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REPORT FROM THE COMMISSION TO THE EUROPEAN PARLIAMENT, THE COUNCIL AND THE EUROPEAN ECONOMIC AND SOCIAL COMMITTEE

Report on the implementation by Member States of Directive 2003/88/EC concerning certain aspects of the organisation of working time

{SWD(2023) 40 final}

I. Introduction

This report reviews the implementation by Member States of Directive 2003/88/EC (hereafter referred to as 'the Directive' or 'the Working Time Directive'), as required by its Article 24. It updates the previous report published in 2017[1]. This report is accompanied by a Staff Working Document where the Commission develops in greater detail the results of its examination[2].

The current report does not provide an exhaustive account of all national implementation measures nor prejudge any position the Commission might take in any future legal proceedings.

The Commission has also updated the Interpretative Communication[3] summarising applicable case-law of the Court of Justice of the European Union ('the Court' or 'the CJEU'). This Communication aims to bring legal clarity and certainty to the Member States and other stakeholders when applying the Working Time Directive.

II. The Directive's objective and requirements

In order to protect workers' safety and health, the Directive establishes common minimum requirements including:

- limits to working time (not more than 48 hours a week on average, including overtime);
- minimum daily and weekly rest breaks (at least 11 consecutive hours of daily rest and 35 hours of uninterrupted weekly rest);
- paid annual leave (at least 4 weeks per year);
- extra protection for night workers.

The Directive also provides for flexibility in the organisation of working time. Minimum rest may be delayed, in whole or part, in certain activities. Individual workers may agree to work beyond the 48-hour limit (the 'opt-out'). Collective agreements may provide for additional flexibility, for instance by allowing weekly working time to be averaged over periods of up to 12 months.

III. Analysis of Member States' application of the Directive

The information set out below and in the Staff Working Document is based on national reports (including the views of national and European social partners), previous Commission reports, and information collected from infringement procedures and from independent experts. It was collected in 2021 and 2022.

[1] COM(2017) 254 final.
[2] SWD(2023) 40 final.
[3] C(2023) 969.

A. Exclusions from the Directive's scope of application

From the information available, it can be concluded that the Directive has for the most part been transposed in both the public and private sectors.

In some Member States, certain categories of workers are excluded from the scope of the general legislation transposing the Directive, but they are generally subject to specific rules on working conditions. In the public sector this is most commonly the case for the armed forces, police, and other security forces, and also for civil protection services such as prison staff and public service firefighters[4].

As for the private sector, several Member States exclude domestic workers[5].

Such exclusions are generally not consistent with the requirements of the Working Time Directive, unless transposition of the Directive's provisions is ensured by collective agreements.

The Court confirmed in 2021 that while the Directive applies to the armed forces[6], certain activities can be excluded from its scope, where its application would be detrimental to the proper performance of military operations, notably in view of the particular international responsibilities of some Member States, the conflicts or threats with which they are confronted, or their geopolitical context. About half of the Member States explicitly apply the Directive to their armed forces[7]. Several Member States do not do so explicitly but, nevertheless, apply its provisions to the armed forces to a certain extent[8]. A few Member States do not apply the Directive to military personnel[9], without prejudice to the existence of national rules concerning the working conditions and protection of health and safety of armed forces personnel.

B. Workers with more than one employment contract

The Directive does not explicitly state whether its provisions set absolute limits in case of concurrent contracts with one or more employer(s) or if they apply to each employment relationship separately. The Court has recently clarified that when workers have several employment contracts with the same employer, the minimum daily rest period applies to those contracts taken as whole, not separately[10]. As indicated in previous implementation reports, the Commission considers that, in the light of the Directive's objective to improve the health

[4] Ireland (police, armed forces, civil protection services, fire fighters, prison staff and marine emergency personnel), Cyprus (armed forces), Italy (police, armed forces, judiciary, penitentiary, public security and civil protection services).
[5] Belgium, Greece, Luxembourg, Sweden.
[6] Judgment in case C-742/19, *Ministrstvo za obrambo*.
[7] Belgium, Bulgaria, Denmark, Germany, Greece, Lithuania, Hungary, Netherlands, Romania, Slovenia, Slovakia, Finland, Sweden.
[8] Czechia, Estonia, Spain, Italy, Luxembourg, Austria, Poland.
[9] Ireland, France, Cyprus, Latvia, Portugal.
[10] Judgment in case C-585/19, *Academia de Studii Economice din Bucureşti*.

and safety of workers, the limits on average weekly working time and daily and weekly rest should, as far as possible, apply per worker.

Member State practice varies considerably on this point.

Bulgaria, Germany, Estonia, Ireland, Greece, France, Croatia, Italy, Cyprus, Luxembourg, the Netherlands, Austria and Slovenia apply the Directive per worker (mostly under express legal provisions to that effect).

Conversely, Czechia, Spain, Latvia, Hungary, Poland, Portugal and Slovakia apply the Directive per contract.

In Belgium, Denmark, Lithuania, Malta, Romania, Finland and Sweden the Directive applies per worker where there is more than one contract with the same employer but per contract where the worker has more than one contract with different employers.

C. Definition and recording of 'working time'

In general, the formal definition of 'working time' set out in Article 2 of the Directive (i.e. that the worker *'is working, at the employer's disposal and carrying out his activity or duties*') does not appear *per se* to give rise to problems of application.

'On-call' and 'stand-by' are periods during which workers must remain available to resume their work in case of need. 'On-call time' is where a worker is required to remain at the workplace or another place determined by the employer, ready to carry out his or her duties if requested to do so. During 'stand-by', a worker must be reachable at all times but is not required to remain at a place determined by the employer.

The Court has held that time spent 'on-call' must count fully as 'working time' within the meaning of the Directive. During 'stand-by' the time linked to the actual provision of services is always working time. The remaining stand-by time qualifies as rest, except when the constraints imposed by the employer have a very significant impact on the worker's possibility to freely manage his or her time and to pursue his or her personal and social interests. In such cases, all stand-by time counts as working time[11].

A majority of Member States[12] have legal provisions regulating 'on-call' work, and several Member States address 'stand-by' periods explicitly in their legislation[13]. The former is generally consistent with the Court's interpretation, the latter does not take account of the recent case-law limiting when stand-by time qualifies as rest. However, some national courts have started to apply that case-law[14].

[11] Judgment in cases C-580/19, *Stadt Offenbach am Main*, para. 39, and C-344/19, *Radiotelevizija Slovenija*, para. 38 and the case-law cited.
[12] Bulgaria, Czechia, Denmark, Germany, Estonia, Spain, France, Lithuania, Latvia, Hungary, Netherlands, Austria, Poland, Slovenia, Slovakia, Sweden.
[13] Bulgaria, Spain, France, Italy, Lithuania, Hungary, Netherlands, Austria, Poland, Finland, Sweden.
[14] In Belgium, Czechia, Denmark, Spain.

Compliance among the Member States with the requirement to treat on-call time as working time is improving, but there are still some issues.

In Denmark, social partners may agree that the rest period can take place during on-call duty at the workplace and some social partners in the health sector have used this possibility. In Poland and Slovenia, only active on-call duty at the workplace counts as working time, and in Slovakia, on-call duty at the workplace does not count fully as working time for certain groups.

The Court ruled in 2019 that Member States must require employers to set up '*an objective, reliable and accessible system enabling the duration of time worked each day by each worker to be measured*'[15]. In most Member States, employers are obliged to monitor and register working time, but five have no such obligation or do not define it clearly: Belgium, Denmark, Cyprus, Malta and Sweden.

D. Breaks and rest periods

Article 4 requires a rest break where the working day is longer than 6 hours, without specifying its duration or defining it in more detailed terms. These details shall be '*laid down in collective agreements or agreements between the two sides of industry or, failing that, by national legislation'.*

This provision appears in general to have been satisfactorily transposed. Most Member States set out minimum provisions for the length and timing of a rest break during the working day. However, some Member States do not set a minimum duration or timing for the rest break by law[16], and it is not clear whether collective agreements regulate this in all cases.

As regards rest (Articles 3 and 5 of the Directive), the Directive's core requirement is that the worker must have a minimum daily rest of 11 consecutive hours per 24-hour period and a minimum uninterrupted rest period of 24 hours per seven-day period, plus the 11 hours of daily rest. The Directive provides a possibility for the weekly rest to be reduced to 24 hours for objective reasons.

These core requirements appear satisfactorily transposed into national law by Member States for most sectors. A few Member States appear to have transposed the requirement for weekly rest incorrectly in some respects, e.g. because the requirement is not transposed for a certain sector[17] or by providing for the use of a 24-hour rest period without the presence of concrete objective reasons[18].

[15] Judgment in case C-55/18, *CCOO*, para. 60.
[16] Denmark, Luxembourg, Romania, Sweden.
[17] Spain (civil servants), Poland (staff of Intelligence Agency).
[18] Netherlands (voluntary police and miners), Slovenia (health sector).

E. Limits to working time

Under Article 6 of the Directive, average weekly working time (including overtime) must not exceed 48 hours per week. In general, this limit has been satisfactorily transposed, and many Member States actually lay down more protective standards.

In a small number of cases the Directive's limit is exceeded, notably:

- The limit is still not satisfactorily applied in practice by Ireland for social care workers, but work is ongoing to remedy the situation.

- The Bulgarian Labour Code still provides for a weekly working time of up to 56 hours where a system of average calculation of the weekly working time has been established and does not limit the use of compulsory overtime for national defence forces, emergencies, urgent restoration of public utilities or transport and the provision of medical assistance[19].

It also seems that the four-month limit for calculating the maximum working time is exceeded in Bulgaria[20], Germany[21] and Slovenia[22], where it is set at 6 months, and in Spain, where it is set at 12 months[23]. This is not confined to the activities mentioned in Article 17(3) of the Directive. In Belgium, the working time scheme 'Plus Minus Account' allows a reference period exceeding one year[24].

F. Annual leave

The core right to paid annual leave (Article 7 of the Directive) is generally transposed satisfactorily.

All Member States explicitly provide for a right to at least four weeks paid annual leave, and all provide for the workers to receive their 'average pay', their 'normal weekly rate', 'average monthly remuneration' or similar while they are on leave. All the Member States provide for an entitlement to a payment in lieu when the employment relationship ends without annual leave being taken.

However, two main problems have been identified. Firstly, some Member States impose conditions on acquiring or taking paid annual leave in the first year of employment which go further than provided for by the Directive as interpreted by the Court. For example, they lay down qualification periods which are too long (6-8 months) before leave can be taken[25].

[19] Labour Code Articles 142 and 146.3.
[20] Labour Code Article 142, Civil Servants Act Article 49.
[21] Working Time Act Articles 3, 7(8) and 14.
[22] ZDR-1 Article 144.3.
[23] Labour Code Article 34.2.
[24] Law of 27 December 2006 Articles 204-213.
[25] Bulgaria, Estonia, Lithuania, Poland, Portugal.

Two Member States have systems in which the right to annual leave with pay is acquired based on the worker's earnings in a qualifying year which precedes the year in which the paid annual leave can be taken ('the holiday year')[26]. The worker is entitled to time off in the first holiday year, but without pay.

The second problem is the lapsing of the right to paid annual leave which the worker has not been able to take. The CJEU has held that a worker who is unable to work due to illness continues to build up paid annual leave entitlements during sick leave. Member States may place a limit on the possibility to carry over annual leave which cannot be taken due to justified incapacity. However, the Court has also held that '*any carry-over period must be substantially longer than the reference period in respect of which it is granted*'[27]. Many Member States have provisions which entitle the worker to carry over or postpone acquired periods of annual leave when taking such leave would coincide with a period of sick leave. But in several countries, the period before the worker loses his or her right to leave with pay appears too short, as it is not longer than the one-year reference period[28].

G. Night work

The Directive has more protective provisions for night workers: they may not work more than eight hours per day on average, and the eight hour limit is absolute (may not be averaged) when the night work is particularly hazardous or stressful.

The Member States generally limit the average working time of night workers to eight hours. However, a number of Member States have set a four month reference period to calculate that average[29]. This is the same length as the standard reference period for calculating the general maximum working time, and is in the view of the Commission too long to fulfil the protective purpose of the provisions on night work.

As for night work involving special hazards or heavy strain, two Member States have not transposed this provision of the Directive[30]. One Member State allows exceptions which are not provided for in the Directive[31].

H. Derogations (Articles 17, 18 and 22 of the Directive)

1. Autonomous workers

Member States are under Article 17(1) allowed to derogate from the provisions on daily and weekly rests, breaks, maximum weekly working time, length of night work and reference periods *'where, on account of the specific characteristics of the activity concerned, the duration of working time is not measured and/or predetermined or can be determined by the workers themselves.'*

[26] Finland, Sweden.
[27] Judgment in case C-214/10 *KHS*, paras 38-40.
[28] Czechia, Estonia, Greece, Hungary, Portugal, Slovenia, Finland.
[29] Denmark, Croatia, Malta, Hungary, Netherlands, Poland, Slovenia, Slovakia, Finland, Sweden.
[30] Germany, Netherlands.
[31] Czechia.

In certain cases Member States do not include all these criteria in their national definitions. For example, some Member States exempt a worker who either earns three times the minimum wage[32], or occupies a position of considerable importance or trust and receives a salary seven times the mandatory minimum wage[33].

2. Derogations requiring the worker to be afforded equivalent periods of compensatory rest

The Directive allows for derogations from the provisions on breaks, daily and weekly rest periods, night work and reference periods for averaging working time:

- in a range of activities or situations, for example, those requiring continuity, certain seasonal activities, or where the worker's place of work and residence are distant from one another (by collective agreement, agreement between the two sides of industry, or national laws or regulations); and

- in any type of activity or situation defined by collective agreement, or agreement between the two sides of industry at national or regional level (or, where those players so decide, by the two sides of industry at a lower level or by the two sides of industry at the appropriate collective level).

However, the rules do not generally allow minimum periods of rest to be missed altogether. This is allowed only in exceptional cases where it is objectively impossible to provide equivalent compensatory rest, and where the workers have received appropriate protection. Moreover, according to the *Jaeger* judgment[34], compensatory rest should be provided in the period immediately following the missed rest.

Member States have generally transposed these derogations and make use of them.

As to the sectors and activities concerned, the Member States generally use the activities listed in the Directive itself.

Nevertheless, some national laws appear to exceed the derogations allowed under the Directive notably:

- by not imposing any requirement to provide equivalent compensatory rest to the worker concerned, for example by allowing missed rest to be compensated financially[35], by not imposing such a requirement for certain sectors or shift work[36], by relying on other kinds of protective measures, or by not providing for a compensatory rest which is equivalent to the shortening of the rest period[37];

[32] Netherlands.
[33] Hungary.
[34] C-151/02, *Jaeger*.
[35] France, Finland.
[36] France, Hungary, Netherlands, Romania.
[37] Germany.

- by setting a timeframe for compensatory rest which is too long, ranging from 14 days to six months for missed daily rest in certain activities or sectors[38] and between six weeks and six months for missed weekly rest[39].

3. Opt-out

Member States have the option not to apply the maximum weekly working time limit as long as the general principles of the protection of health and safety of workers are respected and certain protective measures are put in place (Article 22). A worker may not be obliged to work more than an average of 48 hours a week unless he or she has first given explicit, free and informed advance consent. The employer may not subject the worker to any detriment if such consent is not given. The employer must keep up-to-date records of all workers carrying out such work and place them at the disposal of the competent authorities, who may prohibit or restrict the possibility of exceeding the maximum weekly working hours.

Fifteen Member States now provide for the use of the opt-out. Of these, four (Bulgaria, Estonia, Cyprus and Malta) allow the use of the opt-out irrespective of sector, whereas the other eleven (Belgium, Germany, Spain, France, Croatia, Hungary, the Netherlands, Austria, Poland, Slovenia and Slovakia) limit its use to jobs with extensive on-call time, such as health or emergency services.

Czechia abrogated the opt-out for health services on 30 July 2020, and Latvia ceased to apply it to medical doctors from 1 January 2022. Consequently, twelve Member States (Czechia, Denmark, Ireland, Greece, Italy, Latvia, Lithuania, Luxembourg, Portugal, Romania, Finland and Sweden) currently do not use the opt-out.

The requirements regarding explicit consent from the worker, record-keeping and reporting to the authorities about workers who work more than 48 hours a week on average are generally observed.

There are no explicit limits to the number of working hours which can be allowed pursuant to Article 22, but protection of worker safety and health must be respected. As the Directive does not allow for derogations from daily and weekly rest without compensatory rest, this limits the working hours allowed.

It seems that half of the Member States which implement the opt-out provide some sort of explicit limitation to the working hours allowed[40].

I. Assessments by Member States and social partners

1. Trade unions

[38] Belgium, Czechia, Germany, Spain, Lithuania, Austria, Slovenia, Slovakia.
[39] Czechia, Lithuania, Slovakia, Finland.
[40] Belgium, Spain, Croatia, Hungary, Netherlands, Austria, Slovakia.

The worker organisations[41] consider that the Directive's practical application does not sufficiently protect and improve workers' health and safety. They refer in particular to the opt-out and the derogation for autonomous workers.

The ETUC affiliates identify problems of transposition relating to on-call and stand-by time not being appropriately counted as working time; working time, including during telework, not being recorded; compensatory rest not being taken directly after a shift; the reference periods being extended to twelve months by legislation; and annual leave rights being lost during sick leave.

2. Employers

The employer organisations[42] highlight problems and legal uncertainty as a result of the Court's judgments on on-call time and stand-by time, on recording of working time, and on annual leave. National legislation and collective agreements were suddenly in breach of the Directive, and the counting of more stand-by time as working time created challenges for organising public services requiring continuity of service (health, emergency services).

Employer organisations criticise national laws that are stricter than the minimum requirements in the Directive and consider that social partners' role in implementation is too limited, constraining working time flexibility in a global and digital world.

3. Member States

Most Member States report that the Directive continues to meet its objectives by providing an adequate and solid framework for taking action on occupational health and safety. The increase in telework, new forms of work (e.g. platform work), and recent jurisprudence of the Court present new challenges of interpretation of the Directive's provisions. Several Member States ask for clarification of working time status during on-call and stand-by, on recording working time, and on compensatory rest. Some propose reassessing and revising the core provisions of the Directive.

J. Covid-related measures in the field of working time

The Covid-19 pandemic deeply impacted the world of work. In 2020 and 2021 Member States adapted the rules applicable to working conditions, notably on the organisation of working time. Most of these measures were temporary and are no longer in force.

A number of Member States created new possibilities to extend working time, for instance by increasing the maximum daily and weekly working time[43] and possibilities to work overtime[44] as well as reducing the duration of the minimum daily[45] or weekly rest[46]. This generally

[41] ETUC affiliates and CESI.
[42] BusinessEurope, CoESS, CEEMET, CEMR, PEARLE, SGI Europe and SMEunited.
[43] Germany, Luxembourg.
[44] Belgium, France, Latvia, Slovenia, Finland.
[45] Germany, Poland.
[46] Austria, Poland.

applied only in a limited number of essential sectors, notably health. Temporary restrictions entailed mandatory home-based telework for a number of workers, while several Member States authorised employers to require the taking of annual leave[47].

Short-time working[48] or partial unemployment[49] schemes allowed for working time to be reduced, or the duty to perform work to be suspended altogether, with compensation for loss of income.

K. Conclusions

In general terms, the large majority of workers in the EU are subject to working time rules that respect EU legislation, and are in many cases more protective than the minimum standards set out in the Directive.

Member States' legislation is generally compliant with the Directive's requirements, but various issues have been identified. Incorrect transposition of derogations from daily and weekly rest, including compensatory rest, is the most common problem. Some Member States still do not define on-call time at all or do not apply it appropriately in some sectors (e.g. health, security, law enforcement and emergency services). The challenges of responding to the Court's recent case-law, notably on the qualification of stand-by time and on the recording of working time, have not yet been addressed widely. There are still inconsistencies in the limitations on maximum working time for specific groups of workers (mainly health personnel and armed forces), but compliance among the Member States is improving.

The Directive's core requirements on breaks, daily rest, and weekly rest are generally satisfactorily transposed. The remaining issues mainly relate to the use of derogations from these requirements.

All Member States explicitly provide for a right to at least 4 weeks' annual paid leave. The most common problems are on taking of annual leave during the first year of employment and on the worker's right to acquire annual leave when on sick leave and to carry over the acquired leave rights for a sufficiently long period.

The number of Member States permitting use of the opt-out has slightly decreased.

In conjunction with and without prejudice to its wider role as guardian of the Treaties, the Commission will continue to support Member States' efforts to improve the implementation of the Directive, and is ready to facilitate exchanges between Member States, and between the social partners, where these can be helpful.

[47] Bulgaria, France, Latvia, Austria.
[48] Germany, Lithuania, Hungary, Austria, Poland, Romania, Slovenia.
[49] Luxembourg.