. Firstly, the duty of consistent interpretation starts after the implementation period of the directive has expired. And secondly, the duty is also limited by the wordings of a provision in a directive. If one of the limits applies, the doctrine of consistent interpretation cannot be used.[80]

3.3. The European Working Time Directive

3.3.1. The European Working Time Directive in general

In the preamble of the EWTD (Directive 2003/88/EC) is stated that the objective of the directive is: *"the improvement of workers' safety, hygiene and health at work"*.[81] Therefore, the purpose of the EWTD is to lay down minimum safety and health requirements for the organisation of working time that Member States of the European Union have to guarantee.[82] This means, as stated in Article 15 of the Directive, that a Member State is able *'to apply or introduce laws, regulations or administrative provisions more favourable to the protection of the safety and health of workers.'*

Article 31(2) of the Charter of Fundamental Rights of the European Union states: *'Every worker has the right to limitation of maximum working hours, to daily and weekly rest periods and to annual period of paid leave.'* These rights are included in the EWTD. The CJEU has emphasized the importance of the EWTD's requirements on maximum working time, paid annual leave and minimum rest periods. The CJEU has ruled that every worker must benefit from these minimum requirements.[83]

The EWTD starts in chapter 1 with the scope of the directive and the definitions. The directive does apply to all sectors of activity, both public and private. Solely seafarers are excluded. Chapter 2 provides the Member States with clear requirements. These requirements are the core of the directive. In the articles 3 to 7 the directive sets standards for daily rest (art. 3), daily breaks (art. 4), weekly rest periods (art. 5) and the maximum weekly working time (art. 6). Article 7 obliges Member States to ensure that every worker is entitled to at least four weeks of paid annual leave.

Chapter 3 lays down requirements regarding night work, shift work and patterns of work. Where article 8 sets a clear standard, the rest of the articles in chapter 3 (articles 9-13) describe more general obligations of Member States regarding safety and health protection of night workers. Chapter 4 of the directive contains three articles. Article 14 states that the EWTD shall not apply if other Community instruments contain more specific requirements relating to the organisation of working time for certain occupations or occupational activities. According to article 15, the Member States are allowed to introduce laws, regulations or administrative provisions that are more favourable to the protection of the safety and health of workers. This rule also applies to the permission of Member States regarding the application of collective agreements or other agreements concluded between the two sides of industry. Article 16 is important for the application

[80] Schütze 2015, 104.
[81] Directive 2003/88/EC, recitals 1-4.
[82] Article 1 Directive 2003/88/EC.
[83] CJEU 1 December 2005, C-14/04, ECLI:EU:C:2005:728 (*Abdelkader Dellas and Others v Premier ministre and Ministre des Affaires sociales, du Travail et de la Solidarité*), paras 40-41 and 49; CJEU 6 April 2006, C-124/05, ECLI:EU:C:2006:244 *(Federatie Nederlandse Vakbeweging v. Staat der Nederlanden)*, para. 28.

of article 5 to 8 because the Member States may lay down reference periods. This article restricts these reference periods with a certain maximum.
Under certain circumstances and if the protection of the health and safety of workers is secured, chapter 5 of the EWTD allows derogations and exceptions from the rights as stated in articles 3 to 6, 8 and 16. Article 17 provides Member States with several possibilities to derogate from the above named articles. These derogations refer to a specific category of workers or to a sector. Member States may derogate from the rules on maximum weekly working time, minimum daily rest, daily breaks, minimum weekly rest and the length of night work. Derogations by collective agreements are also allowed on the 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 (article 18). Article 19 limits the option to derogate from the reference periods.
The EWTD contains special rules that apply to certain categories of workers. Article 20 focuses on mobile and offshore workers and article 21 on workers on board of seagoing fishing vessels. In specific transport sectors separate directives on working hours for certain workers apply. These sectors concern transport by air, rail, sea, inland waterways and road.[84] Article 22 states a few miscellaneous provisions concerning the option for a Member State to not apply article 6, while respecting the general principles of the protection of the safety and health of workers. Chapter 6 (article 23-29) contains final provisions regarding procedural manners.

3.3.2. Working time standards

The minimum requirements of the EWTD, as laid down in chapter 5, are:

- a minimum daily rest of 11 consecutive hours in every 24 hours;
- a rest break during working hours if the working day is longer than six hours;
- a minimum weekly uninterrupted rest period of 24 hours in addition to the 11 hours' daily rest for each seven-day period (normally will be calculated over a 14-day period);
- a maximum of weekly working hours: the average working time, including overtime must not exceed 48 hours for each seven-day period (depending on national legislation and/or collective agreements, the 48-hour average is calculated over a reference period of up to 4-12 months);
- paid annual leave of at least four weeks per year;
- extra protection in case of night work
    - normal hours of work for night workers do not exceed an average of eight hours in any 24-hour period;
    - 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,
    - night workers have the right to free health assessments and, under certain

[84] European Commission 2020.

circumstances, to be transferred to day work.

3.3.3. Definitions and scope

The EWTD defines 'working time' as follows: *"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"*[85] Hereafter the EWTD defines 'rest period' as: *"any period which is not working time."*[86] Therefore, the definition of rest period is linked to the definition of working time. However, the definition of working time itself is not clear enough. In the *SIMAP* case, the CJEU ruled that mandatory and actual presence is crucial for the recognition of time as 'working time'. If workers are on-call and not free to spend their time as they wish, the time must be regarded entirely as working time.[87] Ales and Popma notice that this situation has to be distinguished from the situation that a worker must be contactable at all times but does not have to be physically present at work. Workers remain in power to manage their time in such situations, even though there are at the disposal of the employer.[88] In later cases the CJEU reiterated this decision.[89] The reasoning of the CJEU is as follows:

"… *a doctor who is required to keep himself available to his employer at the place determined by him for the whole duration of periods of on-call duty is subject to appreciably greater constraints since he has to remain apart from his family and social environment and has less freedom to manage the time during which his professional services are not required. Under those conditions an employee available at the place determined by the employer cannot be regarded as being at rest during the periods of his on-call duty when he is not actually carrying on any professional activity."*[90]

Since the judgements of the CJEU, it is clear that working time also includes time spend being mandatory physically present at a place away from family and the social environment that is determined by the employer and being immediately available for performing services in case of need.[91] However, it does not mean that the CJEU decided that the hours spend during those forms of work, e.g. on-call work, have to be remunerated. The EWTD does not cover the remuneration, but solely the organisation of working time and the resting periods.[92] Obviously, the judgements have large consequences for certain sectors, such as the health care sector and the fire departments.

Several times, the provisions of the EWTD refer to the term 'worker'. However, the directive itself does not contain a definition. But the EWTD refers to Framework Directive 89/391/EEC. The scope can be derived from that directive. Article 3(a) of the Framework Directive defines worker as: "*any*

[85] Art. 2(1) Directive 2003/88/EC.
[86] Art. 2(2) Directive 2003/88/EC.
[87] CJEU 3 Oktober 2000, C-303/98, ECLI:EU:C:2000:528 (*SIMAP*), paras. 49-52.
[88] Ales & Popma 2019, 483.
[89] CJEU 9 September 2003, C-151/02, ECLI:EU:C:2003:437 (*Jaeger*), paras. 63-65; CJEU 1 December 2005, C-14/04, ECLI:EU:C:2005:728 (*Dellas*), para. 46-48.
[90] CJEU 9 September 2003, C-151/02, ECLI:EU:C:2003:437 (*Jaeger*), para. 65.
[91] Ales & Popma 2019, 483.
[92] Ales & Popma 2019, 484.

person employed by an employer, including trainees and apprentices but excluding domestic servants."
The definition of an employer is stated in article 3(b) of the Framework Directive and describes employer as: *"any natural or legal person who has an employment relationship with the worker and has responsibility for the undertaking and/ or establishment."*
The problem with these definitions is that it is still unclear when there is an employment relationship. That is why case law of the CJEU is needed to interpret the concept of worker at a European Union level.[93] In *SIMAP*, the CJEU ruled: "*that it is clear both from the object of the basic Directive, namely to encourage improvement in the safety and health of workers at work, and from the wording of Article 2(1) thereof, that it must necessarily be broad in scope.*"[94]
The court explicitly emphasizes that the exceptions of the scope of the directive must be interpreted restrictively.[95] It is arguable whether self-employed fall under the scope of the term worker and therefore also are covered by the EWTD. In general, self-employed persons are considered to be undertakings and not workers.[96] Therefore, self-employed are not covered by the EWTD. However, the CJEU ruled in the *FNV KIEM* case 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."*[97]
This means that under certain circumstances it is possible that a self-employed person under national law will be considered a worker under European law and that the scope of the EWTD could be extended to self-employed with a disguising employment relationship.

3.3.4. Derogations (and opt-out) from the EWTD

Despite being of general application in the EU, the EWTD provides Member States with a lot of room to create their own working time regimes within the limits of the directive. One of the most important reasons for using these derogation options is to accommodate the employers' wish to introduce more flexibility in their undertakings in order to be more competitive.[98] The preamble of the EWTD also reflects this. The preamble 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.'*[99]
In order to ensure that a derogation by a Member State or two sides of industry is in line with the principles of protecting health and safety, the preamble adds that in event of a derogation the workers concerned must be given equivalent compensatory rest periods.[100]
Firstly, article 17 EWTD contains various possibilities for Member States to derogate from several

[93] Ales & Popma 2019, 486.
[94] CJEU 3 Oktober 2000, C-303/98, ECLI:EU:C:2000:528 *(SIMAP)*, para. 34.
[95] CJEU 3 Oktober 2000, C-303/98, ECLI:EU:C:2000:528 *(SIMAP*), para. 35.
[96] Ales & Popma 2019, 486.
[97] CJEU 4 December 2014, C413/13, ECLI:EU:C:2014:2411 (*FNV KIEM*), para. 35.
[98] Ales & Popma 2019, 486.
[99] Directive 2003/88/EC, preamble recital 15.
[100] Directive 2003/88/EC, preamble recital 16.

core provisions of the directive, including the maximum of weekly working hours. Article 17(1) EWTD is called the 'autonomous workers' derogation[101] and states:

"W*ith 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."*[102]

This paragraph of article 17(1) provides a derogation for the Member States based on the criteria that workers have autonomy regarding their working time or that their working time cannot be measured and/or predetermined by the employer. Hereafter, the EWTD provides examples for which cases the derogation in particular can be used.

Article 17(2) of the EWTD states the conditions under which it is allowed to use the derogation options of paragraph 3, 4 and 5. Article 17(3), (4) and (5) designate certain categories of activities or workers in which case a derogation from certain articles of the EWTD is allowed. For example, in the case of security and surveillance activities requiring a permanent presence, dock or airport workers, press, radio, television, research and development activities or agriculture.

Secondly, article 18 EWTD allows derogations 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."*

Collective agreements may not derogate, and therefore must remain within the limits, of the rules regarding the maximum weekly working time in article 6 of the EWTD.

Finally, article 22(1) EWTD determines that under certain conditions Member States have the option to not apply article 6, the maximum weekly working time, while respecting the general principles of the protection of the safety and health of workers. The most important condition is that: *"no worker is subjected to any detriment by his employer because he is not willing to give his agreement to perform such work."*[103] The individual opt-out is not applicable to other provisions of the EWTD. Solely in a few EU Member States the opt-out is generally used. In the rest of the Member States there is limited use of the opt-out or it is not allowed to use it.[104] In the Netherlands, the opt-out is used mainly for on-call work.[105] For the purpose of this thesis only the derogation opportunity of article 17(1)(a) of the EWTD is relevant. In the next paragraph will be explained the reasons why.

[101] European Commission 2017b, 44.
[102] Art. 7(1) Directive 2003/88/EC.
[103] Art. 22(1) Directive 2003/88/EC.
[104] Eurofound 2015, 4-5.
[105] Eurofound 2015, 10.

3.4. Article 17(1) (European) Working Time Directive

3.4.1. Introduction

Article 2.1:1(1)(a) Working Time Decree does exclude every worker that earns a higher salary than three times the minimum wage. It does not state certain categories of occupations, activities or sectors. Also, the derogation is laid down in a (governmental) decree and not a collective agreement or an agreement between two sides of the industry. Furthermore, the derogation excludes the applicability of nearly all the important provisions of the Working Time Act. Finally, the explanatory statement describes the assumption that employees with a higher salary than article 2.1:1(1)(a) Working Time Decree have sufficient independence from their employers to prevent overburdening and have enough freedom to regulate their own working time. Therefore, it seems that the government has made use of the 'autonomous workers' derogation of article 17(1) of the EWTD. First, the relevant judgements of the CJEU will be discussed (3.4.2). Secondly, the view of the European Commission on the implementation of article 17(1) EWTD will be explained (3.4.3). Finally, this paragraph describes relevant infringement procedures started by the European Commission (3.4.4.).

3.4.2. Judgements of the CJEU on article 17(1)(a) EWTD

Article 17(1)(a) EWTD offers the opportunity to exclude managers and other persons with autonomous decision-taking powers from important provisions of the EWTD. According to the CJEU, the exception of article 17(1)(a) EWTD should be applied solely to workers who are completely free to organize their own working time or whose working time is not measured or predetermined fully, and not to workers "*whose working time is partially not measured or predetermined or can be determined partially by the worker himself*."[106] Therefore, it is not permitted to exclude all managing executives from the protection of the EWTD. From this ruling can be concluded that derogations based on article 17(1) EWTD are only allowed if the working hours of the workers are not measured or predetermined fully due to the specific characteristics of the work to be performed or that the working hours can be determined fully by the workers themselves.

In the *Isère* case, the CJEU ruled that the derogation of article 17(1)(a) EWTD does not apply to a worker if there is a lack of evidence that the worker is able to decide the number of hours he works and that he is "*not obliged to be present at their place of work at fixed times*".[107] It is important to note that article 17(1) EWTD is the only derogation within the EWTD that is not subject to the condition that workers are afforded equivalent periods of compensatory rest.[108] Therefore, the *Jaeger* case, about the circumstances where granting equivalent compensatory rest is impossible for objective reasons is less relevant.[109]

---

[106] CJEU 7 September 2006, C-484/04, ECLI:EU:C:2006:526 (*Commission v. United Kingdom*), para. 47.
[107] CJEU 14 October 2010, C-428/09, ECLI:EU:C:2010:612 (*Isère*), paras. 41-43.
[108] European Commission 2010, 102-104.
[109] CJEU 9 September 2003, C-151/02, ECLI:EU:C:2003:437 (*Jaeger*).

3.4.3. European Commission's view on the implementation of article 17(1) EWTD

In April 2017, a report from the EC on the implementation of the EWTD provided an overview of how Member States of the EU have implemented the EWTD. Furthermore, the report highlighted key issues and problems.[110] From the analysis of the Member States' application of the EWTD, the EC has concluded that one of the key issues is that derogations opportunities are not transposed by the Member States into national law in (fully) the right way. Concerning the autonomous workers derogation of article 17(1) EWTD, the EC pointed out that: *"In certain cases Member States do not include all the criteria of Article 17(1) in their national definitions."*[111] Hereafter, the EC mentions a list of definitions used by Member States that have made use of the autonomous workers derogation in not fully the right way.[112] In this list the EC mentions, with reference to the Dutch Working Time Decree, the exemption of a worker who earns three times the minimum wage. Also a similar definition of Hungary that exempts a worker who *"fills a position of considerable importance or trust and receives a salary seven times the mandatory minimum wage"*, is mentioned by the EC. In the view of the EC these criteria do not necessarily guarantee that the criteria of article 17(1) EWTD are fulfilled.[113] In May 2017, the EC adopted a clarification of the EWTD with the goal to provide guidance on how to interpret several aspects of the EWTD and avoid further infringements.[114] Firstly, the EC refers to jurisprudence of the CJEU that article 17(1) EWTD only 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 kind of activity concerned.[115] Secondly, the EC refers to the judgement of the CJEU in the *Isère* case in order to explain that: "*Article 17(1) must be interpreted in such a way that its scope is limited to what is strictly necessary in order to safeguard the interests which those derogations enable to be protected."*[116] In the view of the EC, article 17(1) EWTD cannot be applied broadly to a whole category of workers. Whether the derogation is allowed, must be assessed on account of the specific characteristics of the activity concerned.[117] Article 17(1) EWTD consist two qualification criteria. The first criterion is the condition 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.[118]

Based on the *Isère* case, the EC concludes that it appears essential that workers have the ability to decide on both the quantity and the scheduling of their working hours.[119]

---

[110] European Commission 2017a.
[111] European Commission 2017a, 9.
[112] European Commission 2017a, 9-10.
[113] European Commission 2017a, 10.
[114] European Commission 2017b, A. Meeting the challenges of changing work organisation.
[115] CJEU 7 September 2006, ECLI:EU:C:2006:526 (*Commission v. United Kingdom*), para. 20; CJEU 14 October 2010, ECLI:EU:C:2010:612, C-428/09 (*Isère*). para. 41. See the Opnion of Advocate-General Kokott, 9 March 2006, ECLI:EU:C:2006:166 (*Commission of the European Communities v. United Kingdom of Great Britain and Northern Ireland*), paras. 22-32.
[116] CJEU 14 October 2010, ECLI:EU:C:2010:612, C-428/09 (*Isère*), paras. 39-40.
[117] European Commission 2017b, 1. The scope of the 'autonomous workers' derogation.
[118] European Commission 2017b, 1. The scope of the 'autonomous workers' derogation.
[119] European Commission 2017b, 1. The scope of the 'autonomous workers' derogation.

The EC also considers that the derogation of article 17(1) EWTD could be applied in the case of for example 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")* or it could similarly apply to senior lawyers in an employment relationship or academics *("who have substantial autonomy to determine their working time").*

Furthermore, the EC explains the status of the list of three specific categories of workers of article 17(1) EWTD. The EWTD presents the categories 'managing executives or other persons with autonomous decision-taking powers', 'family workers' or 'workers officiating at religious ceremonies in churches and religious communities' as examples "*since they generally have a high degree of autonomous power to organise their working time and could qualify as autonomous workers."* Hereafter, the EC considers that*: "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)."*[120] From the considerations of the EC could be concluded that a derogation that states a certain role or profession, whether or not in combination with a specific salary, does not include all criteria of and is not in line with article 17(1) EWTD. It is also essential to examine whether the worker has the autonomous decision-making powers to organize its working time as a whole, which includes the quantity and the scheduling of the working hours.

3.4.4. Infringement procedures by the European Commission

Based on the Treaties, the EC is responsible for ensuring that EU-law is correctly applied. If not, the EC has the option, based on article 258 of the Treaty on the Functioning of the European Union (TFEU), to start an infringement procedure whenever it considers that a Member State has breached EU-law. The purpose of this procedure is to bring the infringement to an end. The infringement procedure starts with a letter of formal notice by which the EC allows the Member State to present its views regarding the infringement. If no reply to the letter of formal notice is received or if the observations presented by the Member State in reply to that notice cannot be considered satisfactory, the EC will move to the next stage of the infringement procedure, which is the reasoned opinion. If still necessary, the EC will then refer the case to the CJEU.[121]

In November 2013, the EC has decided to refer Ireland to the CJEU for not complying with the EU rules on limits to working time for doctors in public health services.[122] Irish national law respects the requirements of the EWTD and sets limits for working time of doctors. In its statement the EC mentioned: *"in practice public hospitals often do not apply the rules to doctors in training or other non-consultant hospital doctors. There are still numerous cases where junior doctors are regularly required to work continuous 36-hour shifts, to work over 100 hours in a single week and 70-75 hours per week on average, and to continue working without adequate breaks for rest or sleep."*

[120] European Commission 2017b, 1. The scope of the 'autonomous workers' derogation.
[121] Schütze 2015, 371-372.
[122] European Commission 2013a.

In the same month and year, Greece was also referred by the EC for not complying with the limits of the EWTD to working time for doctors in the public health services.[123] According to the EC: *"In practice, doctors working in public hospitals and health centres in Greece often have to work a minimum average of 64 hours per week and over 90 hours in some cases, with no legal maximum limit. There is no legal ceiling to how many continuous hours they can be required to work at the workplace, and they often have to work without adequate intervals for rest or sleep."*

These first two referrals by the EC show that it does not matter whether a Member State has set limits for working time, the EC will always investigate what happens in practice. To my knowledge, the situation in Ireland and Greece has not changed enough to satisfy the EC. As the EC stated in 2017: *"The Directive's maximum limit to weekly working time is still not satisfactorily transposed by Ireland for social care workers nor by Greece for doctors in public health services, but work is ongoing to remedy the situation."*[124]

In January 2014, Spain was asked by the EC to respect the rights of Civil Guard staff to minimum rest periods and the 48-hour limit on average weekly working time, as required by the EWTD.[125] The EC then explains the request as follows: *"Under the current Spanish national law, certain categories of Civil Guard workers are not entitled to these rights, particularly those with command, managing, teaching and investigative functions. Under the Directive, Member States may exclude managing executives or other persons with autonomous decision-taking powers from the 48-hour limit to average weekly working time and minimum rest periods. However, this derogation only applies to persons with genuine and effective autonomy over both the amount and the organisation of their working time, which is not the case for at least the majority of the Civil Guard workers concerned."*

In the case of Spain the EC did not have to refer Spain to the CJEU. The Spanish General Order which regulates the working conditions of the Civil Guard was changed so that it was in line with the EWTD.[126]

In February 2014, Italy was referred to the CJEU. Under Italian law, doctors were deprived of their right to a limit on weekly working hours and to minimum daily rest periods.[127] The EC describes in its statement that: *"several key rights contained in the Working Time Directive, such as the 48-hour limit to average weekly working time and minimum daily rest periods of 11 consecutive hours, do not apply to "managers" operating within the National Health Service. The Directive does allow Member States to exclude "managing executives or other persons with autonomous decision-taking powers" from these rights. However, doctors working in the Italian public health services are formally classified as "managers", without necessarily enjoying managerial prerogatives or autonomy over their own working time."*

The EC withdrew the case of Italy from the CJEU because it eventually adjusted their law

[123] European Commission 2013b.
[124] European Commission 2017a, 7.
[125] European Commission 2014a.
[126] The Spanish General Order OG 4/2010 was changed in OG 11/2014. Guardia Civil, Press releases history, 21 May 2015. Retrieved from: https://www.guardiacivil.es/en/prensa/historico_prensa/5354.html?versionImprimible=true.
[127] European Commission 2014b.

sufficiently so that the maximum average working time of 48 hours will apply to all National Health Service staff.[128]

In September 2014, the EC requested France to respect the rights of certain police officers because under French law, several key rights of the EWTD, such as the 48-hour limit to average weekly working time are not guaranteed.[129] The EC states: *"The Directive contains an exception from the right to a limit of working hours and minimum rest periods in the case of workers who can determine their own working time, such as managing executives. The French police officers in question, however, do not fall within this exception as they are not fully able to determine their working time themselves."*

In 2017, France changed the decree that regulates the working conditions of the police officers to make sure it is in line with the EWTD.[130]

The cases discussed above are examples showing that according to the EC, in order to derogate legitimately from the EWTD, employees must not only need to have a certain role or profession, but also genuine and effective autonomy over both the amount and organization of their working time is necessary. The cases also show that the EC mainly start to investigate a situation after a complaint from a certain professional association or employee organization.

3.5. Conclusion

If provisions of a directive are unconditional and sufficiently precise and if the State fails to implement the directive in national law by the end of the period prescribed or if it fails to implement the directive correctly, individuals can invoke those provisions against the Member State. If the provisions are conditional or not sufficiently precise or in horizontal situations the doctrine of consistent interpretation is a possible solution to achieve the purpose of a directive. National courts are allowed to interpret the national law in the light of a directive. Therefore, a directive may have indirect effects on the national law of a Member State.

The European Working Time Directive (Directive 2003/88/EC) lays down minimum safety and health requirements for the organisation of working time and applies to all sectors of activity, public and private. Despite being of general application in the EU, the EWTD provides Member States with a lot of room to create their own working time regimes within the limits of the directive. One of the most important reasons for using the derogation opportunities is to accommodate the employers' wish to be more competitive via the introduction of more flexible working time arrangements in their undertakings.

For several reasons it seems that article 2.1:1(1)(a) Working Time Decree is based on the autonomous workers derogation, as stated in article 17(1) of the EWTD. From the European Commission's view and case law of the Court of Justice of the European Union in which a

[128] Eurofound 2015, 17, 23.
[129] European Commission 2014c.
[130] The French Ministerial Decree: Décret n° 2017-109 du 30 janvier 2017 modifiant le décret n° 2002-1279 du 23 octobre 2002 portant dérogations aux garanties minimales de durée du travail et de repos applicables aux personnels de la police nationale. Retrieved from: legifrance.gouv.fr/affichTexte.do?cidTexte=JORFTEXT000033956123&categorieLien=id.

derogation is based on article 17 EWTD can be concluded that in order to derogate legitimately from the EWTD employees must not only need to have a certain role or profession, but also need to have genuine and effective autonomy over both the amount and organization of their working time. The European Commission has confirmed that article 2.1:1(1)(a) Working Time Decree falls under the scope of article 17(1) EWTD and points out that the Dutch derogation, an employee who earns three times the minimum wage, does not necessarily include all the criteria of article 17(1) EWTD. For example, article 2.1:1(1)(a) Working Time Decree does not include the criterion that a worker has to have the freedom to determine fully their own working time.

Due to the lack of judgments of the CJEU and legal opinions in literature, it is difficult to judge how legitimate the exception of article 2.1:1(1)(a) of the Working Time Decree in the Netherlands is in the light of the EWTD. However, the view of the European Commission is clear. An exemption of a worker that earns three times the minimum wage does not include all the criteria of article 17(1) EWTD. In my view, article 2.1:1(1)(a) Working Time Decree is not in line with article 17(1) EWTD. The EWTD does not mention the possibility to use the autonomous workers derogation based on solely a certain wage, because it does not include (all) the criteria of article 17(1) EWTD. Therefore, in order to get article 2.1:1(1)(a) Working Time Decree in line with article 17(1) EWTD it should include new criteria. For example, the criteria that a worker must have a certain profession, such as managing executives, and that a worker must have genuine and effective autonomy over both the amount and organization of their working time. The last criterion might need interpretation by the courts because it might not be clear in every case whether the employer or the worker determines the working time. However, the combination of a wage limit and such criteria will make the exemption of workers from protection of the Working Time Act less arbitrary.

Besides legal arguments, social science arguments are relevant in order to examine whether it is necessary to change the exemption of workers from the protection of the Working Time Act in the Netherlands into a stricter criterion. As Zekić argues, the general principles of protection of safety and health of workers also apply to workers with a higher salary than three times the minimum wage. The current Dutch autonomous workers derogation does not take sufficient account of the general principles of protection of safety and health of workers. For example, the workers concerned do not receive equivalent compensatory rest periods. Therefore, these workers should have an alternative form of protection besides the general duty of the employer to ensure the safety and health of the workers. In my view, if long working hours have a negative effect on the health of workers with a higher salary as determined by the Working Time Decree, article 2.1:1(1)(a) of the Working Time Decree should also be changed from a social science perspective.

4. The effects of long working hours on the health of (high wage) workers

4.1. Introduction

Do working hours affect the health of workers and how? A question that is crucial to answer for designing a working time policy. Taking into account the fact that workers that fall under the scope of article 2.1:1(1)(a) Working Hours Decree do not have a statutory maximum working hours per week, it is relevant to research what the effects are of working long hours on the health of high wage workers. Firstly, the literature regarding the link between long working hours and the health of (high wage) workers will be discussed (4.2). Secondly, I will discuss the current situation of working hours in the Netherlands (4.3). Hereafter, the legislative proposal to implement a right to disconnect from work in the Netherlands will be explained (4.4). Finally, a conclusion regarding the effect of working hours on workers' health and the situation regarding working hours in the Netherlands (4.5).

4.2. Literature on the effects of long working hours on worker's health

To my knowledge, there are no recent studies published that examined the effects of long working hours on the health of (high wage) workers in the Netherlands. However, I did find several important studies regarding workers in Asian and Western countries, mainly European countries. In general, the literature shows a mixed view on the effects of long working hours on the health of workers. Besides working hours, many other factors at work might influence the health of an individual employee. Because other factors might play a role on the effects of long working hours on workers' health, it is not easy to prove a causal link.[131] Furthermore, working hours may be endogenous because healthy workers are generally more likely to work long hours than unhealthy workers. This is called the healthy worker effect.[132]

In order to have more reliable results, it is useful to examine several important meta-analyses regarding the link between (long) working hours and health of workers instead of examining all the results of individual studies. An advantage of a meta-analysis is that it provides a more objective summary of the existing evidence than the original studies.[133] Furthermore, quasi-experimental studies provide more objective results than studies that solely examine the results of surveys without examining a variation in working hours. Quasi-experimental researches are able to examine more objective health effects of working hours instead of focusing on self-assessed health (SAH). First, I will discuss the results of several important meta-analyses. Hereafter, I will discuss quasi-experimental studies that focus on the reduction or variations of working hours via the statutory workweek. To my knowledge, there are no studies published in English covering the effects of a reduction or variations of working hours in a fully experimental setting.

[131] Cygan-Rehm & Wunder 2018, 162.
[132] Sánchez 2017, 5.
[133] Virtanen et al. 2012, 589.

4.2.1. Meta-analyses

Recently, there have been several meta-analyses that examined and discussed the results of individual studies. The meta-analyses will be discussed in chronological order, because each new meta-analysis includes more recent studies. In a meta-analysis of twelve studies that included 22,518 participants and 2,313 Coronary Heart Disease (CHD) cases, Virtanen et al. found that long working hours were related to an increased probability of CHD (1.4-fold to 1.8-fold).[134] The authors did several subgroup analyses to examine whether the relation differs depending on the definition of long working hours, sex, region and study design.[135] According to the authors, this was the first meta-analysis of the available evidence on long working hours and CHD. The authors point out that evidence of the effects of long working hours on health depends on the study: *"There are some studies that suggest associations between long working hours and increased cortisol levels, elevated blood pressure, carotid intima-media thickness, anxiety and depression, type 2 diabetes, overweight, unhealthy dietary habits, smoking, and lower physical activity, although other studies found no association between long working hours and cardiovascular risk factors."*[136] Therefore, it might be the case that the relation between long working hours and health of workers, in this study CHD, is contributed by other factors such as lack of rest, poor unwinding, sleep deprivation and shift work.[137] Important to point out is that a limitation of this meta-analyse is that it cannot prove a causal link but only a correlation between long working hours and CHD or health in general because it is based on solely observational studies and not on experimental studies.[138] This also applies to many other studies that examined the relation between long working hours and health.

For example, Amagasa and Nakayama examined the effect of working long hours on the risk of depression. The results of their research show that long working hours do not directly increase the risk of depression.[139] However, combined with increased job demand, the results suggested that the risk of depression was 2 to 4 times higher for workers that work long hours and with high job demand than workers working short hours and with low job demand. Amagasa and Nakayama conclude that the combination of long hours and high job demand is linked with depression.[140] In the Netherlands, higher educated employees are most affected by high job demand.[141] Amagasa and Nakayama suggest that more longitudinal studies are needed in the future. Especially studies that treat job demand *"as an intermediate variable rather than a confounding factor."*[142] It is important that results in the future are better comparable by using for example the same definition of (long) working hours.

A meta-analysis by Cottini and Lucifora examined the effects of working hours on mental health at

[134] Virtanen et al. 2012, 589.
[135] Virtanen et al. 2012, 587.
[136] Virtanen et al. 2012, 592-593.
[137] Virtanen et al. 2012, 593.
[138] Virtanen et al. 2012, 589.
[139] Amagasa & Nakayama 2012, 873.
[140] Amagasa & Nakayama 2012, 873.
[141] Hooftman et al. 2019 via NEA Benchmarktool (https://www.monitorarbeid.tno.nl/cijfers/nea-benchmarktool).
[142] Amagasa & Nakayama 2012, 874.

the workplace by using data from 15 European countries using three waves of the European Working Conditions Survey (1995-2005). The authors show that working more than 40 hours per week is related to a higher probability (9.6%) of mental health problems.[143] Mainly workers that are employed in public sector occupations, white-collar workers, and workers in big firms have a higher probability of reporting work- related mental health problems.[144] However, the analysis of the authors focuses on demanding job characteristics. It combines long working hours with six other job characteristics (complex tasks, no assistance from colleagues, low job autonomy, high work intensity, shift work and repetitive work).[145] Therefore, the results do not provide clear insights into a separate causal effect of working hours on health.[146] A systematic review and meta-analysis of published and unpublished data for 603,308 individuals from Europe, the USA and Australia by Kivimäki et al. found that employees who work long hours (> 55 hours or more per week) have a higher risk (1.3) of stroke than employees who work standard working hours. However, the association between long working hours and coronary heart disease (CHD) is less persuasive.[147] Unfortunately, the authors did not distinguish between groups of workers.

In 1997, Sparks et al. have performed a meta-analysis regarding long working hours and health. They found a small positive correlation between long working hours and health. Since 1997, there has been no comparable meta-analysis published that examined the effects of long working hours on health or occupational health. Until 2019, when Wong et al. published their meta-analysis that covers 46 papers published between 1998 and 2018. The majority of the papers, 34 of the 46 papers (73.91%), were published between 2008 and 2018.[148] Most of the studies were performed in Asian countries (61.59%), the rest in Western countries (38.41%), mainly European. The total sample size of this study is 814,084 participants. The study of Wong et al. is the most recent and extensive meta-analysis that also examined the effects of (long) working hours on workers' health between work classes and for different forms of health. The working class was divided in three categories: "*white collar occupations (management and professional), pink collar occupations (nursing, teaching, and service-oriented work) and blue collar occupations (physical and manual labour workers).*"[149] Wong et al. based their classification of occupational health conditions on the meta-analysis conducted by Sparks et al.[150] Therefore, the occupational health conditions were divided into five categories: *"(1) physiological health (PH), (2) mental health (MH), (3) health behaviours (HB), (4) related health (RH), and (5) nonspecified health (NH).*"[151]

The authors found that long working hours (working more than 50 hours per week or more than 10 hours per day) increase the chance of suffering from occupational health problems, in general, by

[143] Cottini & Lucifora 2013, 967-968.
[144] Cottini & Lucifora 2013, 965.
[145] Cottini & Lucifora 2013, 967.
[146] Cygan-Rehm & Wunder 2018, 163.
[147] Kivimäki et al. 2015, 1743-1744.
[148] Wong et al. 2019, 7.
[149] Wong et al. 2019, 5.
[150] Wong et al. 2019, 5-6.
[151] Wong et al. 2019, 5.

24.3%.[152] They also point out that the effect of working class on the association between long working hours and the five conditions (PH, MH, HB, RH and NH) solely shows a significant influence regarding related health (sleep problem, chronic exhaustion, and occupational injury). Blue-collar workers had a higher risk of suffering from health problems than pink- and white-collar workers.[153] The reason for the difference might be found in the fact that blue-collar workers have low control over their own working time.[154] However, for white-collar occupations, the odds ratio for mental health and physiological health are the highest, respectively 1.310 and 1.145. What is interesting is that the other three categories have odds ratios lower than 1. White-collar employees that work long working hours have a lower chance to suffer from health behaviour (0.988), related health (0.887) and nonspecified health problems (0.970).[155] Therefore, the effects of working hours between working classes remains an important issue for future research. Among the meta-analyses, the results of this study represent the most precise and accurate evidence on the link between long working hours and health currently available.

In my view, in order to prevent high wage workers from suffering of health problems, solutions should focus on mental health and physiological health problems. According to Wong et al. these kind of health problems are common for white-collar workers. However, in general it is difficult to identify the effects of working hours on workers' health. By examining, quasi-experimental studies on reductions in statutory working weeks, which are exogenous, the healthy worker effect can be overcome.[156]

4.2.2. Quasi-experimental studies

After several meta-analyses have been published, other researchers began to design quasi-experimental studies. Several authors did use the variations in the statutory working hours per week to examine the effects of working hours on workers' health. Some of these studies examined the reduction of the statutory workweek in one country. Other studies focused on examining the results for two different countries or several states within a country.

Ahn (2016) and Berniell and Bietenbeck (2017) focus on health-related behaviours and examined the effects of the legislative changes including a four-hour reduction of the standard workweek. Ahn has examined the effects of the reduction of statutory workweek in South Korea from 44 to 40 hours.[157] Berniell and Bietenbeck did the same in the case of France, where the standard workweek was reduced from 39 to 35 hours per week.[158] The study of Ahn shows that a decrease of one working hour increases the probability of regular exercise by 0.13 percentage points and reduces the probability of smoking by 0.03 percentage points. The decline in smoking is more pronounced

[152] Wong et al. 2019, 14.
[153] Wong et al. 2019, 14.
[154] Wong et al. 2019, 14.
[155] Wong et al. 2019, 11-12.
[156] Sánchez 2017, 5.
[157] Ahn 2016, 970-971.
[158] Berniell & Bietenbeck 2017, 2.

among heavy smokers (smoking 10 or 20 cigarettes per day). Interestingly, a reduction in work hours increases the probability of drinking by 0.10 percentage points and decreases the probability of frequent drinking with the same change. Finally, a decrease of one working hour decreases multiple health risks by 0.11 points (0.28%).[159] This study provides some evidence for the benefits of reducing the standard workweek.[160] The study of Berniell and Bietenbeck focuses on male workers that at least work 35 hours per week.[161] They conclude, under the assumption that the effect is driven only by the reduction in hours, that increasing working time by one additional hour results in an increase of smoking by 1.5-2.5 percentage points and reduces self-reported health by 0.04-0.08 points (scale from 0-10).[162] Working time also increases the body mass index (BMI), but according to the authors this effect is small and imprecisely estimated.[163]

An interesting question to answer is whether the impact of the shorter workweek differs by the occupation (blue-collar vs. white-collar), sex and age of a worker. Berniell and Bietenbeck have found that even though blue- and white-collar workers experience the same reduction in hours, there are differences in the impacts of the reduction on their health. For example, the shorter workweek in France decreases smoking by 9 percentage points and increases self-reported health by 0.2-0.4 for blue-collar workers. However, for white-collar workers the effects of the shorter workweek are close to zero and not statistically significant.[164] Furthermore, BMI decreases among white-collar workers but increases among blue-collar workers. The authors think that this difference between both types of workers might exist because blue-collar workers burn more calories while working, and that they do not use the additional free time for physical exercise as white-collar workers do.[165]

Sánchez has used the European Community Household Panel dataset (ECHP) between 1994 and 2001 for France and Portugal to examine the effects of the reduction in the statutory working week on SAH of workers (respectively, from 39 to 35 and 44 to 40 hours per week).[166] Sánchez did not found significant effects on health outcomes for the case of Portugal.[167] For France, Sánchez found that a shorter working week had a negative effect on the health outcomes of younger men (below the average age of 39), but a positive effect on younger women (below the average age of 39).[168] Sánchez explains the differences between the countries and between men and women in France with literature on promotions and psychological health effects. Sánchez explains the difference in the results for men compared to women as follows: *"… a mandatory reduction in working hours for treated individuals (relative to controls) will limit the scope for competition via hours for this group of*

[159] Ahn 2016, 975-976.
[160] Ahn 2016, 982.
[161] Berniell & Bietenbeck 2017, 6.
[162] Berniell & Bietenbeck 2017, 10.
[163] Berniell & Bietenbeck 2017, 11.
[164] Berniell & Bietenbeck 2017, 11.
[165] Berniell & Bietenbeck 2017, 12.
[166] Sánchez 2017, 5.
[167] Sánchez 2017, 20-25.
[168] Sánchez 2017, 25-26.

workers. This negative effect on the probability of promotions (which affects the future income pattern) may have a negative impact on health, as individuals may become concerned and feel stress concerning about their future career and income".[169]

Because workers in Portugal already work longer hours than those in France the reduction of the working week has less effect on their chances of promotion, as working overtime is used less as a way to get promoted.[170] Sánchez points out that: *"the relationship between the psychological and promotions hypotheses might behave differently when higher thresholds of working hours are investigated."*[171] Further research is needed to examine whether the chances of promotion play a role in the effects of a mandatory reduction of the working week with higher thresholds and reductions of more than four hours on workers' health.

Other studies that examined legislative reductions in working hours found evidence that a reduction of working hours affects positively the satisfaction of employees. Hamermesh et al. found that the reduction of working hours in Japan and Korea improves the life satisfaction of workers.[172] Lepinteur shows that the reduced workweek significantly increases job and leisure satisfaction in France and Portugal.[173] While the study of Lepinteur shows that a shorter workweek benefits workers, the author also raises the question whether an increase of job satisfaction is worth the costs. For example, France published that over the years millions were lost because of the shorter workweek.[174] Further research is needed to examine the welfare impact of a statutory shorter workweek.

The study of Cygan-Rehm and Wunder extends the literature on the link between working hours and health by investigating the causal effects on not only subjective but also objective health effects. According to the authors, SAH or satisfaction with own health is still important to examine, because it provides valuable insights into short-term effects of an increase or decrease of working hours. Furthermore, subjective health outcomes might respond more quickly to changes in working time than objective indicators, such as the frequency of doctor visits or sickness absence from work.[175] Cygan-Rehm and Wunder examined several small increases and decreases in the statutory workweek for the public sector in Germany. Because federal states may determine the statutory workweek themselves, there have been variations in working hours between federal states and employee groups over time.[176] The authors found that a one-hour increase in the statutory workweek increases the working hours of an individual by almost half an hour per week on average.[177] Therefore, the statutory workweek is a relevant instrument to examine. Cygan-Rehm and Wunder conclude that an increase in working time impacts the health negatively along various

[169] Sánchez 2017, 26.
[170] Sánchez 2017, 27.
[171] Sánchez 2017, 38.
[172] Hamermesh et al. 2014, 23.
[173] Lepinteur 2019, 214.
[174] Lepinteur 2019, 214-215.
[175] Cygan-Rehm & Wunder 2018, 162.
[176] Cygan-Rehm & Wunder 2018, 162.
[177] Cygan-Rehm & Wunder 2018, 163.

dimensions. For example, one extra hour of work decreases the SAH by nearly 2% and raises the number of doctor visits by about 13%. The authors did not find any compelling evidence that working hours have *"substantial effects on health-related behaviours such as physical activity or smoking habits."*[178] Cygan-Rehm and Wunder tested the results for potentially heterogeneous effects across gender. Their analysis reveals that the negative health responses to longer working hours are mainly driven by women. They think that this might be because female workers spend more time on family responsibilities.[179] In order to prove this argument, they also split the results by the presence of children. They found larger effects of working hours on workers' health among individuals that live with minors in the household.[180] The poorer occupational health might be caused by the pressure to work long hours related to family financial stress.[181] Therefore, the literature provides evidence that the negative effects of long working hours on the health of workers are mainly caused by workers who already have a harder time organizing their working week.

4.3. Working hours in the Netherlands: the current situation

The statutory maximum working week in the Netherlands is 48, 55 or 60 hours per week, depending on the period of calculation.[182] Collective labour agreements in the Netherlands reduce the statutory maximum working week to a 'normal' working week. The normal working week varies from 36 to 40 hours per week.[183] In 2019, the normal working week for the 93 collective labour agreements examined by the Ministry of Social Affairs and Employment (*Ministerie van Sociale Zaken en Werkgelegenheid*) was 37.3 hours per week on average.[184] For the last ten years, the average working week in the Netherlands has remained almost unchanged at 31 hours per week.[185] In 2019, only 4.6 million employees of the 9.0 million people in work in the Netherlands worked full-time (35 hours or more per week). On average, full-time employees in the Netherlands work 39 hours per week.[186] Solely 3.3% of the employees in the Netherlands answered that they work more than 40 hours per week in 2019.[187] Employees in the agricultural sector (31 percent) and managers (23 percent) most often work more than 40 hours per week.[188] This can be explained by the fact that seasonal work is more common in the agricultural sector and managers, given their responsibilities, need to be more available than other employees. In 2019, 71% of the employees in the Netherlands worked overtime, 29.3% of the employees worked overtime regularly. Among higher educated employees, these percentages are 77.7% and 33.3% respectively.[189] On average, higher educated

[178] Cygan-Rehm & Wunder 2018, 163.
[179] Cygan-Rehm & Wunder 2018, 163.
[180] Cygan-Rehm & Wunder 2018, 163.
[181] Artazcoz et al. 2013, 377.
[182] Art. 5:7 Arbeidstijdenwet (Dutch Working Time Act).
[183] Ministerie van Sociale Zaken en Werkgelegenheid 2020, 64.
[184] Ministerie van Sociale Zaken en Werkgelegenheid 2020, 64.
[185] CBS 2020.
[186] Eurostat 2018.
[187] CBS 2020.
[188] CBS 2020.
[189] Hooftman et al. 2019 via NEA Benchmarktool (https://www.monitorarbeid.tno.nl/cijfers/nea-benchmarktool).

employees work 3.6 hours per week overtime in 2019.[190] Of all occupations, mangers work the most overtime in the Netherlands, namely 6.4 hours per week on average.[191] Although higher educated employees in the Netherlands work more than the working hours as stated in the employment contract, on average higher educated employees do not work more than the statutory maximum working week. Exact figures on the percentage of employees who work more than 48 hours per week are lacking. Nevertheless, it is important that employees who are excluded from the protection of the maximum working week as stated in the Working Hours Act, because they earn more than three the minimum wage, still have a certain level of protection of their safety and health. Working excessive hours might lead to serious health problems or in extreme cases to death.[192] Eventually, an employee will have to get rest. In the coming years, I do not expect that the government will set a statutory maximum of the working week for this group of employees. However, a right to disconnect from work, as proposed recently in the Netherlands, might guarantee that employees that fall under the scope of 2.1:1 Working Hours Decree do not have to work or be available at all times.

4.4. The right to disconnect from work in the Netherlands

The work environment in today's Europe is shaped by the use of electronic devices. Digital technologies provide a large number of employers and employees with many possibilities and advantages. Employees nowadays are able to work anywhere and anytime. However, the downside of this is that employers are more and more expecting that employees do work everywhere and all the time.[193] The constant accessibility for work of an employee may affect the health, labour efficiency and personal life of an employee in a negative way.[194] Governments, employers' organizations, trade unions, companies and other stakeholders have looked for ways to adapt labour law to these technological developments.

The right to disconnect from work is one of the most recent trends in health and safety at work and means more or less that a worker has the freedom to disconnect from work after the official office hours and does not have to react to any form of electronic communication.[195] The right to disconnect is linked to the right to rest and leisure, as stated in article 24 of the Universal Declaration of Human Rights.[196] Therefore, implementing such a right into national legislation might be a relevant solution to improve the health and safety of workers.

In 2017, France introduced the right to disconnect from work in its Labour Code.[197] Employers with more than 50 employees have to include the right to disconnect into the process of collective

[190] Hooftman et al. 2019 via NEA Benchmarktool (https://www.monitorarbeid.tno.nl/cijfers/nea-benchmarktool).
[191] Hooftman et al. 2019 via NEA Benchmarktool (https://www.monitorarbeid.tno.nl/cijfers/nea-benchmarktool).
[192] Wong et al. 2019, 1-3.
[193] Von Bergen et al. 2019, 1.
[194] Chudnovskikh 2019, 799.
[195] Von Bergen et al. 2019, 5-6.
[196] Chudnovskikh 2019, 799.
[197] Art. L2242-8 Code du Travail (adapted by LOI n° 2016-1088 du 8 août 2016).

bargaining. Employers with less than 50 employees have to inform their employees on rules of using digital communication outside of working hours.[198] Italy and Spain followed quickly with similar legislation.[199] Since then, several countries have considered or enacted similar legislation.[200] But not always successful.[201] How the right to disconnect from work is recognized depends on how the country deals with this issue. Some countries leave it to the social partners to arrange agreements and others enact it in law.

In the Netherlands, the right to disconnect was for the first time recognized by a collective labour agreement for employees that work in the disability care in 2019.[202] Hereafter, other parts of the healthcare sector followed: nursing homes[203] and childcare.[204] In 2019, Gijs van Dijk, a Member of the Dutch Parliament, introduced a legislative proposal for a law that changes the Working Conditions Act (*Arbeidsomstandighedenwet*) and legally establish a right to disconnect from work.[205] Interested parties could respond to the proposal via an internet consultation in February and March 2019. Most of the 37 respondents reacted positive on the proposal.[206] Several employers' organizations where critical about the proposal, in particular the enforceability of the law.[207] Therefore, the proposal has been changed from an employees' right to disconnect from work into an obligation for the employer to conduct a conversation with the employees about accessibility outside working hours. A sentence will be added to article 3(2) Working Conditions Act to ensure that a conversation between the employer and the employees about accessibility outside working hours will be part of the policy to prevent or limit the workload.[208] The employer will also have to be able to demonstrate that such a conversation has taken place. This can be done, for example, by drawing up a written report.[209] The Labour Inspectorate (*Inspectie SZW*) has concluded that the proposed law is enforceable.[210] The legislative proposal was submitted officially on 21 July 2020 and is currently before the Council of State (*Raad van State*) for advice. Because the legislative proposal is linked to the Working Conditions Act – and not to the Working Hours Act – the salary test of the Working Hours Decree does not apply. Therefore, employers will also have the obligation to conduct a conversation and make agreements with employees that earn more than three times the minimum wage. However, this does not mean that employees are protected against an employer that asks to work excessive working hours. For example, it might not prevent cases like the employee of the Dutch political party, *Partij voor de Vrijheid*, as explained earlier

[198] Chudnovskikh 2019, 800.
[199] Chiuffo 2019, 2, 6-11.
[200] Chiuffo 2019, 2; Chudnovskikh 2019, 800-801.
[201] Chiuffo 2019, 15-18.
[202] Art. 6:6(5) cao Gehandicaptenzorg 2019-2021
[203] Art. 5.1(1) cao VVT (Verpleeg-, Verzorgingshuizen, Thuiszorg en Jeugdgezondheidszorg) 2019-2021.
[204] Art. 4.3 cao Kinderopvang 2020-2021.
[205] See legislative proposal: Voorstel van Wet & Memorie van Toelichting. Initiatiefwet Gijs van Dijk tot het recht op onbereikbaarheid. Retrieved from: https://www.internetconsultatie.nl/rechtoponbereikbaarheid.
[206] Explanatory memorandum: *Kamerstukken II* 2019/20, 35 536, nr. 3, 9.
[207] Explanatory memorandum: *Kamerstukken II* 2019/20, 35 536, nr. 3, 9.
[208] Legislative proposal: *Kamerstukken II* 2019/20, 35 536, nr. 2, 1.
[209] Explanatory memorandum: *Kamerstukken II* 2019/20, 35 536, nr. 3, 6, 10.
[210] Explanatory memorandum: *Kamerstukken II* 2019/20, 35 536, nr. 3, 12.

(para. 2.3.2). Despite several requests from the employee to be fewer hours available due to her health condition, the employer did not agree and the employee had to accept the situation. It is clear that this employee had no freedom to determine her own working hours and could not make other agreements with her employer. To prevent such situations, a stricter criterion in article 2.1:1(1)(a) Working Time Decree is at the very least needed and in addition the introduction of a statutory maximum workweek for all employees, regardless of their salary, would be desirable.

4.5. Conclusion

The literature shows a mixed view on the effects of long working hours on the health of workers. One the hand, several studies show that there is a link between working long hours and health related behaviour of workers. On the other hand, several studies did not find any significant evidence that there is a link between working hours and health. The difference in results may occur because of the healthy worker effect or other factors that influence the effects of long working hours on the health of workers. Unfortunately, it is not possible to prove a causal link between working hours and worker's health via meta-analyses. The individual studies examined by meta-analyses focus on the results of surveys. Nevertheless, these meta-analyses provide a more objective picture than the individual studies because of a larger data set.

The studies that examined the effects of a four hour reduction of the statutory workweek via the results of surveys have a quasi-experimental character and therefore provide more reliable evidence on the effects of working hours and health than meta-analyses. Although a four hour reduction of the statutory working week results in a better self-assessed health (SAH) or satisfaction with their own health, several authors conclude that there is no significant evidence that it results in a better (objective) health of workers. Besides the slightly better health effects, a reduction of the working week can be expensive and not even in proportion to the savings in health costs. If reductions of working hours are too costly, the effects of other instruments and solutions, which are less expensive, should be examined to prevent situations in which employees work excessive working hours. Furthermore, almost all authors point out that their research has limits because of the available data or the research design. Further research is needed to examine the health effects of working hours regarding high wage workers and the subgroups age and sex. Also, the influence of other factors like the availability of the help of colleagues and the degree of freedom to determine working hours should be examined in future research. To my knowledge, there are no recent studies published on the effects of long working hours on the health of high wage workers in the Netherlands. Hence, further research in the Netherlands is needed.

Although the maximum statutory workweek in the Netherlands is 48, 55 or 60 hours, depending on the calculation period, the normal work week is considerably lower. This is because collective labour agreements often determine a lower maximum working week and almost half of the working population works part-time. A small proportion of the employees in the Netherlands who work full-time indicate that they work more than 40 hours per week. The working hours of high wage

employees in the Netherlands, including overtime, remain on average below the statutory maximum working hours per week. Therefore, one can conclude that working long hours is not common in the Netherlands. However, employees who are excluded from the protection of the maximum working week still should have a certain level of protection of their safety and health. Due to technology, employees nowadays are able to work anywhere and anytime. The constant accessibility for work might affect the health, labour efficiency and personal life of an employee in a negative way. In response to these developments, European countries have implemented a legal right to disconnect from work, which means that an employee has the freedom to be not available outside office hours. In 2019, a few collective labour agreements in the health sector in the Netherlands started recognizing the right to disconnect from work. Recently, a legislative proposal was submitted to the Council of State of the Netherlands to guarantee the right to disconnect from work in the form of an obligation under the Working Conditions Act for employers to discuss accessibility outside workhours with their employees. If the right to disconnect from work in this form will prevent situations of high wage employees working excessive working hours in the Netherlands is questionable, but it is a step in the right direction.

5. Conclusion

An important exception on the rules of the Working Time Act (*Arbeidstijdenwet*) is laid down in article 2.1:1(1)(a) Working Time Decree. This provision excludes employees with a salary of more than three times the minimum wage, including holiday allowance, from the protection of the articles 4:2 and 4:3 and the chapters 5 and 6 of the Working Time Act. On a European Union level, the European Working Time Directive (EWTD) 2003/88/EC lays down minimum safety and health requirements for the organisation of working time. Despite being of general application in the EU, the EWTD provides Member States with a lot of room to create their own working time regimes within the limits of the directive. However, from the European Commission's view and case law of the Court of Justice of the European Union (in which a derogation is based on article 17 EWTD) can be concluded that in order to derogate legitimately from the EWTD, employees must not only need to have a certain role or profession, but also need to have genuine and effective autonomy over both the amount and organization of their working time. The European Commission has confirmed that article 2.1:1(1)(a) Working Time Decree falls under the scope of article 17(1) EWTD, the derogation for 'autonomous workers', and points out that the Dutch derogation does not include all the criteria of article 17(1) EWTD. For example, article 2.1:1(1)(a) does not mention the criterion that a worker can determine fully the duration and organization of the working time by themselves. In my view, article 2.1:1(1)(a) Working Time Decree is not in line with article 17(1) EWTD. The EWTD does not mention the possibility to use the autonomous workers derogation based on solely a certain wage, because it does not include (all) the criteria of article 17(1) EWTD. Therefore, in order to get article 2.1:1(1)(a) Working Time Decree in line with the EWTD new criteria should be included. A derogation that includes a combination of: an annual wage limit, a certain profession and genuine and effective autonomy over both the amount and organization of working time will make the exclusion of workers from protection of the Working Time Act less arbitrary.

Besides the legal arguments, social science arguments have been discussed in order to examine whether it is necessary to change article 2.1:1(1)(a) Working Time Decree into a stricter criterion. The literature does show a mixed view on the effects of long working hours on the health of (high wage) workers. Several studies show that there is a link between working long hours and health. Other studies did not find any significant evidence. All the examined meta-analyses and other studies have their own research limits. In order to prove a causal link between long working hours and health experimental research is needed. Furthermore, further research regarding the subgroups age, sex and (blue-, pink- and white-collar) occupations and the influence of other factors is needed. At the moment, too little is known about the causal effects of long working hours on workers' health, especially for high wage workers in the Netherlands. Therefore, it is not fully clear whether from a social science perspective article 2.1:1(1)(a) Working Time Decree should be changed. In general, working long hours is not common in the Netherlands and might be a minor problem. Either way, to prevent constant availability of workers, a legal obligation for employers to discuss accessibility outside workhours with their employees is a step in the right direction.

However, to really guarantee that solely employees that have the freedom to determine fully their own working hours are not protected by the important provisions of the Working Time Act, the current derogation should include new criteria to get in line with the EWTD. In my view, the introduction of a statutory maximum working week and guaranteeing daily and weekly rest periods for all employees in the Netherlands is desirable. It implements article 31(2) CFREU. In my view, it is time that the Dutch government changes the autonomous workers derogation.

Bibliography

Articles

Ahn 2016

Ahn, T. (2016). Reduction of working time: Does it lead to a healthy lifestyle?. *Health economics*, *25*(8), 969-983.

Amagasa & Nakayama 2012

Amagasa, T., Nakayama, T. (2012). Relationship between long working hours and depression in two working populations: a structural equation model approach. *J. Occup. Environ. Med.* 54(7), 868-874.

Artazcoz et al. 2013

Artazcoz, L., Cortès, I., Escribà-Agüir, V., Bartoll, X., Basart, H., Borrell, C. (2013). Long working hours and health status among employees in Europe: between-country differences. Scand J Work Environ Health, *39*(4), 369-378.

Berniell & Bietenbeck 2017

Berniell, M. I., & Bietenbeck, J. (2017). The effect of working hours on health, IZA DP No. 10524, IZA – Institute of Labor Economics, Bonn, Germany.

Bock 2007

De Bock, E.S. 'Wet vereenvoudiging arbeidstijdenwet', *ArbeidsRecht* 2007/19, afl. 4, 3-6.

CBS 2011

CBS. (2011). Meer werknemer met burn-outklachten. 25 October 2011. Retrieved from: https://www.cbs.nl/nl-nl/nieuws/2011/43/meer-werknemers-met-burn-outklachten.

CBS 2020

CBS. (2020). *Meer dan de helft werkt voltijds*. 20 February 2020. Retrieved from: https://www.cbs.nl/nl-nl/nieuws/2020/08/meer-dan-de-helft-werkt-voltijds.

Chiuffo 2019

Chiuffo, F. M. (2019). The ‘Right to Disconnect’ or ‘How to Pull the Plug on Work’. *Available at SSRN 3422283*, 1-22.

Chudnovskikh 2019

Chudinovskikh, M. V. (2019). The right to disconnect in digital economics. In *International Scientific and Practical Conference on Digital Economy (ISCDE 2019)*. Atlantis Press, 799-802.

Cygan-Rehm & Wunder 2018

Cygan-Rehm, K., & Wunder, C. (2018). Do working hours affect health? Evidence from statutory workweek regulations in Germany. *Labour Economics*, *53*, 162-171.

Eurofound 2015
Eurofound (2015), *Opting out of the European Working Time Directive*, Publications Office of the European Union, Luxembourg.

European Commission 2010
European Commission (2010), *Commission staff working paper: Detailed report on the implementation by Member States of Directive 2003/88/EC concerning certain aspects of the organisation of working time ('The Working Time Directive')*, SEC(2010) 1611 final, Brussels, 21 December 2010.

European Commission 2013a
European Commission (2013), *Working time: Commission refers Ireland to Court for not respecting EU rules in public health services,* press release, Brussels, 20 November. Retrieved from: https://ec.europa.eu/commission/presscorner/detail/en/IP_13_1109.

European Commission 2013b
European Commission (2013), *Working time: Commission refers Greece to Court for not respecting EU rules in public health services*, press release, Brussels, 20 November. Retrieved from: https://ec.europa.eu/commission/presscorner/detail/en/IP_13_1108.

European Commission 2014a
European Commission (2014), *January infringements package: main decisions: Working Time: Commission requests Spain to respect the rights of Civil Guard staff to a limit on working hours and to minimum rest periods*, memo, Brussels, 23 January 2014. Retrieved from: https://ec.europa.eu/commission/presscorner/detail/RO/MEMO_14_36.

European Commission 2014b
European Commission (2014), *Working time: Commission refers Italy to Court for not respecting EU rules in public health services,* press release, Brussels, 20 February. Retrieved from: https://ec.europa.eu/commission/presscorner/detail/en/IP_14_159.

European Commission 2014c
European Commission (2014), *Working time: Commission requests France to respect rights of certain police officers to maximum working hours and minimum rest periods*, press release, Brussels, 25 September. Retrieved from https://ec.europa.eu/commission/presscorner/detail/MT/MEMO_14_537.

European Commission 2017a
European Commission (2017), *Report on the implementation by Member States of Directive 2003/88/EC concerning certain aspects of the organisation of working time*, COM(2017) 254, Brussels, 26 April 2017.

European Commission 2017b
European Commission. (2017). *Interpretative Communication on Directive 2003/88/EC of the*

European Parliament and of the Council concerning certain aspects of the organisation of working time. Official Journal of the European Union (2017/C 165/01), 24 May 2017.

European Commission 2020
European Commission. (2020). *Working Conditions – Sectoral Working Time*. Retrieved from https://ec.europa.eu/social/main.jsp?catId=706&langId=en&intPageId=206.

Eurostat 2018
Eurostat. (2018). *How many hours do Europeans work per week?* 25 January 2018. Retrieved from https://ec.europa.eu/eurostat/web/products-eurostat-news/-/DDN-20180125-1#:~:text=On%20average%2C%20a%20full%2Dtime,with%2039.3%20hours%20for%20women.

Gnerre et al. 2017
Gnerre, P., Montemurro, D., Rossi, A.P., Troise, C., Palermo, C., Amati, D., Rivetti, C., D'Arienzo, M., Romani, G., Ragazzo F. (2017). Lack of application of the European Work Time Directive: effects on workload, work satisfaction and burnout among Italian physicians. *Italian Journal of Medicine 2017*, *11*, 159-263.

Hamermesh et al. 2014
Hamermesh, D. S., Kawaguchi, D., Lee, J. (2014). Does labour legislation benefit workers? Well-being after an hours reduction. NBER Working Paper No. 20398. Cambridge MA: NBER.

Hooftman et al. 2016
Hooftman, W.E., Mars, G.M.J., Janssen, B., De Vroome, E.M.M., Michiels, J.M.M., Pleijers, A.J.S.F., Van den Bossche. S.N.J. (2016). *Nationale enquête arbeidsomstandigheden 2016*. Leiden/Heerlen: TNO/Centraal Bureau voor de Statistiek.

Hooftman et al. 2017
Hooftman, W.E., Mars, G.M.J., Janssen, B., De Vroome, E.M.M., Janssen, B.J.M., Ramaekers, M.M.M.J., Van den Bossche, S.N.J. (2017). *Nationale enquête arbeidsomstandigheden 2017*. Leiden/Heerlen: TNO/Centraal Bureau voor de Statistiek.

Hooftman et al. 2018
Hooftman, W.E., Mars, G.M.J., Janssen, B., De Vroome, E.M.M., Janssen, B.J.M., Pleijers, A.J.S.F., Ramaekers, M.M.M.J., Van den Bossche, S.N.J. (2018). *Nationale enquête arbeidsomstandigheden 2018*. Leiden/Heerlen: TNO/Centraal Bureau voor de Statistiek.

Hooftman et al. 2019
Hooftman, W.E., Mars, G.M.J., Knops, J.C.M., Van Dam, L.M.C., De Vroome, E.M.M., Janssenm, B.J.M., Pleijers, A.J.S.F., Van den Bossche, S.N.J. (2019). *Nationale enquête arbeidsomstandigheden 2019.* Leiden/Heerlen: TNO/Centraal Bureau voor de Statistiek.

Kyungjin et al. 2017

Kyungjin, L., Chunhui, S., Jong-Eun, K., Jae Oh, P. (2017). The impact of long working hours on psychosocial stress response among white-collar workers. *Industrial Health, 55*, 46-53.

Lepinteur 2019

Lepinteur, A. (2019). The shorter workweek and worker wellbeing: Evidence from Portugal and France. *Labour Economics*, *58*, 204-220.

Ministerie van Sociale Zaken en Werkgelegenheid 2020

Ministerie van Sociale Zaken en Werkgelegenheid. (2020). *Cao-afspraken 2019.* Retrieved from https://www.uitvoeringarbeidsvoorwaardenwetgeving.nl/mozard/!suite86.scherm0325?mPag=185.

Sánchez 2017

Sánchez, R. (2017). Does a mandatory reduction of standard working hours improve employees' health status?. *Industrial Relations: A Journal of Economy and Society*, *56*(1), 3-39.

Van Drongelen 2019

Van Drongelen, J., (2019). Lidstaten moeten werkgevers verplichten de dagelijkse arbeidstijd te registreren. *JAR* 2019/153, *8*, 1635-1647.

Virtanen et al. 2012

Virtanen, M., Heikkilä, K., Jokela, M., Ferrie, J.E., Batty, G.D., Vahtera, J., Kivimäki, M. (2012). Long Working Hours and Coronary Heart Disease: A Systematic Review and Meta-Analysis. *AM J Epidemiol.* 176 (7), 586-596.

Von Bergen et al. 2019

Von Bergen, C., Bressler, M., & Proctor, T. (2019). On the Grid 24/7/365 and the Right to Disconnect. *Employee relations law journal*, *45*, 3-20.

Wong et al. 2019

Wong, K., Chan, A. H., & Ngan, S. C. (2019). The effect of long working hours and overtime on occupational health: a meta-analysis of evidence from 1998 to 2018. *International journal of environmental research and public health*, *16*(2102), 1-22.

Zekić 2019

Zekić, N. (2019). Meten is weten: Het registreren van arbeidstijden. *ArbeidsRecht*, (11), 38-43.

Books

Ales & Popma 2019

Alex, E., Popma, J. *Chapter 8 Occupational Health and Safety and Working Time* in: Jaspers, T., Pennings, F. & Peters, S. *European Labour Law*. Cambridge: Intersentia 2019.

Blanpain et al. 1997

Blanpain, R. Köhler, E. Rojot, E. *Legal and Contractual Limitations to Working Time in the European Union*. Leuven: Peeters Press 1997.

Blanpain & Engels 1997

Blanpain, R., Engels, C. (1997). *Part 1 European Report* in: *Legal and Contractual Limitations to Working Time in the European Union*. Leuven: Peeters Press.

Bouwens et al. 2015

Bouwens, W.H.A.C.M., Houwerzijl, M.S., Roozendaal, W.L. (2015). *Schets van het Nederlandse arbeidsrecht.* Deventer: Wolters Kluwer.

Jaspers et al. 2019

Jaspers, T., Pennings, F. & Peters, S. (2019). *European Labour Law*. Cambridge: Intersentia.

Schenkeveld 2003

Schenkeveld, W. (2003) *Het Kinderwetje van Houten*. Hilversum: Uitgeverij Verloren.

Schütze 2015

Schütze, R. (2015) *European Union Law*, Cambridge: Cambridge University Press.

Sloot 1997

Sloot B. (1997). *Chapter 11. The Netherlands* in: Blanpain, R. Köhler, E. Rojot, E. *Legal and Contractual Limitations to Working Time in the European Union*. Leuven: Peeters Press.

De la Vega 2013

De la Vega, B. V. (2013). *Chapter 1 Occupational Health and Safety: An EU Law Perspective* in: Ales, E. *Health and Safety at Work. European and Comparative Perspective.* Alphen aan den Rijn: Kluwer Law International.

Case law

Court of Justice of the European Union

- CJEU 8 October 1987, C-80/86, ECLI:EU:C:1987:431(*Kolpinghuis Nijmegen BV*).
- CJEU 4 December 1974, C-41/74, ECLI:EU:C:1974:133 (*Van Duyn v. Home Office*).
- CJEU 5 April 1979, C-148/78, ECLI:EU:C:1979:110 (*Ratti*).
- CJEU 26 February 1986, C-152/84, ECLI:EU:C:1986:84 (*Marshall*).
- CJEU 14 July 1994, C-91/92, ECLI:EU:C:1986:84 (*Faccini Dori v. Recreb*).
- CJEU 10 April 1984, C-14/83, ECLI:EU:C:1984:153 (*Sabine von Colson en Elisabeth Kamann v. Land Nordrhein-Westfalen*).
- CJEU 13 November 1990, C-106/89, ECLI:EU:C:1990:395 (*Marleasing SA v. La Comercial Internacional de Alimentacion SA*).
- CJEU 3 Oktober 2000, C-303/98, ECLI:EU:C:2000:528 *(SIMAP)*.
- CJEU 9 September 2003, C-151/02, ECLI:EU:C:2003:437 (*Jaeger*).
- CJEU 5 October 2004, Joined cases C-379/01 to C-403/01, ECLI:EU:C:2004:584, para. 112

(*Pfeiffer et al. v. eutsches Rotes Kreuz, Kreisverband Waldshut*).

- CJEU 1 December 2005, C-14/04, ECLI:EU:C:2005:728 (*Abdelkader Dellas and Others v Premier ministre and Ministre des Affaires sociales, du Travail et de la Solidarité*).
- CJEU 6 April 2006, C-124/05, ECLI:EU:C:2006:244, para 28 *(Federatie Nederlandse Vakbeweging v. Staat der Nederlanden)*.
- CJEU 4 July 2006, C-212/04, ECLI:EU:C:2006:443 (*Konstantinos Adeneler and others v. Ellinikos Organismos Galaktos (ELOG)*).
- CJEU 7 September 2006, C-484/04, ECLI:EU:C:2006:526 (*Commission v. United Kingdom*).
- CJEU 14 October 2010, C-428/09, ECLI:EU:C:2010:612 (*Isère*).
- CJEU 4 December 2014, C413/13, ECLI:EU:C:2014:2411 *(FNV KIEM*).
- CJEU 14 May 2019, ECLI:EU:C:2019:402 (*CCOO v. Deutsche Bank*).

Dutch Court of Appeal the Hague

- Court of Appeal the Hague 21 May 2019, ECLI:NL:GHDHA:2019:1121.

Subdistrict court Middelburg

- Subdistrict court Middelburg 9 January 2012, ECLI:NL:RBMID:2012:BV5144.

Parliamentary documents

- *Kamerstukken II* 1993/94, 23 646, nr. 3.
- *Kamerstukken II* 2019/20, 35 536, nr. 3.