agricultural, commercial, administrative, service or vocational, cultural and leisure activities, Art. 1(4) of Directive 2003/88/EC in conjunction with Art. 2(1) of Directive 89/391/EEC (Framework Directive on Protection at Work). Seafarers as defined in Directive 1999/63/EC are excluded under Art. 1(3) second sentence of Directive 2003/88/EC. Furthermore, under Art. 1(4) of Directive 2003/88/EC in conjunction with Art. 2(2) first sentence of Directive 89/391/EEC the rules do not apply to certain specific public service activities, e. g. the armed forces, the police, and the civil protection services where their characteristics inevitably conflict with the application. Nevertheless, the Member States have a duty under Art. 1(4) of Directive 2003/88/EC in conjunction with Art. 2(2) second sentence of Directive 89/391/EEC to ensure as far as possible that the safety and health of workers is protected in light of the objectives of the Framework Directive on Protection at Work as well as the Working Time Directive.

6

Case 303/98 – **Sindicato de Medicos de Asistencia Publica (Simap)**
[2000] ECR I-7505

In the Simap case the Tribunal Superior de Justicia de la Comunidad Valenciana submitted the question to the *ECJ*, inter alia, whether doctors who work for the public health service fall within the scope of application of the Working Time Directive or if they are excluded from the scope of application by Art. 1(4) of Directive 93/104/EC in conjunction with Art. 2(2) second sentence of Directive 89/391/EEC. The *ECJ* supported a broad interpretation of the scope of the Directive 89/391/EEC. It noted that this can be derived from the objective to improve workers' safety and health protection as well as from the wording of its Art. 2(1). By implication, the exclusions from the scope of Directive 89/391/EEC and therefore also its Art. 2(2) must be interpreted narrowly. Moreover, Art. 2(2) of Directive 89/391/EEC excludes only certain specific activities in the public service which are meant to secure public safety and order and are indispensible to the common good. As a rule such activities cannot be equated with the activities of doctors. Doctors who work in the public health service therefore do not fall under the exception of Art. 2(2) of Directive 89/391/EEC. They are not excluded from the scope of this Directive nor the scope of the Working Time Directive under Art. 1(4) of Directive 93/104/EC in conjunction with Art. 2(2) second sentence of Directive 89/391/EEC.

Case 397/01 to 403/01 – **Pfeiffer**
[2004] ECR I-8835

The restrictive interpretation of the exception provision in Art. 2(2) of Directive 89/391/EEC was confirmed by the *ECJ* in the Pfeiffer case. That matter concerned the question whether emergency workers are covered by the directive. The Court held once again that the scope of Directive 89/391/EEC is to be construed broadly and the exception provision therefore restrictively. Under this assumption the *ECJ* explained that Art. 2(2) of Directive 89/391/EEC does not exclude civil protection services as such from the scope of the directive, only "certain specific activities" of these services the characteristics of which inevitably

conflict with the rules laid down by the directive. This exclusion must therefore be interpreted in such a way that its scope is restricted to what is strictly necessary in order to safeguard the interests which it allows the Member States to protect. The exclusion was adopted purely for the purpose of ensuring the proper operation of services essential for the protection of public health, safety and order in cases, such as a catastrophe, the gravity and scale of which are exceptional and a characteristic of which is the fact that, by their nature, they do not lend themselves to planning as regards the working time of teams of emergency workers. The civil protection service in the strict sense can be clearly distinguished from the activities of emergency workers. Even if a service such as the one with which the national court was concerned must deal with events which, by definition, are unforeseeable, the activities which it entails in normal conditions and which correspond moreover to the duties specifically assigned to a service of that kind are nonetheless capable of being organised in advance, including the working hours of its staff. The service thus exhibits no characteristic which inevitably conflicts with the application of the Directive 89/391/EEC and/or the Working Time Directive. Emergency services therefore do not fall within the exception by virtue of Art. 1(4) of Directive 93/104/EC in conjunction with Art. 2(2) second sentence of Directive 89/391/EEC. Whether an emergency worker is regarded as a mobile worker to which the Working Time Directive only has limited application (discussed forthwith), the *ECJ* did not have to decide because the provision, which was only introduced by the Amendment Directive 2000/34/EC, was not yet applicable to the case. On the other hand, the *ECJ* rejected applying the exception for road transport in Art. 1(3) of Directive 93/104/EC to the activities of an emergency worker.

7 Moreover, by virtue of Art. 14, the Working Time Directive does not apply where other Community instruments contain more specific requirements concerning certain occupations or occupational activities. Such provisions exist, inter alia, for **pregnant women and women who have recently given birth** (Directive 92/85/EEC; for an outline *Ewing*, 22 Industrial Law Journal 1993, No. 3, pp. 165 *et seqq.*; for details on implementation in the UK see *Mair*, 63 Modern Law Review 2000, pp. 877 *et seqq.*), for **children and young people** (Directive 94/33/EC), for seafarers on ships (Directive 1999/63/EC), for flying workers in civic aviation (Directive 2000/79/EC) and for persons performing mobile road transport activities (Regulation (EC) No. 561/2006; Directive 2002/15/EC; for an outline on all these directives see *Blanpain*, European Labour Law, 2006, pp. 368 *et seqq.*, 465 *et seqq.* and 471 *et seqq.*). One must take into account here that the exclusion applies only where special rules exist. Where there are no special rules the Working Time Directive still applies.

8 In addition, the Working Time Directive's application is limited regarding **mobile workers**, workers on off-shore installations as well as workers on board seagoing fishing vessels, Art. 20 and 21 of Directive 2003/88/EC. Mobile worker means any worker employed as a member of travelling or flying personnel by an undertaking which operates transport services for passengers or goods by road, air or inland waterway, Art. 2 No. 7 of Directive 2003/88/EC. A legal definition of activities on off-shore installations is contained in Art. 2 No. 8 of the Directive. The exceptions from

the scope of the Working Time Directive must be distinguished from the derogation possibilities that are provided for by virtue of Arts. 17–19 of the directive for a great number of areas of activity. Whereas in the case of exceptions the directive does not apply or only in part, where national law does not provide otherwise, the Working Time Directive in principle applies fully to areas of activity for which derogations are possible, however derogating regulations by virtue of the aforementioned provisions may be adopted by means of national law.

Which **persons are covered** by the Directive 2003/88/EC is determined by the terms "worker" and "employer". These terms have a specific meaning in European law that do not necessarily correspond with the existing definitions in the individual Member States (Case 428/09 – Union syndicale Solidaires Isère, para. 28). "Worker" within the meaning of Art. 1(4) of Directive 2003/88/EC in conjunction with Art. 3(a) of Directive 89/391/EEC means any person employed by an employer, including trainees and apprentices but excluding domestic servants. "Employer" within the meaning of Art. 1(4) of Directive 2003/88/EC in conjunction with Art. 3(b) of Directive 89/391/EEC means any natural or legal person who has an employment relationship with the worker and has responsibility for the undertaking and/or establishment. **9**

III. Working time

"Working time" under Art. 2 No. 1 of Directive 2003/88/EC means any period during which the worker is working, is at the employer's disposal and carrying out his activity or duties, in accordance with national laws and/or practice. The antonym to this is the **rest period**. This means any period which is not working time, Art. 2 No. 2 of Directive 2003/88/EC. **10**

11

Case 151/02 – **Jaeger** [2003] ECR I-8389

In the Simap case the *ECJ* had to consider the question whether stand-by service or on-call duty is considered working time in terms of Art. 2 No. 1 or a rest period in terms of Art. 2 No. 2 of Directive 93/194/EC. In the Jaeger case this question was submitted to it again for a preliminary ruling with reference to the German law of working time. The German law of working time distinguishes between readiness for work, on-call service and stand-by service. Readiness for work means the employee must make himself available to his employer at the place of employment and is obliged to remain continuously attentive in order to be able to take action on his own initiative in case of need. A characteristic of on-call service is that the employee must be present at a particular place determined by the employer either on or outside the premises and must keep himself available to provide services on demand of the employer. As long as his services are not needed he may rest or keep himself occupied with something else. Finally, the stand-by service is characterized by an employee who does not have to be present at a particular place determined by the employer but must merely be reachable at all times in order to perform his professional tasks at short notice and without delay. Whereas readiness for work has been considered full working time under German law, stand-by service and on-call service has in principle been regarded as a rest period. Only the times the employee actually performs his professional tasks during his

stand-by or on-call service was recognized as working time. The *ECJ* rejected this view. According to its opinion, on-call service is working time in its entirety for the purposes of Art. 2 No. 1 of Directive 93/104/EC. Conversely, stand-by service as a rule is not considered working time within this meaning. Under Art. 2 No. 1 of the Working Time Directive, working time is any period during which the worker is working, is at the employer's disposal and carrying out his activity or duties, in accordance with national laws and/or practice. On-call service unquestionably fulfils the first two conditions of this definition. In addition, the employee's duty to be present at the work place in order to provide his professional services and to be available must be seen as coming within the ambit of the performance of his duties, even if the activity actually performed varies according to the circumstances. The situation is different with stand-by service. Even though they are at the disposal of their employer, in that it must be possible to contact them, the fact remains that in that situation employees may manage their time with fewer constraints and pursue their own interests. In this case only time linked to the actual performance of services must be regarded as 'working time' within the meaning of the Working Time Directive. This view was confirmed by the *ECJ* in subsequent judgments in other contexts (cf. for example Case 397/01 through 403/01 – Pfeiffer [2004] ECR I-8835; Case 12/04 – Abdelkader Dellas i.a./Premier ministre and Ministre des Affaires sociales, du Travail et de la Solidarité [2005] ECR I-10253; Case C-258/10 – Grigore).

IV. Organization of working time

1. Maximum weekly working hours

12 Art. 6 of Directive 2003/88/EC provides for a **maximum weekly working time** of **48 hours**. Overtime is included in this. The Member States may lay down a reference period of up to four months for this maximum weekly working time pursuant to Art. 16(b). Higher weekly working times may be offset within this period of time as long as the weekly working time within the reference period does not exceed 48 hours on average. In the calculation of this average, the periods of paid annual leave and sick leave shall not be included. The instructions of the Directive concerning maximum weekly working time can be implemented by national legal and administrative provisions, collective agreements or agreements between the social partners. A **maximum daily working time** is **not** provided for by the Directive **expressly**. However, Art. 3 of Directive 2003/88/EC stipulates a daily minimum rest period of 11 hours (discussed forthwith). By implication, the maximum daily working time therefore may not exceed 13 hours.

13 A national rule that allows an employee to be transferred to another job against his will because he demanded the weekly working time limit be complied with, is a violation of Art. 6(b) of Directive 2003/88/EC. It undermines the employee's right to work within the maximum weekly working time and the practical effect of the provision (*effet utile*). The fact that the employee does not suffer a specific (financial) detriment by the transfer is immaterial (cf. Case 243/09 – Fuß [2010], this case involved a fireman who – after requesting compliance with the working time limits – was transferred from on-call duty to a post involving office duties at

the same salary). A detriment within the meaning of Art. 22(1) of Directive 2003/88/EC is only significant where national measures implement the provision, which was not the case here. Art. 22(1) of Directive 2003/88/EC gives the Member States the option of not applying Art. 6 under certain circumstances. Above all, it is necessary for the employee to agree to work in excess of the weekly working limit (Art. 22(1)(a)). No employee may suffer any detriment because of his refusal to perform such work (Art. 22(1)(b)).

2. Rest periods

The antonym to working time – as mentioned earlier – is the rest period. 14
Pursuant to Art. 2(b) of Directive 2003/88/EC this means any period which is not working time. The Working Time Directive for one thing stipulates in its Art. 3 a **minimum daily rest period**. Pursuant to this, every worker is entitled to a minimum rest period of eleven consecutive hours per 24-hour period. Additionally, Art. 5 of Directive 2003/88/EC lays down a **minimum weekly rest period**. According to Art. 5(1) of the directive this shall be a minimum uninterrupted rest period of 24 hours per each seven-day period plus the 11 hours' daily rest. The resulting minimum rest period of 35 hours may be reduced to 24 hours pursuant to Art. 5(2) if objective, technical or work organisation conditions justify this. The Member States may lay down a reference period of up to 14 days for the minimum weekly rest period under Art. 16(a) of the Working Time Directive. Within this period it is possible to offset a reduced weekly rest period if the weekly rest period within the period does not exceed 35 or 24 hours on average.

3. Breaks

Rest periods must be distinguished from breaks. Under Art. 4 of Directive 2003/88/EC every worker is entitled to a break where the working day is longer than six hours. The details, particularly the length and the conditions under which these breaks are granted, are to be laid down primarily by collective agreements or agreements between the social partners and only subsidiarily by national laws. Whether breaks constitute working time as set out in Art. 2 No. 1 or rest periods as set out in Art. 2 No. 2 of Directive 2003/88/EC is unclear. 15

4. Annual leave

According to Art. 7(1) of the Working Time Directive every worker is entitled to 16
a **minimum period of paid annual leave** of **four weeks**. The details are determined by the conditions for the entitlement to, and granting of, leave laid down by national legislation and/or practice. Except where the employment relationship is terminated, the minimum period of paid annual leave may not be replaced by an allowance in lieu thereof, Art. 7(2) of Directive 2003/88/EC. This is because the purpose of the right to paid annual leave is to enable the worker to rest and to enjoy a period of relaxation and leisure (Case 486/08 – Tirol [2010], para. 30). As such the *ECJ* considers the right to annual leave to be a particularly significant principle of social law in the Community (now the Union) (consistent case-law, see e. g. Case 173/99 – BECTU [2001] ECR I-04881, para. 43; Case 342/01 – Merino Gómez [2004] ECR I-2605, para. 29; Case 486/08 – Tirol decision [2010], para. 28).

17 In **German law**, § 3(1) BUrlG (Bundesurlaubsgesetz) ensures a statutory minimum period of paid annual leave of 24 working days and is in compliance in this respect with the Working Time Directive. However, § 4 BUrlG (Bundesurlaubsgesetz) lays down that this entitlement to leave is acquired by the worker only after the employment relationship has been in existence for six months. Whether this restriction is permissible under European law is in dispute. The *ECJ* held that a British regulation under which a worker's entitlement to paid annual leave did not arise until a worker had been continuously employed for 13 weeks with the same employer was incompatible with the Working Time Directive (Case 173/99 – BECTU [2001] ECR 2001 I-4881; see also Cases 131/04 and 257/04 – Robinson-Steele and others [2006] ECR I-2531 regarding "rolled up" payment and case comment by *Bogg*, European Law Review 2006, 892–905). In that case a worker lost all entitlement to annual leave at the end of his employment relationship without having achieved the minimum work period of 13 weeks. German law is different here. In case of termination of the employment relationship before expiration of the waiting period under § 4 BUrlG (Bundesurlaubsgesetz), the worker is entitled to partial leave under § 5(1) BUrlG. Whether the German law meets the requirements of the Directive 2003/88/EC with this regulation is in dispute.

18

Case 486/08 – **Zentralbetriebsrat der Landeskrankenhäuser Tirol**
[2010] ECR I-3527

A right to paid annual leave that has already been accumulated remains with no restrictions until it expires. It may not be reduced or be granted only with a reduced level of holiday pay. The *ECJ* had to decide a case where an employee transferred from a fulltime position to part-time employment. He was not able to take the leave he had accumulated while working fulltime within the reference period, so he took it at a time when he was already working part-time. The national law (which was § 55(5) of the L-VBG) provided that in the event of a change in employment the annual leave which has not yet been taken would be adjusted proportionally to the new contract – in this case this meant a reduction of leave or pay. This was considered to be incompatible with the Part-time Work Directive (cf. also § 4, para. 14). The worker must be entitled to actual rest for relaxation and leisure. The taking of annual leave in a period after the reference period has no connection to the hours worked by the worker during that later period. Consequently, a change, and in particular a reduction, of working hours when moving from full-time to part-time employment cannot reduce the right to annual leave that the worker has accumulated during the period of full-time employment.

19 Criticized by many German commentators was the *ECJ* decision concerning a question **submitted for preliminary ruling by the *Landesarbeitsgericht Düsseldorf*** (Case 350/06 – Schultz-Hoff [2006] ECR I-179). Persons who are incapacitated due to illness for a long period of time and whose employment relationship ends because of termination or retirement, often lose their entitlement to annual leave because they cannot take leave due to their continuous incapacity. Pursuant to the

consistent practice of the *Bundesarbeitsgericht* (e. g. recently *BAG* of 11 April 2006 – 9 AZR 523/05) this entitlement to annual leave lapsed due to the statutory limitation (§ 7(3) BUrlG) at the latest by the end of the carry-over period, i. e. by the 31 March of the following year. If leave cannot be taken in a continued employment relationship, e. g. because of incapacity to work until the end of the carry-over period without the employer being at fault, then the entitlement is extinguished at this point in time due to the limitation, without entitlement to compensation in lieu thereof or entitlement to substitute leave arising. The *ECJ* has found this to be incompatible with European law: Art. 7(1) of Directive 2003/88/EC must be interpreted to mean that workers must certainly receive a minimum paid annual leave of four weeks, and so specifically in the case where leave is not taken because the worker has been on sick leave for the whole leave year, it must be granted at a later time. This is surprising given that even Art. 9 of Convention No. 132 of the ILO contains the rule that leave must be granted and taken no later than one year or 18 months after expiration of the leave year. Considering this, one would have expected an unlimited entitlement to annual leave to be expressed more clearly if this had been intended by the EC-Directive. By its ruling in the case KHS presenting a convincing teleological approach the *ECJ* has also deduced a time limit to the claim to holiday or payment (**Case 214/10 – KHS [2011]**): The recreational function of leave could only take effect, if the granting of the leave in the carry-over period is still related to the reference period. Yet, any carry-over period must be substantially longer than the reference period in respect of which it is granted. The *ECJ* did not define an exact time limit, but in the case KHS it ruled that a time limit of 15 months is appropriate. It was however decided differently and therefore the **French law** is probably also incompatible with European law (see *Cass*. soc. of 28 January 2004 – RJS 4/04, no. 423). In another ruling concerning Art. 7(1) of Directive 2003/88/EC, the *ECJ* has decided that this provision precludes national provisions or practices which make entitlement to paid annual leave conditional on a minimum period of ten days' or one month's actual work during the reference period (Case 282/10 – Dominguez [2012]). Such a restriction was laid down in Art. L. 223-2 (1) of the *Code du travail*, which has been declared contrary to European law by the *ECJ*.

V. Night and shift work

In its third chapter the Directive 2003/88/EC contains special rules for night and shift workers. **Night worker** under Art. 2 No. 4(a) of Directive 2003/88/EC means any worker who, during night time, works at least three hours of his daily working time as a normal course. Additionally, any worker is considered a night worker under Art. 2 No. 4(b) of the Working Time Directive who is likely, during night time, to work a certain proportion of his annual working time, as defined at the choice of the Member State concerned either by national legislation following consultation with the social partners or by collective agreements or agreements between the social partners conducted at national or regional level. **Night time** according to the Directive 2003/88/EC means, under Art. 2 No. 3, any period of not less than seven hours, as defined by national law, and which must include, in any case, the period between midnight and 5.00 o'clock. The term **'shift work'** is legally defined in Art. 2 No. 5. It means any method of organising work in shifts whereby **20**

workers succeed each other at the same work stations according to a certain pattern, including a rotating pattern, and which may be continuous or discontinuous, entailing the need for workers to work at different times over a given period of days or weeks. Therefore, a shift worker is any worker whose work schedule is part of shift work, under Art. 2 No. 6 of Directive 2003/88/EC.

21 Art. 12 of Directive 2003/88/EC obligates the Member States, expressed as a general clause, to take the measures necessary to provide, on the one hand, night workers and shift workers with safety and health protection appropriate to the nature of their work, and on the other hand to ensure appropriate protection and prevention services or facilities with regard to the safety and health of night workers and shift workers which are equivalent to those applicable to other workers and are available at all times.

22 Special rules, exclusively applicable to night workers, are included in Arts. 8–11 of Directive 2003/88/EC. First of all, its Art. 8 determines the **length of night work**. According to Art. 8(1)(a) of Directive 2003/88/EC normal hours of work for night workers may not exceed an average of eight hours in any 24-hour period. The reference period, within which a longer period of night work may be made up for, is to be defined after consultation of the social partners or by collective agreements or agreements concluded between the social partners at national or regional level as laid down by Art. 16(c) of Directive 2003/88/EC. In calculating the average working time within the reference period, the minimum weekly rest period, which must be granted pursuant to Art. 5 of the Working Time Directive, is not taken into account. Where night work involves special hazards or heavy physical or mental strain, a worker may not work more than eight hours in a 24-hour period during which he performs night work, under Art. 8(1)(b) of Directive 2003/88/EC. Work involving special hazards or heavy physical or mental strain shall be defined by national legislation and/or practice or by collective agreements or agreements concluded between the social partners, taking account of the specific effects and hazards of night work, Art. 8(2) of Directive 2003/88/EC.

23 Art. 9(1)(a) of the Working Time Directive gives night workers the **right to a free health assessment** before taking up their work and thereafter at regular intervals. The free health assessment must comply with medical confidentiality pursuant to Art. 9(2) of Directive 2003/88/EC and by virtue of Art. 9(3) of Directive 2003/88/EC may be conducted within the national health system.

24 Night workers with health problems verifiably linked to their night work are entitled under Art. 9(1)(b) of Directive 2003/88/EC to be transferred to day work as far as a transfer is possible and the night worker is suited to the work.

25 Under Art. 10 of the Working Time Directive the work of certain categories of night workers can be made subject to certain guarantees, under conditions laid down by national legislation and/or practice, in the case of workers who incur risks to their safety or health linked to night-time working.

26 Under Art. 11 of Directive 2003/88/EC an employer who regularly uses night workers must bring this information to the attention of the competent authorities if they so request.

27 There is a special rule to protect shift workers embodied in Art. 13 of Directive 2003/88/EC which deals with the **pattern of work**. If an employer intends to organise work according to a certain pattern, he must take account of the general principle of adapting work to the worker. This is to be done especially with a view