



Implementation Report and Interpretative Communication on the Working Time Directive 2003/88/EC

European Sectoral Social Dialogue Committee on Local and Regional Governments
Working group meeting
Brussels, 8 June 2023

Bertrand Muller-Schleiden, Unit EMPL C1 - Labour Law
DG Employment, Social Affairs and Inclusion

Overview

- 1. A working time package**
- 2. A new Implementation Report**
- 3. An updated Interpretative Communication**

1. A working time package

The Commission adopted on 15 March 2023 a new package updating the 2017 package and consisting of:

- an Implementation Report (24 languages) - COM(2023)72
- a Commission Staff Working Document (in English only) – SWD(2023)40
- an update of the 2017 Interpretative Communication (24 languages) – C(2023)969 (*published in the Official Journal of the EU – corrigendum on 26.4.2023*)

2. A new Implementation Report

Legal basis and structure

- Five-yearly report based on Article 24(2) and (3) of the Working Time Directive
- Report and Staff Working Document pursue same purpose and follow overall same structure as 2017 Report
- Factual overview of measures adopted by Member States to implement the Directive, highlighting key issues and problems; follows article-by-article structure
- Report and Staff Working Document further include a section on social partners' evaluation of practical implementation of the Directive and on Member States' assessment of the Directive, and briefly present Covid-related measures in the field of working time

Main provisions of the Directive - definitions

Definition of working time – WTD Article 2

- **Working time:** “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”
- **Rest period:** "any period which is not working time“
- No derogations are possible from this article

Main provisions of the Directive – core rights

Daily rest (Art. 3)	11 consecutive hours per 24-hour period
Breaks (Art. 4)	1 break when working > 6 hrs
Weekly rest (Art. 5)	24 hours (+ 11 hrs daily rest) per 7-day period
Max. weekly working time (Art. 6)	48 hours on average
Maximum daily working time for night workers (Art. 8)	8 hours per 24 hours
Minimum paid annual leave (Art. 7)	4 weeks

NB Link to *Charter of Fundamental Rights* Article 31.2 « Every worker has the right to limitation of maximum working hours, to daily and weekly rest, and to an annual period of paid leave »

Main provisions of the Directive - derogations

'Autonomous workers' (Art. 17 (1))	Where "duration of working time is not measured and/or predetermined"; i.e. worker has full control over both volume & organisation of working hours
Specific situations (Art. 17 (2) & (3))	Derogating from all except Art. 6 Where continuity of service required and in case of accident or imminent risk of accident Implies 'compensatory rest' or, in exceptional cases, an 'appropriate protection'
Individual opt-out from Art. 6 (Art. 22)	Where the 48 hours weekly limit may be exceeded subject to individual worker's consent.
Limits to the derogations from the reference period for Art. 6 (Art. 19)	Standard: 4 months; extension possible: - by law to 6 months - by collective agreements to 12 months

Main messages of the report

- Large majority of workers in the EU are subject to working time rules that respect or are more protective than the Directive
- Rules on breaks, daily and weekly rest and annual leave are generally satisfactorily transposed
- Compliance issues include:
 - Derogations from daily or weekly rest and compensatory rest
 - Lack of definition of on-call time or inappropriate application in some sectors
 - Maximum weekly working time limits for some groups of workers (mainly health and armed forces)
 - Annual leave during first year and overlap with sick leave
- Number of MSs applying individual opt-out has decreased

Impact of new case-law

The analysis of the national implementation of the Working Time Directive takes into consideration some significant recent developments in the case-law of the Court of Justice of the EU, notably as regards the following topics:

- the concept of working time in relation to on-call and stand-by
- the obligation to record all working time
- the application of the Directive per worker and not per contract in case of multiple contracts of employment concluded with the same employer

On-call and stand-by time

- C-518/15, *Matzak*
- C-344/19, *Radiotelevizija Slovenija*
- C-580/19, *Stadt Offenbach am Main*
- C-214/20, *Dublin City Council*

Time spent 'on-call' must count fully as working time. 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.

On-call and stand-by time

- 16 MSs regulate on-call - BG, CZ, DK, DE, EE, ES, FR, LT, LV, HU, NL, AT, PL, SI, SK, SE
- 11 MSs regulate on-call and stand-by – BG, ES, FR, IT, LT, HU, NL, AT, PL, FI, SE
- No MS regulation takes account of the recent (post-Matzak) case-law, though some national courts have started to apply it – BG, CZ, DK, ES

Recording of working time

- C-55/18, CCOO

The Court of Justice 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.

This raises complex questions notably in the case of workers performing remote work or telework who enjoy a degree of flexibility and autonomy in organising and delivering work without physical supervision, for instance when it comes to the 11 hours of uninterrupted daily rest.

- 5 MSs have no *clear* obligation set in law concerning recording of all working time – BE, DK, CY, MT, SE

Application of the Directive per worker in case of multiple contracts with the same employer

- C-585/19, *Academia de Studii Economice din București*

In 2021, the Court of Justice 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.

- 13 MSs apply the directive per worker – BG, DE, EE, IE, EL, FR, HR, IT, CY, LU, NL, AT, SI (15 in 2017)
- 7 MSs apply the directive per employment contract – CZ, ES, LV, HU, PL, PT, SK (10 in 2017)
- 7 MSs apply the directive per worker with the same employer – BE, **DK**, **LT**, **MT**, **RO**, FI, SE (3 in 2017)

Use of the individual opt-out (Article 22)

- 4 MSs apply the opt-out across all sectors – BG, EE, CY, MT
- 11 MSs apply the opt-out in specific sectors – BE, DE, ES, FR, HR, HU, NL, AT, PL, SI, SK
- 12 MSs do not apply the opt-out – **CZ**, DK, IE, EL, IT, **LV**, LT, LU, PL, RO, FI, SE (10 in 2017)

Assessment by social partners

- **Trade unions' views**

Worker organisations consider that the Directive's practical application does not sufficiently protect and improve workers' health and safety. They identify problems 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
- annual leave rights being lost during sick leave

Assessment by social partners

- **Employers' views**

Employer organisations consider that the Working Time Directive does not provide the necessary flexibility to adapt the working time arrangements to the needs of employers and workers in a global and digital world.

They highlight problems and legal uncertainty as a result of the Court's judgments on the following topics:

- on-call time and stand-by time
- recording of working time
- annual leave

Member States' views

Member States were asked for their views on the impact of the Directive and the challenges of its practical implementation:

- most of them report that the Directive continues to meet its objectives by providing an adequate and solid framework for taking action on occupational health and safety;
- main challenges mentioned:
 - concepts of 'working time' and 'rest period' require clarification, notably with regard to on-call/stand-by duties and travelling time; take better account of intermediate periods of time
 - need to clarify right to compensatory rest
 - need to codify the Court's judgments interpreting the Directive
 - need to clarify that maximum weekly working time applies per worker

- request to increase working time flexibility (cf. extend reference period for maximum weekly working time to 12 months without collective agreement, amend requirements for daily and weekly rest)
- request to revise the Directive to allow for exclusion of military personnel
- related to increasing incidence of new forms of work (cf. platform work) and remote work/telework, blurring boundaries between working time and rest periods:
 - ✓ need for clarifications on how to record working hours effectively, notably in the context of remote work
 - ✓ data protection
 - ✓ right to disconnect
 - ✓ challenge to Directive's provisions on breaks and continuous rest period
- need for more detailed protective provisions vs need to take account of workers' increased autonomy in organizing their working time

3. An updated Interpretative Communication

Why and how?

- a rich body of case-law of the Court of Justice on the Working Time Directive: more than 80 preliminary rulings (judgments and orders of the Court)
- the 2017 Interpretative Communication: objective and neutral, not binding, bringing legal clarity and certainty
- 32 rulings interpreting the Directive since 2017, justifying an update of the Communication
- up-to-date as of September 2022; self-standing reference document, making the 2017 Communication redundant
- aim and structure of the new Communication remain unchanged

Main topics covered by the Court's case-law since 2017 (in addition to those already presented with the Implementation Report):

- Scope of the Directive (C-147/17, *Sindicatul*; C-588/18, *Fetico*; C-609/17 and C-610/17, *TSN and AKT*), including as regards activities of members of armed forces (C-742/19, *Ministrstvo za obrambo*)
- Derogation for autonomous workers (C-175/16, *Hälvä*)
- Right to paid annual leave:
 - employer's obligation to enable the worker to exercise that right (C-619/16, *Kreuziger*; C-684/16, *Max-Planck*; C-569/16 and C-570/16, *Bauer and Willmeroth*; C-518/20 and C-727/20, *Fraport and St. Vincenz-Krankenhaus*; C-120/21, *LB*)
 - right for workers reinstated after an unlawful dismissal (C-762/18 and C-37/19, *Varhoven and Iccrea Banca*)

Thank you for your attention