

FACT SHEET

# FUNDAMENTAL RIGHTS AND THE WORKING TIME DIRECTIVE



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The Charter of Fundamental Rights guarantees all workers the right to limitation of their working hours and protection against the health and safety risks of long and irregular hours of work. *This provision is incompatible with individual opt-outs and other exclusions from working time protection.*

The EU Treaties stipulate that social policies should be developed to improve the living and working conditions of European workers and citizens. *This provision is incompatible with proposals to weaken existing standards.*

Questions linked to working time are fundamental to trade unions and our society, and lie at the heart of Social Europe. Safeguarding the health and safety of workers, as well as that of third parties, and allowing working people to reconcile private and professional life is crucial to the interests of workers, societies and economies.

# FUNDAMENTAL RIGHTS ON WORKING TIME

Working time is a fundamental right enshrined in European and international law. In the European Union these fundamental rights have been enshrined in the Charter of Fundamental Rights and in the Treaties:

- » The Charter of Fundamental Rights became legally binding following the entry into force of the Lisbon Treaty. Article 31 of the Charter deals with ‘fair and just working conditions’, and specifies that **“every worker has the right to working conditions which respect his or her health, safety and dignity”**. It adds that **“every worker has the right to limitation of maximum working hours, to daily and weekly rest and to an annual period of paid leave”**.
- » The Treaty has specified that the European Union and the Member States shall have as their objective **“the promotion of employment, improved living and working conditions, so as to make possible their harmonisation, while the improvement is being maintained”** (Article 151). This also translates into the duty to progressively reduce long working hours, while improvements are maintained.
- » International standards on the regulation of working time include the preamble to the ILO Constitution that created the International Labour Organisation in 1919. This covers the **“regulation of the hours of work, including the establishment**

of a maximum working day and week” of an eight hour day and a 48 hour working week<sup>1</sup>. There are thirty-nine different ILO standards that impact on working time, covering daily and weekly working time (eight hour day, 40 hour week), weekly rest period of a minimum of 24 hours, a minimum entitlement to three weeks annual leave, as well as standards on night work, part-time work and workers with family responsibilities.

- » The Council of Europe’s 1961 European Social Charter (as well as the revised Charter 1996) also established in Art.2 the goal of reduced working hours requiring Member States to ensure “reasonable daily and weekly working hours” and the progressive reduction in the length of the working week.

Despite working time being a fundamental right, the ETUC has been highly concerned about the consistent attempts by the European Commission to reduce these fundamental rights under the revision of the Working Time Directive (WTD).

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1 In 1919 the ILO first set the eight-hour working day and 48-hour week for industrial workers, in the ILO Convention No. 1 on Hours of Work (Industry). In 1930 Convention No 30 extended the principle of an eight-hour day and 48 hour working week to those working in the commercial and office sectors of the economy.

A strong WTD is even more relevant today in light of the significant changes that have occurred in the workplace, in the organisation of work and societal changes. For this reason Europe requires a modern organisation of work and working time that meets workers' needs for healthy working hours, a better work-life balance and decent wages. These are crucial to achieving the EU's goals of more and better employment, competitiveness and gender equality, and to enable Europe to respond to the challenges resulting from the economic crisis, demographic ageing and global competition.

# THE WORKING TIME DIRECTIVE (WTD)

The WTD establishes minimum health and safety requirements on working time. The original Directive 93/104/EC, adopted in 1993, was amended in 2000 by Directive 2000/34/EC and the two have now been consolidated into Directive 2003/88/EC<sup>1</sup>.

The Preamble to the WTD states that “The improvement of workers’ safety and health at work is an objective which should not be subordinated to purely economic considerations”.

The Directive covers:

- » Maximum weekly working time of 48 hours on average, including overtime
- » Minimum of four weeks paid annual leave
- » A rest break if the working day is longer than six hours
- » Minimum rest period of 11 consecutive hours in each 24 hours period, Minimum uninterrupted rest period of 24 hours plus the 11 hours’ daily rest
- » A maximum of eight hours’ night work, on average, in each 24 hours period

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1 Council Directive 93/104/EC of 23 November 1993 concerning certain aspects of the organisation of working time and Council Directive 2003/88/EC of 4 November 2003 concerning certain aspects of the organisation of working time.

The minimum requirements of the WTD are binding for all Member States of the EU and are important in preventing employers from getting a competitive advantage by putting pressure on workers to accept long and irregular working hours. The current Directive is already very flexible and establishes a maximum 48-hour working week, but permits working time to be averaged out over four months, thus allowing working weeks of more than 48 hours to be compensated by shorter working weeks.

In addition, the WTD includes two far-reaching derogations, allowing for almost unlimited extension of working hours.

- » First, the four-month reference period can be extended to one year, but only in specific cases, on the basis of collective agreements.
- » Second, Member States are allowed not to apply the maximum 48-hour limit at all, on the basis of voluntary agreements with individual workers: the so-called 'opt-out'. The Commission was under a legal obligation to re-examine the latter within seven years of the directive's implementation in November 2003. Since then the ETUC has demanded the deletion of the individual opt-out, in line with the Treaty obligation to limit maximum working hours for all workers in the EU.



# REVISION OF THE WTD

Attempts by the European Commission to revise the Working Time Directive date back to 22 September 2004, when the Commission made a proposal to include the individual 'opt out' clause in the main Directive and to address the issue of on-call time, following ECJ judgements on the issue (see box below). Following several years of deadlock, a common position on the Directive was agreed by the Member States in 2008 in the Employment, Social Policy, Health and Consumer Affairs Council (EPSCO). The June 2008 Council Agreement contained three main proposals:

- » To keep the individual 'opt-out' in the Directive, enabling employers to agree with individual workers working hours beyond the maximum working hours of 40 hours a week in the Directive. In particular, the 'opt out' clause had been promoted by the UK along with a number of other Member States.
- » To define so-called inactive parts of on-call duty as not being working time, even when the worker has to be available in the workplace. This was on the basis that on-call working time would be divided into 'active' and 'inactive' periods
- » To extend the reference period for counting the average maximum working week of 48 hours from four to 12 months, without any reference to proper safeguard provisions, such as collective agreements

At the time, and since then, the ETUC has argued that these provisions are regressive and undermine working conditions and trade union rights to collective bargaining.

The 2008 position of the Council had not taken into account any of the proposals made by the European Parliament in its first reading. This led the European Parliament, in the second reading in 2008 to reject the common position of the Member States. This resulted in deadlock, particularly regarding the 'opt out' and 'on call' working time, with the European Commission and the European Parliament holding diametrically opposed positions. The Working Time Directive was referred to a conciliation committee in early 2009 under the co-decision procedure between the Council and the Parliament. However, this was unsuccessful and the deadlock remained.

### On-call: the SIMAP, Jaeger, Pfeiffer, and Dellas cases in the European Court of Justice (ECJ)

Those judgements have been important in defining on-call work as working time. In the SIMAP, Jaeger and Pfeiffer cases the ECJ ruled that 'on-call working time' i.e. when the employee must be available in the workplace must be defined as working time under the Directive. Furthermore compensatory rest time must be taken immediately after the working period. The judgements were not widely welcomed by some Member States who as a

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reaction applied the opt-out to cases of on-call working time in areas such as doctors working on call in hospitals.

The SIMAP judgement (3 October 2000, C-303/98) concerned a case brought before the ECJ on behalf of a group of Spanish doctors. The ruling declared that all time spent resident on-call would count as working time and the ECJ clearly stated, by referring to the link between on-call work and the health and safety objective of the WTD, that time spent on-call by doctors in primary health care teams must be regarded in its entirety as working time, and where appropriate as overtime, if these doctors are required to be at the health centre. If they must merely be contactable at all times when on call, only time linked to the actual provision of health care services must be regarded as working time: *"the objective of the Directive is to ensure the safety and health of workers by granting them minimum periods of rest and adequate breaks. (...) to exclude duty on-call from working time if physical presence is required would seriously undermine that objective."*

The ECJ judgement Jaeger (9 September 2003, C-151/02), concerning the application of on-call within the UK National Health Service, followed the SIMAP line. The ECJ ruled that the Directive does not allow a Member State to classify in its legislation periods of inactivity of a worker in the context of such on-call duty as rest. *"Directive 93/104 precludes national legislation (...) which treats as periods of rest the periods of on-call duty during*

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*which the doctor is not actually required to perform any professional task and may rest but must be present and remain available at the place determined by the employer with a view to performance of those services if need be or when he is requested to intervene.(...)In fact that is the only interpretation which accords with the objective of Directive 93/104 which is to secure effective protection of the safety and health of employees by allowing them to enjoy minimum periods of rest”.*

On the issue of compensatory rest, the ECJ said: in order to make use of the derogation possibilities of article 17 par. 2 of the Directive (which allows derogation of the 11-hour daily rest for instance for health care workers) *“a reduction in the daily rest period of 11 consecutive hours by a period of on-call duty performed in addition to normal working time is subject to the condition that equivalent compensating rest periods be accorded to the workers concerned at times immediately following the corresponding periods worked.”*

In the Dellas case (Abdelkader Dellas and others v Premier Ministre, European Court of Justice, 1 December 2005) the ECJ ruled that the French system was incompatible with the Directive. Mr Dellas’s periods of on-call duty at the workplace should have been taken into account in their entirety when calculating maximum daily and weekly working time permitted by the directive. Citing earlier decisions (SIMAP and Jaeger), the ECJ ruled that

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on-call duty performed by a worker where they are required to be physically present on the employer's premises must be regarded in its entirety as 'working time', regardless of the work actually done.

On the basis of these ECJ rulings the entire time that an employee is required to be present at work has to count as actual working hours, even if the employee is allowed to sleep during their shift. However, under the European Commission's proposed revision of the Working Time Directive in 2004 a distinction was made between active and inactive elements of on-call time; while the September 2008 Communication to the European Parliament stated that inactive periods of on-call working time were not to be considered as working time 'unless national law and collective agreements so provided'. The Parliament voted (in its second reading) for any period of on-call time, including inactive time, spent on the employer's premises to be counted as working time. Some Member States have refused to implement these judgements, and used them as a pretext for applying the opt-out, especially to doctors in hospitals and workers working on-call in other professions and sectors, such as fire fighters.

# COMMISSION COMMUNICATION ON A NEW “REVIEW” OF THE WTD: FIRST AND SECOND STAGE CONSULTATIONS AND ETUC REACTION

Following the stalemate on the WTD and the lack of success in the conciliation process in 2009, on 24 March 2010, the Commission adopted a Communication on the review of the WTD, as a first stage of consultations with the EU social partners on the ‘possible direction of EU action regarding the Working Time Directive’. The Commission’s consultation paper proposed that a comprehensive review of the WTD be carried out ‘to reflect broadly on the kind of working time regulation the EU will need in order to cope with the challenges of the 21st century.’

In July 2010 the ETUC’s submitted its unchanged position to the Commission, : an end to the opt-out; to keep the rules on the reference period ; to codify ECJ jurisprudence on on-call work in the workplace; and to clarify that the Directive must be applied ‘per worker’.

The ETUC also urged the Commission to ensure that all relevant research and evidence be included in the Commission’s social and economic impact assessment of the WTD and that these be taken into

account while drafting its proposals on the revision of the Working Time Directive.

On 21st December 2010 the Commission launched the second stage of consultation with workers' and employers' representatives at EU level on the content of the revised WTD and to ask the social partners at EU level if they wished to enter into negotiations on the WTD.

The Commission published three reports to coincide with the second stage consultation. First, on the legal implementation of the Working Time Directive in Member States. This report showed significant differences and problems with conformity of national legislation with the WTD. Second, a review of the first stage of consultations. Third, a review and assessment of the economic and social impacts of working time, carried out by Deloitte for the European Commission. The report points to substantial evidence of the negative impact of long working hours and of weekend and night work on workers' health and well-being.

The second stage consultation paper asked the social partners for their views on two alternative approaches to working time. The Commission proposed a review of on-call work only or a comprehensive review of the WTD.

## Who is using the opt-out?

Currently five Member States allow the use of the opt-out in any sector/activity (UK, Malta, Cyprus, Estonia and Bulgaria).

Eleven Member States allow the use of the opt-out, but only in the health sector and in jobs that make extensive use of on-call time (Belgium, Czech Republic, Germany, Spain, France, Hungary, the Netherlands, Poland, Slovenia, Slovakia and Latvia).

A further eleven Member States state that they do not use the opt-out (Austria, Denmark, Finland, Greece, Ireland, Italy, Lithuania, Luxembourg, Portugal, Romania and Sweden).

*Source: Deloitte (2010) Study to support an Impact Assessment on further action at European level regarding Directive 2003/88/EC and the evolution of working time organisation. Final report, Commissioned by European Commission DG for Employment, Social Affairs and Equal Opportunities, 21 December 2010.*

In responding to the second stage consultation the ETUC drew up a Resolution, adopted by the Executive Committee on 8-9 March 2011. The Resolution reiterated the legal basis of the WTD and the legal obligation to limit working hours to respect health and safety (under Article 31 of Charter of Fundamental Rights), and to progressively reduce long working hours while improvements are being maintained (under Article 151 of the Treaty on the Functioning of the European Union).



The ETUC pointed to the evidence from the impact assessment carried out by Deloitte, which had not been sufficiently taken account of by the Commission and which specifically :

- » Warns against legislation to extend the reference period to 12 months as this would be “detrimental to health and safety”, suggesting that short reference periods would avoid the potential negative effect of long working hours resulted from an extended reference period.
- » Recommends that a five day, eight hour, 40 hour working week was conducive to work-life balance. The impact of the opt out in extending working hours beyond the limits in the current WTD would “result in an increased risk of health impairments”.

The Resolution states that the Commission gave insufficient consideration to the ETUC’s first stage consultation position and in particular that:

- » Maintaining the opt-out, extending the reference periods and weakening the position on on-call time and compensatory rest would contradict health and safety principles that are based on solid evidence and research.

As a result the ETUC recommended that, backed-up by the impact assessment, the Commission should:

- » End the opt-out from the 48 hour limit on weekly working time;
- » Keep the current reference period in place;
- » Codify the ECJ jurisprudence on on-call working time in the workplace on the basis that on-call time should be recognised as working time;
- » Codify for all workers that the Directive has to apply per worker.

The ETUC highlights some Commission's proposals that go in the right direction, but identifies the need for improvements to be taken in certain areas.

These include the need to ensure that all workers are protected by working time legislation, including volunteer firefighters; that compensatory rest periods should be granted immediately; that compensatory time for recovery on weekends cannot be replaced by another day off; that work-life balance and gender equality provisions need to be strengthened; that the derogation for autonomous workers should be limited to those in the most senior and executive positions; and that further provisions need to be introduced to extend the principle of working time to multiple contracts held by different employers.

The ETUC confirmed that it would enter into negotiations with the social partners at European level with a mandate which had the following objectives:

- » A comprehensive revision of the WTD which can serve the health and safety of workers;
- » The end or phasing-out of the individual opt-out in the near future;
- » Keeping the status quo concerning reference periods;
- » Ensuring compliance of the ECJ judgments on on-call time and compensatory rest.

## For further information

ETUC Resolution (2011) *The Working Time Directive: Limitation of working hours and greater influence of workers for the benefit of healthier working lives*. ETUC Resolution. Approved at the Executive Committee, 8-9 March 2011

<http://www.etuc.org/a/8483>

ETUC (2010) *The Working Time Directive: Limitation of working hours and more influence of workers, for healthier working lives*. Position of the ETUC on the Communication of the European Commission of 24 March 2010, being the first stage consultation of the social partners at EU level on the review of the *Working Time Directive*, approved by the ETUC Executive Committee, Brussels, 3 June 2010

<http://www.etuc.org/a/7350>

ETUC (2009) ETUC Executive Committee 8 July 2009: declaration on the Working Time Directive

<http://www.etuc.org/a/6361>

ETUC (2008) Working Time Directive

<http://www.etuc.org/a/5548>

ETUC Statement: Revision of the Working Time Directive. Statement adopted by the ETUC Executive Committee at their meeting held in Brussels on 5-6 December 2005.

<http://www.etuc.org/a/1839>

European Commission (2010) *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')*, COM(2010)802/3, Brussels

<http://ec.europa.eu/social/main.jsp?catId=329&langId=en&newsId=964&furtherNews=yes>

Deloitte (2010) *Study to support an Impact Assessment on further action at European level regarding Directive 2003/88/EC and the evolution of working time organisation*. Final report, Commissioned by European Commission DG for Employment, Social Affairs and Equal Opportunities, 21 December 2010.

<http://ec.europa.eu/social/main.jsp?catId=706&langId=en&intPageId=205>

European Commission (2010) *Detailed overview of the replies received from the social partners at European level to the first-phase consultation under Article 154 TFEU on Reviewing the Working Time Directive*, Brussels

<http://ec.europa.eu/social/main.jsp?catId=329&langId=en&newsId=964&furtherNews=yes>

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

<http://ec.europa.eu/social/main.jsp?catId=329&langId=en&newsId=964&furtherNews=yes>



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