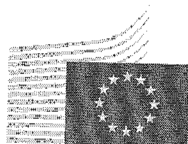

EUROPEAN COMMISSION
Employment, Social Affairs and Inclusion DG
Employment
**Working Conditions**

Brussels,
EMPL/B2/IV/sv(2016)

Mr Enrico Reginato
European Federation of Salaried Doctors
Rue Guimard 15
1040 Bruxelles
Belgium
info@fems.net

**Subject: Your complaint registered with us under CHAP(2015)03533**

Dear Mr Reginato,

I refer to your complaint, registered with us under reference number CHAP(2015)03533, about the compatibility of Italian law and practice, and in particular Basilicata regional law, with the Directive 2003/88/EC (the Working Time Directive). You have indicated in your complaint that the Working Time Directive is not fully implemented in Italy. This happens notwithstanding the enactment of the law 161 of 30 October 2014 following the referral to the Court of Justice of the European Union.

You mention in particular the regional law in Basilicata n.53 of the 26 November 2015 (hereafter referred to as 'the regional law'), and three of its provisions: the reference period for the calculation of maximum weekly working time, defined in Article 2 a) of the law; the daily rest, defined in article 2 c); and the time spent in private practice, defined in article 2 b).

We understand that Article 2 of the regional law, as you mention in your complaint, provides for 12 months of reference period for the calculation of the maximum weekly working time of 48 hours. It also states that the private practice ensured for the *Azienda Sanitaria* (the health authority) or other authorities of the National Health System, does not count in the calculation of working time as limited under Articles 4 and 7 of the Legislative Decree 66/2003 on weekly working time and daily rest. It finally indicates that weekly rest periods of less than 11 hours are possible in exceptional and unforeseeable cases or sudden absences that do not allow ensuring the continuity of the service of assistance.

We have now carefully examined your complaint. Please find below our detailed observations.

## 1. The EU legal context

As you are aware, at the level of the European Union (EU), the Working Time Directive (hereafter referred to as 'the Directive') governs certain aspects of the organisation of working time. It sets out a number of provisions with a view to protect the health and safety of workers. It applies to workers, including in the health sector, with the existence of some derogations in the case of activities involving the need for continuity of service or production, including services relating to the reception, treatment and/or care provided by hospitals or similar establishments.

### (i) Reference period

Article 6 of the Directive sets limits to the weekly working time providing that

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

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

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

Under Article 16 b). of the Directive, on reference periods:

*"Member States may lay down: [...]for the application of Article 6 (maximum weekly working time), a reference period not exceeding four months. [...]"*

Under Article 17 (3) c) of the Directive derogations may be made from Article 16:

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

*(i) services relating to the reception, treatment and/or care provided by hospitals or similar establishments, including the activities of doctors in training, residential institutions and prisons;"*

This should be done in accordance with paragraph 2 of the same Article 17, under which:

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

Under Article 18 derogations may be made from Article 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 lower level.*" These derogations "*shall be allowed on condition that equivalent compensating rest periods are granted to the workers concerned or, in exceptional cases where it is not possible for objective reasons to grant such periods, the workers concerned are afforded appropriate protection.*"

Under Article 19 on limitations to derogations from reference periods, the option to derogate from Article 16 b) provided for in the abovementioned Articles 17 (3) and 18 "*may not result in the establishment of a reference period exceeding 6 months.*"

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

**(ii) Daily rest**

Under Article 3 of the Directive, on daily rest, "*Member States shall take the measures necessary to ensure that every worker is entitled to a minimum daily rest period of 11 consecutive hours per 24-hour period.*"

Also in this case, derogations can be provided in the case at stake. Under Article 17 (3), derogations may also be made from Article 3 in the case of activities involving the need for continuity of service or production, including services relating to the reception, treatment and/or care provided by hospitals or similar establishments, including the activities of doctors in training, residential institutions and prisons. Furthermore, derogations may be made from Article 3 under Article 17 (4)

"*(a) in the case of shift work activities, each time the worker changes shift and cannot take daily and/or weekly rest periods between the end of one shift and the start of the next one; (b) in the case of activities involving periods of work split up over the day.*"

The derogations can be made only in accordance with paragraph 2 of the same Article 17, (see above), provided that the workers concerned are afforded equivalent periods of compensatory rest or, in exceptional cases in which it is not possible, for objective reasons, the workers concerned are afforded appropriate protection.

Derogations to Article 3 can also be made following Article 18 by collective bargaining. Also in this case it is only "*on condition that equivalent compensating rest periods are granted to the workers concerned or, in exceptional cases where it is not possible for objective reasons to grant such periods, the workers concerned are afforded appropriate protection.*"

**(iii) Time spent in private practice**

The Directive applies to workers. Under the case-law of the Court of Justice of the European Union (CJEU), the term "worker" in the Directive is a concept of EU law which must be "*defined in accordance with objective criteria which distinguish the employment relationship by reference to the rights and duties of the persons concerned*"[1] and that it is for the national courts to decide, based on those criteria, in any case before them, "*having regard both to the nature of the activities concerned and the relationship of the parties involved.*"[2].

[1] Isère, Case C-42809, paras 28-29

[2] Isère, Case C-42809, paras 28-29

With regard to the concept of "working time", it is defined in point (1) of Article 2 of the Directive:

*"'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;"*

It is important to note that the CJEU has repeatedly held that the Directive defines that concept as any period during which the worker is at work, at the employer's disposal and carrying out his activity or duties, in accordance with national laws and/or practices, and that that concept is placed in opposition to rest periods, the two being mutually exclusive[3].

In that regard, the CJEU has held that the concepts of "working time" and "rest period" within the meaning of the Working Time Directive constitute concepts of EU law which must be defined in accordance with objective characteristics, by reference to the scheme and purpose of that Directive, which is intended to improve workers' living and working conditions. Only such an autonomous interpretation is capable of securing full effectiveness for that Directive and uniform application of those concepts in all the Member States.[4] The Court of Justice also noted that Article 2 of the same Directive is not one of the provisions from which the Directive allows derogations.[5]

## 2. Assessment

### (i) Reference period

We take note of the information in your complaint that no national agreement allowing a twelve-month reference period exist. The definition of a reference period of twelve months, as indicated in Article 2 a) of the regional law, raises a question of compatibility with the Directive. A twelve-month reference period is not compliant with the Directive, unless set by collective agreements or agreements concluded between the two sides of industry and in accordance with the provisions as mentioned above. The Commission's services lack information to assess whether collective agreements at regional level or agreements concluded between the two sides of industry allowing for twelve-month reference periods are currently in place.

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[3] Judgments in *Jaeger*, C-151/02, EU:C:2003:437, paragraph 48; *Dellas and Others*, C-14/04, EU:C:2005:728, paragraph 42, and orders in *Vorel*, C-437/05, EU:C:2007:23, paragraph 24, and *Grigore*, C-258/10, EU:C:2011:122, paragraph 42). The Directive does not provide for any intermediate category between working time and rest periods (see, to that effect, judgment in *Dellas and Others*, C-14/04, EU:C:2005:728, paragraph 43, and orders in *Vorel*, C-437/05, EU:C:2007:23, paragraph 25, and *Grigore*, C-258/10, EU:C:2011:122, paragraph 43

[4] See judgment in *Dellas and Others*, C-14/04, EU:C:2005:728, paragraphs 44 and 45, and orders in *Vorel*, C-437/05, EU:C:2007:23, paragraph 26, and *Grigore*, C-258/10, EU:C:2011:122, paragraph 44

[5] See order in *Grigore*, C-258/10, EU:C:2011:122, paragraph 45.

**(ii) Daily rest**

The Directive does not allow derogations to the minimum daily rest period of 11 hours, unless it is provided that the workers concerned are afforded equivalent periods of compensatory rest or that, in exceptional cases in which it is not possible, for objective reasons, to grant such equivalent periods of compensatory rest, the workers concerned are afforded appropriate protection.

It is unclear to the Commission whether equivalent periods of compensatory rest or appropriate protection is afforded to hospital doctors working in Basilicata that, following Article 2(c) of Legislative Decree 66/2003, do not benefit from the minimum daily rest period of 11 hours.

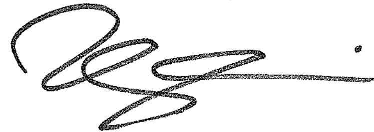
**(iii) Time spent in private practice**

It derives from existing case-law that periods which can be qualified as working time, pursuing activities that are the ones of a worker, in line with the Court's interpretation, fall within the scope of application of the Directive and have to be organised according to its provisions. The Commission's services lack information to assess whether time spent in private practice for the *Azienda Sanitaria* (the health authority) or other authorities of the National Health System, and requested by the hospital for institutional finalities, fall within this scope.

## 3. Conclusion

Your complaint raises questions of compatibility of national and regional law and practice with the Working Time Directive. Your complaint has therefore been transferred to the Commission's EU-PILOT system so that we can request further information from the national authorities. Their replies should enable the services of the Commission to fully evaluate your complaint and decide whether any further measures are required. You will shortly receive a further communication advising you of the EU-PILOT reference number, and will be kept informed on the outcome of our enquiries with the national authorities.

Yours sincerely,



Muriel Guin

Head of Unit