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Delegations will find attached document COM(2017) 254 final.

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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(2017) 204 final}

## **I. Introduction**

This report reviews the implementation by Member States of Directive 2003/88/EC concerning certain aspects of the organisation of working time<sup>1</sup> (hereafter referred to as ‘the Directive’ or ‘the Working Time Directive’), as required by Article 24 of the Directive. The report recalls the Directive’s objectives and main provisions and sets out the Commission’s main findings on Member State implementation. In annex to the report is a staff working document where the Commission develops in greater detail the results of its examination.<sup>2</sup>

The aim of this report is therefore to provide an overview of how Member States have implemented the Directive and to highlight key issues and problems.

The Commission is also presenting an interpretative communication<sup>3</sup> to bring legal clarity and certainty to the Member States and other stakeholders when applying the Working Time Directive and thus improve its actual implementation. The report and the interpretative communication have the shared goal of better implementation of the Directive, in line with the policy framework set out in the recent Commission Communication ‘*EU Law: Better Results through Better Application*’.<sup>4</sup>

It cannot, however, provide an exhaustive account of all national implementation measures and does not prejudge any position the Commission might take in any future legal proceedings.

## **II. The Directive’s objective and requirements**

The Directive was adopted by the European Parliament and the Council of the European Union under Article 137(2) of the Treaty establishing the European Community (now Article 153(2) of the Treaty on the Functioning of the European Union).

Its main purpose is to lay down minimum safety and health requirements for organising working time. Many studies show that long working hours and insufficient rest (particularly over prolonged periods) can have damaging effects (higher rates of accidents and mistakes, increased stress and fatigue, short-term and long-term health risks).

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<sup>1</sup> Directive 2003/88/EC of the European Parliament and of the Council of 4 November 2003 concerning certain aspects of the organisation of working time (OJ L 299, 18.11.2003, p. 9). The Directive consolidates and repeals two earlier Directives from 1993 and 2000.

<sup>2</sup> SWD(2017) 204

<sup>3</sup> Communication from the Commission, Interpretative Communication from the Commission on Directive 2003/88/EC of the European Parliament and of the Council of 4 November 2003 concerning certain aspects of the organisation of working time, C(2017) 2601

<sup>4</sup> Communication from the Commission, EU law: Better results through better application, C/2016/8600, OJ C 18, 19.1.2017

The Court of Justice of the European Union ('the Court' or 'the CJEU') has held that the Directive's requirements on maximum working time, paid annual leave and minimum rest periods '*constitute rules of Community social law of particular importance, from which every worker must benefit*'.<sup>5</sup>

Similarly, the Charter of Fundamental Rights of the European Union<sup>6</sup> provides in Article 31(2) that:

*'Every worker has a right to limitation of maximum working hours, to daily and weekly rest periods and to an annual period of paid leave.'*

The Directive establishes common minimum requirements for workers in all Member States, which include:

- 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 choose to work in excess of the 48-hour limit (this is referred to as the 'opt-out'). Collective agreements may provide for flexibility in the organisation of working time, 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**

In 2014, the Commission undertook to examine the Directive's implementation by all Member States. This examination took into consideration national reports (including the views of national and European social partners), previous Commission reports on implementation, information collected from EU-pilot and infringement procedures, contributions from independent experts and research done by the Commission itself. The most

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<sup>5</sup> Judgment of 1 December 2005, *Abdelkader Dellas and Others v Premier ministre and Ministre des Affaires sociales, du Travail et de la Solidarité*, C-14/04, ECLI:EU:C:2005:728, paras 40-41 and 49; Judgment of 6 April 2006, *Federatie Nederlandse Vakbeweging v Staat der Nederlanden*, case C-124/05, ECLI:EU:C:2006:244, para 28.

<sup>6</sup> Charter of Fundamental Rights of the European Union (OJ C 303, 14.12.2007, p. 1); According to Article 52(1) of the Charter, '*Any limitation on the exercise of the rights and freedoms recognised by this Charter must be provided for by law and respect the essence of those rights and freedoms. Subject to the principle of proportionality, limitations may be made only if they are necessary and genuinely meet objectives of general interest recognised by the Union or the need to protect the rights and freedoms of others.*'

important findings of general relevance are summarised in points A to I below. These points are highly inter-related, and any assessment of compliance with the Directive must take this into account.

### **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.

However, in some Member States, categories of workers are excluded from the scope of the legislation. 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.<sup>7</sup> As for the private sector, several Member States exclude domestic workers.<sup>8</sup>

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

### **B. Workers with more than one employment contract**

The Working Time Directive establishes minimum requirements for 'workers'. However, it 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 not yet had to rule on this point. As indicated in previous reports<sup>9</sup>, the Commission considers that, in the light of the Directive's objective to improve the health and safety of workers, the limits on average weekly working time and daily and weekly rest should as far as possible, apply per worker. Taking into account the need to ensure that the

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<sup>7</sup> Ireland (The Organisation of Working Time Act number 20 Part I no. 3 para. (1) An Garda Síochána (police), armed forces), Ireland (The Organisation of Working Time Act number 20 Part I no. 3 para. (3b) and the Organisation of Working Time (Exemption of Civil Protection Services) Regulations (S.I. No 52/1998) ia. fire fighters, prison staff and marine emergency personnel; Cyprus (The Working Time Law of 2002, Art. 4 armed forces); Italy (Legislative Decree 66/2003 Article 2 — police and armed forces, the judiciary, penitentiary, public security and civil protection services are all excluded if their duties impose particular demands and a Ministerial Decree so provides).

<sup>8</sup> Belgium (Labour Code of 16 March 1971 Article 3); Greece (Presidential Decree No 88/1999 as amended by Presidential Decree No 79/2005 Article 1), Luxembourg (Labour Code Article L. 211-2, Sweden (Working Hours Act SFS 1982:673 Section 2), United Kingdom (The Working Time Regulations 1998 Part III Regulation 19).

<sup>9</sup> Report from the Commission on the State of Implementation of Council Directive 93/104/EC of 23 November 1993 concerning certain aspects of the organisation of working time, COM(2000) 787 final; Report from the Commission on the implementation by Member States of Directive 2003/88/EC concerning certain aspects of the organisation of working time and accompanying document, COM(2010) 802 final and SEC(2010) 1611 final.

health and safety objective of the Working Time Directive is given full effect, Member States' legislation should provide for appropriate mechanisms for monitoring and enforcement.

Member State practice varies considerably on this point. Austria, Bulgaria, Croatia, Cyprus, France, Germany, Luxembourg, the United Kingdom, Estonia, Greece, Ireland, Italy, Lithuania, the Netherlands and Slovenia apply the Directive per worker (mostly under express legal provisions to that effect).

Conversely, the Czech Republic, Denmark, Spain, Latvia, Hungary, Malta, Poland, Portugal, Romania, and Slovakia apply the Directive per contract.

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

### **C. Definition of 'working time' and 'on-call 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 to give rise to problems of application.

Most Member States do not have specific legal provisions defining the status of what is referred to as on-call work.

'On-call time' refers to periods 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. According to the Court's rulings, all on-call time must be fully counted as working time for the purposes of the Directive. This principle applies both to periods where the worker is working in response to a call, (*'active'* on-call time), and to periods where s/he is allowed to rest while waiting for a call, (*'inactive'* on-call time), provided that s/he remains at the workplace.

Where a specific mention of on-call work is made in national rules, this is generally consistent with the Court's interpretation. Furthermore, national courts have generally in practice introduced EU case-law.

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 Slovenia, legal acts regulating the police, judges, armed forces and civil servants<sup>10</sup> still expressly provide that inactive periods during on-call time at the workplace are not to be treated as working time. In Belgium, a decree applying to boarding schools and certain residential care establishments in the French and German communities and in the region of Wallonia also allows certain periods of time not to be counted as working time. These are parts of the periods spent following residents on excursions and part of periods during the evening and night in which the worker has a suitable place to rest.<sup>11</sup> For social care workers in Ireland and doctors in the public health sector in Greece, there is still an issue with the counting of on-call time as working time, but work is ongoing to bring the situation in line with the Directive. According to a new collective agreement for municipal physicians in Finland,<sup>12</sup> the on-call work of certain doctors performed in addition to their regular working time is not counted as working time. In Denmark the legislation allows social partners to agree that the rest period can be placed during on-call duty at the work place and some of the social partner in the health sector have used this possibility<sup>13</sup>.

#### **D. Breaks and rest periods**

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

The Directive allows collective agreements to establish the duration and terms of the break. Nevertheless, the duty to transpose the Directive lies with the Member States. It is therefore their responsibility to ensure that all workers, including those who may not be covered by collective agreements, are entitled to a break.

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.

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<sup>10</sup> The Police Organisation and Work Act (Official Gazette of Slovenia, No 15/13, 11/14, 86/15, 77/16) Article 71; The Judicial Service Act (Official Gazette of Slovenia, No 94/07 official consolidated text, 91/09, 33/11.63/13.95/14.95/14 ZUPPJS15, 17/15); the Defence Act Article 97e (Official Gazette of Slovenia the RS, No. 103/04, 95/16-consolidated text No.8); the Collective Agreement for Public Sector (Official Gazette of Slovenia, No 57/08, 23/09, 19/09, 89/10, 40/12, 46/13, 95/14, 91/16 Article 46.

<sup>11</sup> Royal Decree of 26 May 2002 concerning the hours of work of workers employed in institutions and services of the Joint Subcommittee on Education and Housing of the French Community, the Walloon Region and the German-speaking Community (C.P. 319.02).

<sup>12</sup> KT-Local government employers and the negotiation organisation for professionals in the public sector (JUKO) 31 May 2016.

<sup>13</sup> The Executive Order No 324 of 23 May 2002 on Daily and Weekly Rest Periods Section 19, Collective agreement on working time for health personnel employed by the regions Annex 5, Commented agreement on daily and weekly rest time for the health personnel Section 4 (ia. nurses, bio analysts, physiotherapists), Collective agreement for doctors employed in the regions Section 29.

However, some Member States do not set a minimum duration or timing for the rest break by law,<sup>14</sup> and it is not clear whether collective agreements in all cases cover these aspects.

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<sup>15</sup> or by providing for the use of a 24-hour rest period without the presence of concrete objective reasons.<sup>16</sup>

### **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.

Several countries have amended their legislation for certain groups of workers in order to comply with the Directive's requirements. We still see a few cases where the Directive's limit is exceeded, notably:

- 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.
- The Bulgarian Labour Code 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.<sup>17</sup>

It also seems that the four-month limit for calculating the maximum working time is exceeded in Germany,<sup>18</sup> Bulgaria<sup>19</sup> and Slovenia,<sup>20</sup> where it is set at 6 months, and in Spain, where it is

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<sup>14</sup> Denmark (The Statutory Act No 896 of 2004 on the implementation of parts of the Working Time Directive section 3); Luxembourg (The Labour Code Art. L. 211-16); Romania (the Labour Code (Law no. 53/2003) Article 134); Sweden (The Working Hours Act (1982:673) Section 15).

<sup>15</sup> Spain (civil servants).

<sup>16</sup> Belgium, Slovenia (health sector).

<sup>17</sup> Labour Code Articles 142 and 146.3.

<sup>18</sup> Working Time Act Articles 7(8) and 14.

<sup>19</sup> The Labour Code art. 142, The Civil Servants Act art. 49.

<sup>20</sup> The ZDR-1 Article 144.3 .



set at 12 months<sup>21</sup>. This is not confined to the activities mentioned in Article 17(3) of the Directive.

## 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 4 weeks paid annual leave, and all provide for the worker to receive his/her 'average pay', his/her 'normal weekly rate', 'average monthly remuneration' or similar while s/he is on leave.

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 of Justice. For example, they lay down qualification periods which are too long (6-8 months) before leave can be taken.<sup>22</sup>

A few 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')<sup>23</sup>. The worker is entitled to time off in the holiday year, but without pay. These rules may result in a delay of more than a year before accrued paid annual leave can be taken.

The second main 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 entitlement during the period of 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 framed that possibility and held that '*any carry-over period must be substantially longer than the reference period in respect of which it is granted*'.<sup>24</sup> 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/her right to leave with pay appears too short, as it is not longer than the one-year reference period.<sup>25</sup>

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<sup>21</sup> The Labour Code Article 34.2.

<sup>22</sup> Bulgaria (the Labour Code Article 155(2), 8 months); Estonia (the Employment Contracts Act § 68 (4), 6 months).

<sup>23</sup> Denmark, Finland, Sweden.

<sup>24</sup> Judgment of 22 November 2011, *KHS AG v Winfried Schulte*, C-214/10, ECLI:EU:C:2011:761, para 38-40.

<sup>25</sup> Denmark (Consolidated Act 202 of 2013 on Holidays Article 13.5); Estonia (The Employment Contract Act of 17 December 2008 Article 68, within 1 year as of the end of the calendar year for which the holiday is calculated); Lithuania (The Labour Code of 4.6.2002 Article 174, in the next annual leave year); Slovenia (Employment Relationships Act (No 21/2013) Article 162, by 31 December of the following year); Finland (Annual Holidays Act 162/2005 Article 26; a postponed summer holiday may be granted during the same

## **G. Night work**

The Directive has more protective provisions for night workers: they may not work more than 8 hours per day on average, and not more than 8 hours on any day when the night work is particularly hazardous or stressful. According to Article 16(c), the reference period for the application of this limit is to be defined after consultation with the two sides of industry or in collective agreements.

The Member States generally limit the average working time of night workers to 8 hours. However, a number of Member States have chosen to let the working time of night workers be averaged over a period of 4 months.<sup>26</sup> Such a reference period is of the same length as the reference period for calculating the general maximum working time.

In light of the Directive's objective to lay down minimum health and safety requirements and because of the need to ensure the provision on night work remains effective, the reference period applicable for night work should be substantially shorter than the period used for the maximum working week. Thus, the Commission is of the opinion that a reference period of 4 months is too long.

As for night work involving special hazards or heavy strain, three Member States have not transposed this provision of the Directive.<sup>27</sup> Also, one Member State allows for certain exceptions which are not provided for in the Directive for this kind of work.<sup>28</sup>

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

### **1. Autonomous workers**

Member States are 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*. This is particularly in cases such as managing executives with autonomous decision-taking powers

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calendar year after the holiday season, and a postponed winter holiday by the end of the following calendar year).

<sup>26</sup> Denmark (Act no 896 of 2004 on the implementation of parts of the Working Time Directive Section 5), Croatia (Labour Act No 93/14 Article 69), Malta (collective agreement or 17 weeks), Hungary, Netherlands (Working Hours Act of 23 November 1995 Section 5:8), Poland, Slovenia (The Employment Relationships Act (No 21/2013) Article 152), Slovakia (Act No 311/2001 The Labour Code Article 98), Sweden (Working Hours Act SFS 1982:673 Section 13a), United Kingdom (Working Time Regulations 1998 Reg. 6).

<sup>27</sup> Germany, Italy, Netherlands.

<sup>28</sup> Czech Republic (Labour Code section 94 (1)).

but also family workers or workers officiating at religious ceremonies in churches and religious communities.

In certain cases Member States do not include all the criteria of Article 17(1) in their national definitions.

For example, some legislative texts exempt a worker who either:

- works from home,<sup>29</sup>
- earns three times the minimum wage,<sup>30</sup>
- fills a position of considerable importance or trust and receives a salary seven times the mandatory minimum wage<sup>31</sup> or
- has an administrative function<sup>32</sup>.

These criteria do not necessarily guarantee that the criteria of the Directive are fulfilled.

## 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, activities which involve a need for continuity, certain seasonal activities where there is a surge of activity, and certain situations 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 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 alternative protection. Moreover, according to the *Jaeger* judgment,<sup>33</sup> compensatory rest should be provided promptly, in the period immediately following that in which the rest was missed.

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

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<sup>29</sup> Luxembourg (the Labour Code Article L.211-3).

<sup>30</sup> Netherlands (the Working Time Decree of 4 December 1995 Article 2.1:1).

<sup>31</sup> Hungary (Act I of 2012 on the Labour Code Sections 208 and 209).

<sup>32</sup> Portugal (Law No 7/2009, of 12 February (the Labour Code) Article 18a).

<sup>33</sup> Judgment of 9 September 2003, *Landeshauptstadt Kiel v Norbert Jaeger*, C-151/02, ECLI:EU:C:2003:437.

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

Nevertheless, the national laws of a number of Member States 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, in urgent situations and where this would have a serious impact on business activities or by allowing missed rest to be compensated financially<sup>34</sup>, by not imposing such a requirement for certain sectors or shift work,<sup>35</sup> 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;<sup>36</sup>
- by setting a timeframe for the granting of compensatory rest periods which is too long, for example some Member States allow equivalent compensation for missed parts of daily rest to be provided within periods ranging from 14 days to 6 months in certain activities or sectors<sup>37</sup> and some allow equivalent compensation for missed parts of weekly rest to be afforded between 6 weeks and 6 months after the rest was missed.<sup>38</sup>

### 3. Opt-out

Member States have the option not to apply the maximum limit to weekly working time 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 of the Directive). The worker may not be obliged to work more than an average of 48 hours a week unless s/he has first given his/her explicit, free and informed advance consent to perform such work. The Member State must ensure that the worker is not subjected to any detriment by his/her employer if the worker is not willing to give his/her agreement to perform such work. The Member State must also ensure that the employer keeps up-to-date records of all workers who carry out such work

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<sup>34</sup> Belgium (Labour Code of 16 March 1971 Section VI Article 38); France (L.3132-5 Labour Code); France (D-3131-2 Labour Code); Finland (Working Hours Act 605/1996 Section 32); France (Decree n°2000-815 25 August 2000 relating to working time in the state public sector Article 3)<sup>34</sup>; Finland (Working Hours Act 605/1996 Section 32).

<sup>35</sup> France (Decree n°2000-815 25 August 2000 relating to working time in the state public sector Article 3), Hungary (Act CLIV of 1997 on Healthcare (Eütv); Act CCV of 2012 on the Legal Status of Soldiers (Hjt.); Netherlands (The Working Time Decree of 4 December 1995 chapter 5); Romania (Labour Code Article 135).

<sup>36</sup> Germany (the Working Time Act Article 7(2a) and 7(9)).

<sup>37</sup> Belgium (Law of 14 December 2000 for the Public Sector Article 7); Czech Republic (Act no 262/2006 the Labour Code sections 90a and 92); Germany (The Working Time Act of 6 June 1994 Articles 5.2 and 5.3); Spain (Law 55/2003 of 16 December 2003 of the Framework Statute for Statutory Workers in the Health Service Article 54); Austria (The Civil Servant Employment Act No 33/1979 Section 48a); Austria (Law 461/1969 on Working Hours Section 12); Slovenia (The Employment Relationships Act (ERA-1) 2013 Article 158); Slovenia (Medical Practitioners Act No 72/06-ZZdrS UPB3) Article 41d, Health Services Act No 23/05 – ZZdej UPB2); Slovakia (Act No 311/2001 The Labour Code Section 92.2); Finland (The Working Hours Act 605/1996 section 29).

<sup>38</sup> Czech Republic (Act no 262/2006 the Labour Code sections 90a and 92); Slovenia (The Employment Relationships Act (ERA-1) 2013 Article 158); Slovenia (Medical Practitioners Act No 72/06-ZZdrS UPB3) Article 41d, Health Services Act No 23/05 – ZZdej UPB2); Slovakia (Act No 311/2001 The Labour Code Section 93.5); Finland (The Working Hours Act 605/1996 section 32).

and places these records at the disposal of the competent authorities, who may, for reasons connected with the safety and/or health of workers, prohibit or restrict the possibility of exceeding the maximum weekly working hours.

Some 18 Member States now provide for the use of the opt-out. Of these, 6 (Bulgaria, Croatia, Cyprus, Estonia, Malta and the United Kingdom) allow the use of the opt-out irrespective of sector, whereas the other 12 (Belgium, the Czech Republic, France, Germany, Hungary, Latvia, the Netherlands, Austria, Poland, Slovakia, Slovenia and Spain) limit its use to jobs which make *extensive* use of on-call time, such as health services or emergency services. Croatia and Austria are new users of the opt-out.

The remaining 10 Member States (Denmark, Ireland, Greece, Italy, Lithuania, Luxembourg, Portugal, Romania, Finland and Sweden) do not use the opt-out.

The requirements directly stated in the Directive regarding explicit consent from the worker, recordkeeping and reporting to the authorities about workers who work more than 48 hours a week on average are generally observed. Some countries, however, seem to lack a clear transposition of the requirement to prohibit detrimental treatment of workers who refuse to consent.

There are no explicit maximum limits to the number of working hours which can be allowed pursuant to Article 22. However, the Directive does say that the general principles for the 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, the requirements for rest will in any case limit 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.<sup>39</sup>

According to the information available to the Commission, five Member States have explicit provisions requiring the employer to record the working hours of workers who have chosen to opt out.<sup>40</sup> The recording of working hours may, however, also follow from general legislation which applies to all workers.

## **I. Assessments by Member States and social partners**

### **1. Trade unions**

The European Trade Union Confederation (ETUC) is of the opinion that the Directive's practical application does not meet its objectives to protect and improve workers' health and

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<sup>39</sup> Belgium, Czech Republic, Spain, Croatia, Latvia, Hungary, Netherlands, Austria, Slovakia.

<sup>40</sup> Belgium, Germany, France, Cyprus, Latvia.

safety. The ETUC says that the opt-out is undermining the Directive's aim, because working long hours is damaging workers' health.

The ETUC is of the opinion that the Working Time Directive has not been transposed in a satisfactory way in the different Member States.

The most critical problems concern:

- on-call time not being counted as working time;
- compensatory rest not being taken directly after a shift;
- the reference periods being extended to twelve months by legislation;
- the use of the opt-out; and
- the derogation for autonomous workers.

The view that the Directive has not been transposed in a satisfactory way in the different Member States is shared by Eurocadres, which argues that the most obvious problems concern on-call time and the derogation for autonomous workers.

## 2. Employers

The main problems employer organisations raise concerning the Directive's application are:

- national laws which are seen as stricter than what the Directive requires and not making enough use of available derogations
- significant problems with the practical application of the SIMAP-Jaeger judgments on on-call time and compensatory rest and also the judgments on annual leave in the context of sick leave.

BusinessEurope member federations find that the measures to transpose the Directive meet its objectives in terms of protecting workers' health and safety. However, they also find that they go beyond what is necessary in this regard.

BusinessEurope reports that their member federations generally consider that from a legal point of view the Working Time Directive has been transposed in a satisfactory way in their respective countries. Member federations also point to problems of non-compliance with the Directive regarding on-call time and provisions on compensatory rest in certain public and private sectors.

## 3. Member States

The Member States were mainly asked to report on any evaluation work carried out under their authority and to indicate what the main conclusions were on the socioeconomic impact of the transposing measures. At the time the information was collected, only the United Kingdom had carried out a specific evaluation of the effects of measures transposing the requirements and derogations of the Directive.

This evaluation states that the 15 % reduction in the number of employees working in excess of 48 hours between 1997 and 2013 should primarily be seen as part of a wider international trend towards reduced working hours. However, the evaluation also states that the findings suggest that the introduction of the Working Time Regulations has had some small additional effect in reducing the amount of long hours worked.

## **J. Conclusion**

In general terms, the large majority of workers in the EU are subject to working time rules that respect EU legislation. In many cases national rules afford greater protection than what is required under the Directive.

The compliance of Member State legislation with the Directive's requirements is improving. For example, many countries have amended their legislation on annual leave, in particular for the acquisition and carry-over of annual leave for people who are on sick leave or maternity/parental leave. Also, several countries have amended their legislation on the maximum working time of specific groups of workers.

The analysis carried out by the Commission in 2010 showed that a large number of Member States had introduced the derogation allowing workers to 'opt-out' of the limit on maximum working time. Since then, the situation has been stable, with Croatia and Austria being the only other Member States to have introduced the derogation.

The current report also shows that there remain problems with the implementation of important elements of the Directive, as interpreted by the Court of Justice.

Incorrect transposition of the requirement to provide compensatory rest where minimum rest periods are shortened or postponed is clearly the most widespread problem.

There are also other, though less common, problems. These concern the treatment of on-call time as working time, the limitations to maximum working time for specific groups of workers (mainly health personnel and armed forces) and limitations to working time for night workers.

In addition, there are problems in several Member States as regards the rules on acquisition of annual leave during the first year of employment and the worker's right to keep the acquired leave rights for a sufficiently long period when annual leave coincides with sick leave.

The Commission will address the positions arising under national laws or practices in accordance with the Commission's communication '*EU Law: Better Results through Better Application*'.

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



The Interpretative Communication aims to bring legal clarity and certainty when applying the Directive. This report contributes to identifying the key areas for future cooperation with Member States and for enforcement activities.