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Info-Document :	AEMH 11-028
Title:	Report on the Implementation by Member States of the European Working Time Directive
Author :	European Commission
Purpose :	Info-documents disseminated by the AEMH European Liaison Office do not necessarily reflect the opinion of the AEMH and its Board. Info-documents are meant to inform, to raise awareness, to alert, to launch a debate, to incite taking action,.....
Distribution :	AEMH Member Delegations
Date :	18 January 2011



EUROPEAN COMMISSION

Brussels, 21.12.2010
COM(2010) 802 final

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

**on implementation by Member States of Directive 2003/88/EC ('The Working Time
Directive')**

{SEC(2010) 1611 final}

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

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1. INTRODUCTION

This Report reviews the implementation by Member States of the Working Time Directive 2003/88/EC¹ (afterwards "the Directive") as required by Article 24 thereof. It recalls the Directive's objectives and main provisions and sets out the main results of the Commission's examination of implementation by Member States, backed by the annexed Working Paper of the Commission services, where the results of the examination are developed in greater detail.

The aim of this Report is to provide an overview of how Member States have implemented the Directive and to highlight the key problems. It cannot provide an exhaustive account of all national implementation measures².

2. THE DIRECTIVE'S OBJECTIVE AND REQUIREMENTS

The Directive was adopted by the European Parliament and the Council under Article 137(2) of the EC Treaty (now Article 153(2) TFEU).

Its main purpose is to lay down minimum safety and health requirements for organising working time. Many studies³ 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.)

The Court of Justice has held that the Directive's requirements concerning 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*'⁴.

Similarly, the Charter of Fundamental Rights⁵ provides at 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.'

¹ 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.

² Nothing in this report should be understood as prejudging the position which the Commission may take in the future in any legal proceedings.

³ See the range of studies cited at Chapter 5.2 of the Working Paper.

⁴ *Dellas*, Case C-14/04, [2005] ECR-I-10253, paras 40-41 and 49: *FNV*, Case C-124/05, para 28.

⁵ Charter of Fundamental Rights of the European Union (OJ C 303, 14.12.2007, p. 1).

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 any overtime)*
- *minimum daily and weekly rest breaks (at least 11 consecutive hours' daily rest and 35 hours' 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 hours exceeding the 48-hour limit (the so-called 'opt-out'). Collective agreements may provide for flexibility on organisation of working time, for instance by allowing weekly working time to be averaged over periods of up to 12 months.

3. ANALYSIS OF APPLICATION IN THE MEMBER STATES

In 2008 the Commission launched a fully fledged examination of the implementation of the Directive by all Member States, based on national reports (including the views of the social partners at national level), reports from the social partners at European level, and information available to the Commission from other sources, such as independent expert reports. The most important findings of general relevance are summarised in points 3.1 to 3.9 below. These points are highly inter-related, and any assessment of compliance with the Directive must take this into account.

3.1. Limits to working time

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

However, doctors may be required to work an average of 60 hours per week in *Austria* under sectoral legislation, without their consent. In *France*, the unclear provisions on length of doctors' working time seem to have led to a practice where the regular working time rosters of doctors in public hospitals can already exceed the 48-hour limit under the Directive. *Hungary* allows an average working time of 60 to 72 hours per week, subject to agreement by the parties concerned, in so-called 'stand-by jobs': it is not clear that these contracts would fall within the 'opt-out' derogation. Also, in several Member States the application of rules relating to on-call time, doctors in training, or public sector workers raises issues about conformity with the working time limit.

The Directive provides that, when calculating limits to weekly working time, the hours worked may be averaged over a 'reference period'. This allows longer hours to be worked in certain weeks, provided that correspondingly shorter hours are worked in other weeks. Normally, the reference period is not to exceed four months; but it may be extended by law to not more than six months in certain activities, and by collective bargaining, to not more than twelve months in any activity.

In general, the reference period has been satisfactorily applied in Member States; and in some Member States, significant amendments have been made recently to improve compliance. However, a number of Member States still do not appear to comply fully with the Directive. *Bulgaria* and *Germany* allow a six-month reference period for all activities. *Germany*, *Hungary*, *Poland*, and *Spain* allow a 12-month reference period without a collective agreement.

3.2. On-call time

‘On-call time’ refers to periods where a worker is required to remain at the workplace, ready to carry out his or her duties if requested to do so. According to the Court of Justice’s rulings⁶, all on-call time at the workplace 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.

The analysis showed that a number of Member States have made significant changes to their legislation or practice, in order to bring it closer to what is required by the Court of Justice’s decisions: notably the *Czech Republic*, *France*, *Germany*, *Hungary*, *Netherlands*, *Poland* (for certain sectors), *Slovakia* and the *UK*. In eleven Member States these changes included introducing the ‘opt-out’, see point 3.7.

At this stage, it seems from available information that on-call time at the workplace is entirely treated as working time under national law in nine Member States: *Cyprus*, the *Czech Republic*, *Estonia*, *Italy*, *Latvia*, *Lithuania*, *Malta*, the *Netherlands*, and the *UK*.

This is also the general position, with some relatively limited sectoral exceptions, in *Austria* and *Hungary*. In addition, on-call time at the workplace is entirely treated as working time under the Labour Code as regards the private sector (but not for all of the public sector) in *Spain* and *Slovakia*. Moreover, on-call time at the workplace in the specific context of the *public health sector* is now entirely treated as working time in *France*, *Poland*, *Slovakia* and *Spain*.

It is also clear that there is a significant number of Member States where on-call time at the workplace is still not fully treated as working time in accordance with the Court’s decisions:

- There is no legal requirement or practice of treating ‘active’ on-call time as working time in *Ireland* (as a general rule) or in *Greece* (doctors in public health services).
- ‘Inactive’ on-call time at the workplace is, as a general rule, *not* fully counted as working time by the applicable national law or collective agreements in *Denmark*, *Greece* and *Ireland*; this is also the case (except in specific sectors) in *Poland*⁷. It is not fully counted as working time, under specific sectoral rules, in *Greece* (public sector doctors); *Slovenia* (armed forces, police, prisons, judges, prosecutors) and *Spain* (Guardia Civil).

⁶ *SIMAP* (C-303/98), *Jaeger* (C-151/02), *Pfeiffer* (C-398/01) and *Dellas* (C-14/04).

⁷ With the exception of health services and professional soldiers.

- In *Belgium, Finland* and *Sweden*, national law generally treats inactive on-call time as working time, but has allowed derogations from this principle through collective agreements, which often do not comply with the Court's decisions. In *France*, it is common for sectoral collective agreements to provide for 'équivalence' (meaning that inactive periods of on-call time at the workplace will be only partially counted). The French authorities have called on the social partners to review their agreements, but it is not clear that they all comply fully.
- Compliance regarding on-call time remains unclear in *Bulgaria* and *Romania* (generally), in *Slovenia* (other than parts of the public service already mentioned above) and in *Spain* (public service, police, firefighters).

3.3. Compensatory rest

The Directive's core requirements for minimum daily and weekly rest periods and a rest break during the working day have, in general, been satisfactorily transposed.

The main difficulties lie rather with the use of derogations, which allow a minimum rest to be postponed or shortened, but only on condition that the worker receives an extra rest period of equivalent length at another time to compensate for the missed rest ('equivalent compensatory rest'). The rules do not allow minimum rests to be missed altogether, except 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, compensatory rest should be provided promptly, in the period immediately following that in which the rest was missed.

In several Member States, derogations have been used in a way which goes beyond what these rules permit. There are three main problems:

- **Excluding certain workers from the right to rest periods:** this is a problem for specific sectors in *Belgium* (residential schools, defence forces); *Greece* (public sector doctors); and *Hungary* (occasional workers, public sector schools, defence forces). It is a problem, more broadly, as regards certain workers in *Austria* (including workers in health institutions and residential care) and in *Latvia*.
- **Allowing derogations which do not require equivalent compensatory rest:** *Belgium, Bulgaria, Estonia, Hungary, and Latvia* all allow such derogations in a widely-defined range of activities or sectors. *Germany* (by collective agreement only) and *Romania* allow them in on-call work and health services respectively. *Portugal* allows them for the public sector.
- **Delays in providing compensatory rest,** contrary to the *Jaeger* judgment: in nine Member States, there seems to be no general legally binding norm about the timing of compensatory rest. They are: *Austria* (as regards weekly rest), *Cyprus, Denmark, France, Greece, Ireland, Italy, Luxembourg and Malta*. In *Belgium, Germany, and Latvia*, there is no legally binding norm for substantial sectors or situations.

In *Austria* (as regards daily rest), *Belgium* (public sector), *Denmark* (under some collective agreements), *Finland, Hungary, Poland* (for some sectors), *Portugal* (public sector), *Slovakia, Slovenia, and Spain*, compensatory rest must be provided within a specified period, but that period can involve a much longer delay than under the *Jaeger* judgment.

3.4. Doctors in training

Doctors in training are covered by the Working Time Directive, following an amending Directive of 2000⁸. It allowed the 48-hour limit to average weekly working time to be introduced very gradually for these workers, up to 31 July 2009.

This change has clearly led to significant improvements in health and safety protection, in a number of Member States where no minimum rest periods, or limits to working time, previously applied to doctors in training. However, the picture is not yet satisfactory.

Greece has suspended transposition for this group: as a result, doctors in training can still be required to miss minimum rest periods and to work very excessive hours (between 66 and 80 hours per week on average). *Ireland* does not apply its transposing legislation, so that a substantial number of doctors in training are still working over 60 hours per week on average and some are working over 90 hours in a single week, without receiving minimum daily rests. *Belgium* did not previously transpose the Directive for doctors in training, who worked up to 79 hours per week on average, but it is currently legislating to do so⁹. In *France*, the national rules on doctors in training still do not appear to set any effective upper limit to their working time.

3.5. Public sector workers

The Directive applies to the public sector. There is a limited exception for certain public service activities, such as the armed forces, police or some activities of the civil protection services. However, the Court of Justice has held that this derogation must be limited to exceptional contexts, such as natural or technological disasters, attacks or serious accidents, and that the normal activities of such workers are covered by the Directive¹⁰.

In general, Member States have transposed the Directive for the public sector. However, several Member States have not transposed it to cover certain groups of workers.

The Directive has not been transposed in *Cyprus*, *Ireland*, or *Italy*, as regards the armed forces and the police. In *Spain*, it has not been transposed for the police (Guardia Civil) and it does not seem to have been transposed for most other public sector workers, including civil protection services. In *Italy*, it is also not transposed for the emergency services; and derogations for doctors in public health services, court and prison staff, as well as the exclusion of employees in libraries, museums and State archaeological sites, seem to exceed what the Directive would allow. In *Greece*, the Directive is not transposed for doctors working in the public sector.

3.6. Workers with more than one employment contract

The Directive does not expressly state how working time limits should be applied in the case of a worker who is working under two or more employment relationships at the same time. Should the limits be respected ‘per-worker’ (adding up the hours worked for all concurrent employers): or ‘per-contract’ (applying the limits to each employment relationship separately)?

⁸ Directive 2000/34/EC (OJ L 195, 1.8.2000, p. 41).

⁹ On 13 December 2010, the amending legislation had been approved by both Chambers and was awaiting royal signature. It was expected to enter into force early in 2011.

¹⁰ *Feuerwehr Hamburg* (C-52/04) and *Commission v Spain* (C-132/04).

The practice in Member States varies considerably on this point. Fourteen Member States apply the Directive per-worker. However, eleven Member States apply it per-contract. They are: the *Czech Republic, Denmark, Hungary¹¹, Latvia, Malta, Poland, Portugal, Romania, Slovakia, Spain, and Sweden*. *Belgium and Finland* adopt an intermediate position.

The Commission has already stated that, as far as possible, the Directive must be applied per worker¹². Given its objective of protecting workers' health and safety, Member States should put in place appropriate mechanisms for monitoring and enforcement, particularly where there are concurrent contracts with the same employer.

3.7. The 'opt-out'

The picture regarding use of the opt-out has changed considerably over recent years. In 2000, the UK was the only Member State to make use of the opt-out. Sixteen Member States now do so, including one which is currently legislating to introduce it.

Eleven Member States indicate that they have not allowed the use of the opt-out in their transposing legislation: they are *Austria, Denmark, Finland, Greece, Ireland, Italy, Lithuania, Luxembourg, Portugal, Romania and Sweden*.

It is important to note that the use of the opt-out varies considerably. Five Member States (*Bulgaria, Cyprus, Estonia, Malta, and the UK*) allow its use, irrespective of sector. Eleven (*Belgium, the Czech Republic, France¹³, Germany, Hungary, Latvia, the Netherlands, Poland, Slovakia, Slovenia, and Spain*) allow (or are currently introducing) a more limited use of the opt-out, restricted to specific sectors or to jobs which make extensive use of on-call time.

There is also wide variation in the protective conditions attached to the opt-out. For example, some Member States specify limits to average weekly hours of opted-out workers (ranging from 51 hours in *Spain*, to 72 hours including on-call time in *Hungary*), while seven Member States have no explicit limit for these workers. Two Member States (*Germany and the Netherlands*) require a collective agreement, as well as the consent of the individual worker, for an opt-out to be valid. Only three Member States (*Germany, Latvia and Malta*) mention a clear obligation for the employer to record working hours of opted-out workers, and only two (*Czech Republic and Slovakia*) mention an obligation for the employer to notify the labour inspectorate when the opt-out is used. In addition, *Germany* requires specific measures to take account of health and safety, and the *Netherlands* requires the social partners to first consider whether the need for an opt-out could be avoided by organising the work differently.

The opt-out has been introduced very recently in many Member States. However, the Commission is unable to fully evaluate its operation in practice, since Member States' reports do not provide adequate information about the number of hours actually worked by opted-out workers, and over what period of time. Most Member States do not seem to provide for any monitoring or recording of working time of opted-out workers. This situation deprives policy-makers, Member States who are primarily responsible for enforcing EU law, and the Commission as guardian of the Treaties, of the basic information needed to examine how far

¹¹ Except in health care activities.

¹² Commission Report on the Working Time Directive - COM(2000) 787, point 14.2.

¹³ The legal situation in France regarding excess hours worked in on-call posts is particular and is set out in detail in the attached Working Paper.

opted-out employees (as well as co-workers or clients) may be exposed to risks caused by excessive working time.

There is also cause for concern that, in some Member States, the health and safety objectives of the Directive may not be respected, and the requirement of the worker's advance voluntary consent to opt out may not be properly applied.

3.8. Annual leave

The right to paid annual leave under Article 7 seems, in general, to be satisfactorily transposed. The main problems relate to delays, and to the exhaustion of the right to paid annual leave.

In some Member States, national law can require a worker to wait up to one year before he or she may actually take any paid annual leave. Also, in some Member States, the right to paid annual leave conferred by the Directive is lost at the end of a leave year or of a carry-over period, even if the worker has not had an opportunity to take it for reasons beyond their control, such as illness. This is not compatible with the Directive¹⁴.

3.9. Night work

Because the human body is more sensitive at night to changes in its environment and to certain more onerous types of work, long periods of night work can present extra risks to workers' health and safety. The Directive therefore provides more protective standards for night workers: not more than 8 hours' work per day on average, and not more than 8 hours on any day in night work which is particularly hazardous or stressful. Derogations are possible, either by legislation or by collective agreement, on condition that the night worker receives equivalent compensatory rest.

Overall, the rules regarding night work have been transposed satisfactorily. The main gaps in transposition which were noted in the Commission's last implementation report on this Directive have been addressed. However, in *Hungary*, the limit to night work does not seem to have been transposed. The special limit for working time in particularly hazardous or stressful night work does not seem to be transposed fully in *Estonia* or transposed at all in *Italy*; and in *Spain* it can be exceeded. Moreover, in *Estonia, Latvia, Romania, Ireland* and *Italy*, such work does not seem to be clearly defined, which risks making any limit ineffective.

4. ASSESSMENTS BY MEMBER STATES AND BY THE SOCIAL PARTNERS

In their implementation reports, sixteen Member States considered that transposing the Directive had produced a positive overall impact; by providing a higher level of protection for workers, by making national law simpler and more effective, or by extending legal protection to previously excluded groups.

However, eleven Member States considered that the *acquis* on on-call time and immediate compensatory rest had, or would have, a significant negative impact, by creating practical difficulties for the organisation of working time, particularly in 24-hour services, such as health care or fire-fighting. Fourteen Member States called for changes to the Directive as an

¹⁴ *BECTU* (C- 173/99); *Schultz – Hoff and Stringer* (C-350/06 and C-520/06).

urgent priority regarding on-call time, more flexible reference periods or the timing of compensatory rest.

Trade unions underlined the Directive's importance for European social policy, and the continuing need for common minimum standards in this area at European level. Protection against excessive working hours should not be reduced; derogations should be tightened up, the opt-out should be phased out, protective conditions more strictly applied and overall enforcement improved.

Employers at European level saw working time as a key element for flexibility and competitiveness. But they generally saw the Directive as going beyond what was needed to protect workers' health and safety. They called for greater simplicity and flexibility in national transposition and for changes to the Directive as an urgent priority to allow longer reference periods, and regarding on-call time and the timing of compensatory rest.

National reports from eleven Member States, and the report by European-level trade unions, expressed strong concerns about the effectiveness of monitoring and enforcement of the Directive at national level, particularly in specific sectors. The most frequently mentioned issues were:

- excess working time and missed minimum rests in public hospitals, particularly regarding on-call time by doctors
- employers who did not observe working time limits, reference periods or minimum daily rests or did not keep proper records of excess working time
- national rules which transposed the Directive in an unclear or impractical way
- unclear scope of the derogation at Article 17.1 ('autonomous workers')¹⁵
- employers who did not provide annual leave entitlements within the year.

Employers' organisations generally considered enforcement and monitoring to be satisfactory. In certain Member States, they felt that monitoring imposed excessive regulatory burdens on SMEs and on compliant undertakings.

5. CONCLUSIONS

The Commission acknowledges the considerable efforts that have been made in many Member States to achieve transposition or to improve compliance following decisions of the Court of Justice or national courts, or notifications by the Commission.

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

However, the Commission's analysis shows that a large number of Member States have introduced the use of the 'opt-out' since 2000, with eleven doing so, in order to manage their current difficulties regarding on-call time and compensatory rest in 24-hour services.

¹⁵ See attached Working Paper, sections 4.2, 9.1 and 9.2.

The analysis also shows that there remain problems with the implementation of core elements of the Directive, as interpreted by the Court of Justice, such as:

- the definition of working time (including 'on-call' time), and the rules on equivalent compensatory rest (where minimum rest periods are postponed), particularly in services operating on a 24 hour/ 7 day basis;
- the situation of workers with multiple contracts;
- the situation of specific groups of workers (particularly in public defence and security services; and the so-called 'autonomous workers');
- the lack of proper monitoring or enforcement of the conditions attached to the opt-out, in many of the Member States who allow its use.

The Commission will :

- Assess the Directive's overall impact on workers' health and safety against the background of evolving work patterns and models of work organisation;
- Clarify the interpretation of some rules, taking into account the jurisprudence, the experience of Member States in its application, and the opinions of the social partners¹⁶;
- Address the position arising under national laws or practices, with particular attention to those which result in workers being obliged to work excessive hours or to work without adequate rest.

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 Commission launched a review of the Directive in March 2010¹⁷, based on consultation of the social partners at European level under Article 154(2) TFEU.

It has also launched a detailed study of the economic and social impact of the Directive, which will complement the legal impact assessment provided by this Report.

The Commission is determined to bring its review of the Working Time Directive to a successful conclusion. With this aim in view, it is adopting, simultaneously with this Report, a Communication launching the second phase consultation of the social partners under Article 154(3) TFEU.

¹⁶ Details are set out in COM(2010) 801, mentioned in the footnote below.

¹⁷ COM(2010) 106, 24.3.2010; COM(2010) 801, 21.12.2010.