



NOTE FOR THE ATTENTION OF THE SOCIAL PARTNERS

HEARING ON THE WORKING TIME INITIATIVE

19 JANUARY 2017

1. Introduction

The Commission is committed to step up efforts on application, implementation and enforcement of EU law in order to make sure its policies deliver better results for citizens, businesses and public authorities¹.

The Commission Work Programme 2017 announced a package of actions related to the European Pillar of Social Rights, following the public consultation, including an initiative 'on the implementation of the Working Time Directive (non-legislative)'.

This initiative would be one of the concrete outputs linked to the European Pillar of Social Rights to be presented in March, and one of the first examples of the strategic approach to the application of EU legislation set out in the Communication *EU Law: Better Results through Better Application*, which proposes reinforced cooperation and capacity building with Member States and a more strategic approach to enforcement and infringements.²

The aim of the initiative on the Working Time Directive is to provide legal guidance to reinforce legal certainty without engaging into a process of legislative revision, by means of a **Interpretative Communication**.

It will be accompanied by a new **Implementation Report**³, analysing the state of play as regards the transposition of the Directive.

The proposed initiative on the Working Time Directive is the culmination of a thorough review process over the past 6 years, to which the EU Social Partners actively participated at several stages.

The review of the Working Time Directive sought to:

¹ Communication *Better Regulation: Delivering better results for a stronger Union*, COM(2016) 615 final, pages 2 and 9.

² Communication *EU Law: Better Results through Better Application*, C(2016) 8600 final

³ The previous implementation report is accessible under the following link: <http://ec.europa.eu/social/BlobServlet?docId=6426&langId=en>

- ensure legal certainty and clarity, notably in view of effective enforcement and in particular in the light of the important case-law of the Court of Justice of the European Union (CJEU) on the Directive over the past decades;
- take account of current trends in the world of work (e.g. increase of flexible, autonomous and digitalised forms of work) and make sure that both workers and employers can implement flexible work organisation while preserving the purpose of the Directive to protect the health and safety of workers;
- secure the protection of all workers, including the most vulnerable workers who work atypical or excessive hours;
- prevent excessive regulatory burden.

The review process included a two stage consultation of EU Social Partners in 2010⁴ as well as a public consultation and several external studies carried out in the period 2014-2015.

In the period 2010-2012 the review was suspended in view of the negotiations between the cross-industry social partners, which aimed at redesigning in a balanced manner the legal framework in the area of working time, and which did not conclude in an agreement.

The Commission resumed the review process, including the assessment of options for follow-up, in 2013.

A public consultation on the Working Time Directive was held from 1 December 2014 till 18 March 2015 and received 2,193 responses. Submissions were received from respondents in all Member States but one⁵. However the contributions from 5 countries⁶ amount to more than 70% of the overall turnout. In 11 Member States⁷, fewer than 10 respondents participated.

Over 60 % of the submissions were made by individual citizens, 10% by workers' organisations or trade unions and 7% by employers' organisations. SMEs comprised 5% of respondents and large companies 4%. 27 European Social Partners organisations participated, 17 of which were employers' organisations and 10 representing workers or certain categories of workers. Additionally, 11 national governments or ministries⁸ submitted a contribution to the consultation.

As concerns sectors, there was significant participation from public services (27%, notably police and firefighters) and the healthcare/residential care sector (22%).

⁴*Reviewing the Working Time Directive (first-phase consultation of the social partners at European Union level under Article 154 of the TFEU)* Brussels, 24.3.2010 COM(2010) 106 final;

Reviewing the Working Time Directive (Second-phase consultation of the social partners at European level under Article 154 TFEU), Brussels, COM(2010) 801/3

⁵ Hungary.

⁶ The United Kingdom, Germany, France, the Netherlands and Austria.

⁷ Latvia, Malta, Slovakia, Croatia, Lithuania, Slovenia, Estonia, Cyprus, Denmark, Greece and Luxembourg.

⁸ Belgium, Cyprus, the Czech Republic, Denmark, Estonia, France, Ireland, Latvia, Malta, the Netherlands and the United Kingdom. With the exception of France and the United Kingdom, submissions were made by individual ministries.

On main substantive issues (opt-out, on-call time, reference periods, and concurrent contracts) results suggest widely persistent divergences in views among stakeholder categories.

Replies as to the future approach for the Directive seemed to reflect awareness among many stakeholders of the difficulty of coming to an agreement which would satisfy all parties' positions.

While some employers' organisations, including at EU level, called for an overall revision of the text, a majority of trade unions and several employers' organisations did not favour a general revision of the Directive at present, despite explicit dissatisfaction with the current rules on both sides.

Among the 11 governments or ministries which responded, views were not homogenous and among those which contributed, 6 favoured an overall revision while 2 did not wish to reopen the current Directive.

39% of citizens expressed a preference not to substantively change the Directive while 24% of individual respondents would favour sector-specific legislative changes (e.g. in sectors that work on a '24/7' basis such as hospital or emergency services). 22% of citizens who participated preferred an overall revision of the Directive.

Overall, it arises from the results of the public consultation that there is a need to clarify the current rules.

2. Rationale & main messages

One of the conclusions of the Commission's review is that the Working Time Directive remains a relevant instrument in today's world of work.

At the same time, there is a pressing need to bring clarity and guidance on its content and application. This would allow the Commission and social partners to address the current trends in working conditions and work organisation in the most operational and efficient way, and to preserve the purpose of the Directive of protecting the health and safety of workers in a balanced and effective manner.

First of all the initiative represents a concrete response to one of the emerging findings of the Pillar consultation, that the *acquis* should be better implemented and enforced.

The Working Time Directive is complex to implement due to the volume of related case-law, the application of the flexibility and derogations it permits for employers, and the impact of changes to the world of work. This makes it a good candidate for applying the Commission's new "better results through better application" approach to EU law, recently adopted.

The second feature which underlies the initiative is the need to support modern work organisation in the most operational and efficient way while preserving the purpose of the Directive of protecting the health and safety of workers. This initiative contributes to address the current trends in working conditions such as the increase of flexible, autonomous and digitalised forms of work, or the demand for better work-life balance.

Besides the two above-mentioned drivers, a number of specific considerations should be underlined, as they flow from the review diagnosis which is presented in the Roadmap:

- Insufficient clarity on a number of legal issues relating to the Directive (e.g. personal scope, definition of working time/ on-call time, timing of compensatory rest, paid annual leave): many issues were left unresolved, or were unforeseen, by the co-legislators of the existing Directive. The CJEU has played an important role in resolving a number of these outstanding issues, but the ensuing case law (as developed in the period 2000 up to now) has not been consolidated into a single text, making it difficult for national authorities/private employers/workers to access, which generates undesirable regulatory burdens or consequential costs.
- Incorrect application of the Directive in an evolving work organisation: despite improvements over the last years, existing provisions and derogations are not always properly used, which generates complaints and infringements. A minority of workers consistently works over the 48-hour average weekly limit, sometimes for very excessive hours with risks both for them and for others (e.g. co-workers, service users), disruptions to the balance between work and family life, and unequal conditions within the Single Market.

The objectives of this initiative are:

- to offer greater certainty to national legislators and clarity for employers about the obligations and flexibilities contained in the Directive, so as to contribute to reducing burdens and infringements;
- to help better apply the Directive's provisions in the context of new and flexible work organisations;
- to ensure the effective enforcement of existing EU minimum standards and thus support a better protection of the workers' health and safety risks associated with excessive or inappropriate working hours and inadequate rest periods, to the benefits of all parties;
- (indirectly) The above mentioned objectives will contribute to promote sustainable employment and socio-economic convergence within the EU, enhancing free movement and increased efficiency of the internal market.

3. The Interpretative Communication

The aim of the Interpretative Communication is to bring legal clarity and certainty to the Member States, social partners and other stakeholders when applying the Working Time Directive, including clarifying the scope for flexibility and derogations in its application, and to assist Member States in implementing the Directive in a way that minimises burdens and avoids infringements.

To that end, the document will compile the provisions arising from both the text of the Directive and its interpretation through the CJEU case-law in a single document in order to make them clearer, more readable and accessible to all.

Over the past 30 years, more than 50 judgments and orders of the CJEU have dealt with the Working Time Directive and interpreted its provisions. This significant amount of case-law makes it difficult for Member States, social partners, stakeholders and interested

citizens to understand the exact content and extent of the Directive's provisions, since the part contained in CJEU rulings is not easily accessible. Yet this jurisprudence is key to ensure a proper implementation of the Directive in order to avoid that misunderstandings or lack of awareness as to the latest developments in case-law lead to compliance issues.

The Interpretative Communication will further clarify the Commission's understanding of the requirements of the Directive, as interpreted by the Court, as well as of its scope and the flexibility that is allowed for under certain conditions in its implementation. While the Directive aims to protect the safety and health of workers and therefore regulates certain aspects of the organisation of working time, its provisions also contain a number of provisions which allow flexibility for employers if these are included in national transposition instruments⁹. This notably includes the flexibility directly enshrined in the basic provisions of the directives such as the use of the reference period of 14 days to calculate workers' weekly rest periods, and also derogations which may be created by collective agreements in all sectors, by law in specific sectors such as those requiring continuity of service, or the individual 'opt-out' which, subject to certain protective conditions, allows workers to agree to work for more than 48 hours per week on average.

Clarifying the exact scope of the provisions and of the derogations permitted will help reduce non-conformity and abuses, and thus safely and properly address more flexible forms of work, as well as alleviate administrative burden by decreasing the need for successive changes to national, regional or local legal texts and to established patterns of work organisation.

4. The Implementation Report

This Report flows from Article 24(3) of the Directive that, every 5 years, the Commission shall submit to the European Parliament, the Council and the European Economic and Social Committee a report on its application. The last report was adopted in December 2010.

As the previous one, this new Report aims at analysing the state of play as regards the transposition of the Directive and identifying the remaining or arising issues.

It is based on different sources of information: reports from the national authorities, reports from social partners, previous implementation reports of the Commission, information collected through EU-pilot and infringement procedures and Commission services' own research. The analysis is currently being verified and complemented by the network of the European Centre of Expertise in the field of labour law, employment and labour market policies (ECE).

The preliminary analysis shows that while there have been some improvements in the implementation of the Directive since 2010, the transposition measures of the Member States remain largely the same. There are persisting problems in a number of Member States concerning specific groups of workers, in particular public sector workers such as armed forces, police and firefighters and the so-called autonomous workers. On substance, the most common issues that remain are issues relating to the use of

⁹ Member States have the possibility to apply more protective provisions in their transposition, if they choose to do so.

derogations from the requirements for daily and weekly rest¹⁰ or annual leave. Furthermore there are still some cases where on-call time is not (or not entirely) considered as working time.

5. Questions

1. What are the views of the social partners on this non-legislative initiative as presented?
2. In particular, which provisions of the Working Time Directive are to be clarified in the interpretative communication in view of the needs and challenges that the social partners may identify when the Directive is implemented on the ground?

¹⁰ Inter alia workers are not entitled to compensatory rest when their normal rest periods are shorter than 11 hours