



## **ETUC Resolution**

### **The Working Time Directive: Limitation of working hours and greater influence of workers for the benefit of healthier working lives**

Adopted at the Executive Committee on 8-9 March 2011

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ETUC Position on the Communication of the European Commission of 21<sup>st</sup> December 2010: the second stage of social partners EU level consultation on the revision of the Working Time Directive:

- 1) On 21<sup>st</sup> December 2010 the Commission has adopted a Communication reviewing the Working Time Directive (WTD), which constitutes the second stage of consultation of the EU social partners on the content of the envisaged action at EU level to amend the WTD and to ask the social partners at EU level whether they wish to enter into negotiations. The Commission has made two proposals: a) to focus the review on on-call work or b) to proceed to a comprehensive review.

At the same time the Commission has eventually made public its implementation report concerning the WTD launched in 2008, as well as the study in support of an impact assessment of further action at EU level regarding the WTD and the evolution of working time organisation. This report by Deloitte is a valuable one to assess the Commission's proposals in its Communication on the second stage of consultation.

The implementation report shows problems of conformity of national law with the WTD both as regards the different topics and the various Member States. This is a situation which is persisting over the last years.

- 2) The 2003/88/EC Directive (revising the original Directive 93/104/EC) which is based on a 'health and safety' legal foundation is a very important element of the EU's social policy acquis. Nevertheless the Directive must be understood as being firmly embedded in a wide range of international standards and fundamental rights (ILO conventions, the European Social Charter, the Charter of Fundamental rights, etc.) which are very much interdependent.

With the entry into force of the Lisbon Treaty, the Charter of Fundamental Rights (CFREU) has become legally binding. Article 31 of the Charter deals with

*'fair and just working conditions'*. Accordingly, “**every worker has the right to working conditions which respect his or her health, safety and dignity**”. In its second paragraph, it says “**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 starting point for any debate on the WTD must be the recognition that the EU and all its Member States have a double legal obligation, i.e. to ensure that every worker has a right to limitation of his working hours which is implemented in a way which respects his health, safety and dignity (Article 31 CFREU), and to progressively reduce (long) working hours, while improvements are being maintained (Article 151 TFEU). This provision is also to be interpreted as a non-regression obligation that any new social legislation has to serve this objective.

Moreover, the ETUC draws the attention to the “horizontal clauses”, in particular the gender mainstreaming clause (Art. 8 TFEU) and the social clause (Art. 9 TFEU) which is to be read in conjunction with the overall social objectives of the Union enshrined in Art. 3 TEU. The latter requires aiming at i.e. social progress and high level of protection. Therefore, in defining and implementing its social policies and activities, the Union shall take all those requirements into account. The Commission nevertheless did not feel obliged to take into account the results of the impact assessment or even took an opposite approach.

Also, as mentioned in the preamble of the WTD: “**the improvement of workers’ safety and health at work is an objective which should not be subordinated to purely economic considerations**”. These obligations give direction to the scope for a ‘comprehensive review’ of the Directive, which must clearly respect and build on this Community acquis. Any attempt to extend working time practices, involving long, irregular and unhealthy hours for business and/or financial reasons must be considered to be not in conformity with these legal obligations.

The rationale for prohibiting excessive working time is constantly reinforced by new research. The Working Time Directive remains a vital piece of health and safety legislation, which protects workers from some very real risks in the modern world of work. Long working hours often reach far beyond the individual worker, impacting on their work colleagues, passers-by, friends and families and the upbringing of their children. Of course, the health problems caused by excessive working time also have an impact on each member states’ social security and health systems.

## **ETUC ASSESSMENT OF THE COMMISSION PROPOSALS**

- 3) The ETUC regrets that the concerns firmly expressed in the first phase of the consultation have not sufficiently been taken into consideration by the

Commission when it submitted its policy options (see below). Further points have not at all taken up, such as the ETUC demand to clarify the definition of “worker” and the development of guidelines to prevent circumvention of working time rules by bogus-self employment. The ETUC makes it very clear that it is crucial to legislate as well on those points in a review exercise wishing to make the Working Time Directive a modern legislation, just as well as the aspect of consultation of workers on working time issues.

**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.**

- 4) The most worrying proposals concern maintaining the opt-out, the extension of the reference periods, as well as the counting of on-call time. Protection against long and exhausting working hours and patterns is important to protect the individual worker and provide him/her with fair and just working conditions.

Again, when making its proposals, the Commission did not take into consideration the findings of the impact assessment which proposes *“both would suggest a limitation of working hours followed by an adequate period of rest. This should not be postponed in order to avoid any accumulation of fatigue or detrimental effects to safety, health and work-life balance.”*

The Directive in its present form is already a very flexible tool, which gives enough scope to the social partners on all levels in order to negotiate the needed solutions. Trade unions all over Europe have always shown their readiness to negotiate on working time.

- **Opt-out:** The Commission argues that the recourse to the opt-out reveals a wide and swift proliferation and that a solution to the problem consists in reducing the need of using it. It wishes to reinforce the protection and to install a mechanism for an effective periodic evaluation of the opt-out.

The impact assessment is very clear, as the message reads: *“In any event, extending working hours beyond the limits of the current WTD would result in an increased risk of health impairments – while a reduction of working hours should lead to a reduction in health problems.”*

The impact assessment even goes further in making the following hypothesis *“... although one that is well founded. It can thus be concluded that even for those working hours “voluntarily”, the risk of health problems will increase as the numbers of hours they work goes up, as is the case with self-employed workers”.*

Furthermore the study clearly says that “*work-life balance begins to decline substantially beyond 40 hours/week*”. The conclusion drawn in the impact assessment goes as follows: “***Combining this (5-day week) with the evidence on daily working time and safety yields a recommendation of 5x8 = 40 h per week, which would be in agreement with the limit indicated by the effects on work-life balance.***”

On this basis the Commission could have proposed not only the end of the opt-out but also the lowering of the maximum working time per week to 40 hours/week. It is not understandable that on the basis of such an assessment, the Commission can persist in proposing to keep the individual opt-out, thereby deliberately putting at risk the health of the EU workers. Keeping the opt-out instead infringes the fundamental rights of workers in the EU to working conditions which respect his or her health, safety and dignity and his/her right to limitation of maximum working hours as guaranteed in Art. 31 CFREU as explained above.

The ETUC requests to put an end to the opt-out, as the individual opt-out is not compatible with the basic principles of health and safety protection. Nor is it a sufficient option to reinforce the protection, as the impact assessment has revealed that the enforcement is not too efficient in practice.

Furthermore is the opt-out in contradiction with Art.2 of the European Social Charter. This became explicit in two decisions of the European Committee of social rights concerning France on a French version of the opt-out. The Committee stated clearly: when member states of the European Union agree on binding measures in the form of directives which relate to matters within the remit of the European Social Charter, they should – both when preparing the text in question and when transposing it into national law – take full account of the commitments they have taken upon ratifying the European Social Charter.

- **Reference periods:** The proposal by the Commission to extend the reference periods is simply not acceptable. In the Commission’s proposals, the reference period can be either longer than 12 months following an agreement between the social partners, or it can be restricted to 12 months by legislation, after consultation of the social partners for the sectors or Member States where “opt-out” is not applied.

The Commission opens up the possibility of a reference period of a maximum of 12 months by legislation after simple consultation of the social partners. This would leave workers without any effective safeguards.

Derogations from the four-month rule, when inevitable, must be cast in such a form as that they promote negotiated solutions between sufficiently strong bargaining parties which can guarantee a balanced outcome. Therefore collective bargaining needs to be the pre-condition for derogations.

The question of which sector could possibly need reference periods longer than one year is still unanswered. Collective bargaining guarantees that real needs in specific situations can be detected and solved.

The impact assessment says the findings “*would also argue for short reference periods, in order to avoid an undue accumulation of negative effects during certain times within the reference period.*”

It confirms the ETUC point of view that the “average 48 hour maximum” is already a very flexible concept and a reference period of 4 months offers a wide scope for today’s needs of companies and workers.

It is the cumulative effect of these different changes which makes the Commission’s proposal for longer reference periods so hazardous, since all safeguards are being downgraded at the same time. Neither the safeguard represented by collective agreements for the negotiation of the reference period between social partners, nor the restriction by legislation of the annual working hours to a lower limit is retained. Longer reference periods without adequate safeguards being collective agreements can lead to workers suffering one-sidedly imposed very long and irregular working time patterns, which would be completely unacceptable.

- **On-call time:** It is the first time in the revision process that the Commission goes some way towards aligning its proposals to the case law of the ECJ on on-call time being working time. The Commission considers on-call time as working time, and avoids any distinction between “active” and “passive” working time. The Commission’s tabled compromise however consists in counting the periods of on-call time differently, subject to defined maximum weekly limits and to the condition that the workers concerned are afforded appropriate protection.

The ETUC cannot accept any proposal to count on-call time differently. The ETUC has always stressed that on-call time has to be recognised as working time and that no difference can be made between “active” and “passive” on-call time. Therefore all time spent on-call needs to be working time and counted as such. This is in line with the ECJ judgment in *Dellas* where the Court explicitly states that counting on-call time as a percentage of normal working time is contrary to the Directive: “Community law requires those hours of presence to be counted in their entirety as working time”.

- **Paid annual leave:** After the ECJ *Schultz-Hoff* and *Stringer* decisions, the Commission has opened the way for the Member States to set appropriate ceilings to the accrued paid annual leave entitlements. And this despite the fact that the Court argued that the Directive does not allow Member States to exclude the very existence of a right expressly granted to all workers and that national law cannot extinguish the right to leave at the end of the leave year and/or of a carry-over period, even where the worker has been on sick leave for the whole leave year, if the worker could not exercise his right to paid annual leave.

The ETUC is of the opinion that the acquired right by a worker to paid annual leave cannot be cut by a ceiling, as this is a social right of every worker and being on sick leave means only that the worker could not exercise this right. The entitlements do persist and they cannot be limited by a determined ceiling. The ETUC calls for a codification of the ECJ case-law as well on this point.

**Some of the Commission's proposals are a step in the right direction, but further improvements are still needed**

- **Scope and specific sectoral problems:** It is to be welcomed that the Commission considers that all workers fall under the scope of the Directive. And the quest for greater harmonisation of working time rules for all road transport mobile workers is of course to be supported under the special Directive 2002/15/EC. The Commission needs to ensure that all workers in all industrial sectors and occupations are protected by working time legislation, and that they can enforce their rights. Therefore the idea of the Commission to treat volunteer firefighters differently cannot be supported, as their work needs to be considered working time when they are called in.
- **Compensatory rest:** The Commission presents the pros and cons of the compensatory rest to be taken directly after the shift, but does not make any concrete proposal on how to solve this question at the European level.

*The impact assessment argues that “All this would caution against an extension of reference periods for calculation average work hours (or rest periods) since longer reference periods allow for a greater accumulation of work within certain time spans within the reference period and thus for an accumulation/increase of fatigue, instead of avoiding negative effects like fatigue right from the outset by providing adequate work-rest dynamics. (...) support the theoretical and empirical long- and well-founded ergonomics concept, implying that rest periods should not be postponed, but taken as early as possible in order to avoid the development and accumulation of fatigue or other impairing effects.”*

The notion of “equivalent compensatory rest” in the WTD is fundamental to the ETUC. Compensatory rest should not be postponed. It is very surprising that the Commission did not take the impact assessment into consideration by following here too the ECJ case law stating that compensatory rest should be granted immediately. Again the ETUC claims the codification of the ECJ case law concerning on-call time.

- **Weekly rest - Sunday work:** Related to the question of compensatory rest is the problem of working at “unusual” times, such as Sundays, Saturdays and during evenings, such times which are usually devoted to rest and not to work. The impact assessment underlines that “*working at unusual times is associated with impairments to safety, health, well being and work-life balance. The (albeit rather scarce) evidence available, clearly shows that those who work on Sundays display a substantially increased risk (about 30%) of causing/suffering an*

*accident, leading to work-time lost. The results therefore demonstrate at the same time that work on Saturdays is also substantially associated with an increased accident risk. This leads to the conclusion that both weekend days have a special function of recuperation from work-related demands which conflicts with working during the weekend. It is worth mentioning that these effects do not require regular work on Sundays but that the effects can already be observed with occasional work on Sundays or just one Sunday per month. And this in spite of the fact that work on Sundays must normally be compensated for by a day off during the week (...). Sundays thus obviously have a special function for recovery, which cannot be compensated for by a different day off."*

Those findings make it very clear that the recovery of the worker weekly rest on the weekend and especially on Sunday cannot be replaced by any other day off.

- **Work-life balance:** The proposals concerning work-life balance are much too weak. Still the Directive does not take the gender aspect into consideration. Working time arrangements must not undermine Art. 33 par. 1 CFREU on family and professional life, which provides i.e. that the family shall enjoy legal, economic and social protection and contribute to its achievement.

A step to reduce the negative impact of irregular and unpredictable working hours would certainly consist in having a provision ensuring that workers are informed *well in advance of substantial changes* in their working time patterns, though this is not specific enough. The definition of “well in advance” and “substantial changes” is important. The impact assessment shows even a risk for the health and psychosocial complaints when “*flexibly arranged working times are unreliable, e.g. because of frequent rescheduling, emergencies or work on call*”.

Another idea brought forward is to include a provision ensuring that the employer would have to examine the workers’ request for changes in working time and justify any refusal. This proposal does not go far enough. A worker as a party to an employment contract has always the possibility to request a change in working time. What would be needed is the right for the worker to ask for changes in his/her working time or working time distribution. Even the impact assessment refers to such a right. Granting workers the right to request an adaptation of their working hours to their needs does not only recognises the importance to allow workers the right to influence the schedule of their working hours, it also provides them with an opportunity to negotiate a better outcome.

- **Autonomous workers:** The ETUC asks for the derogation for autonomous workers to be further limited, to only chief executive officers (or persons in comparable positions), senior managers directly subordinated to them and persons who are directly appointed by the board of directors.
- **Multiple contracts:** The Commission clearly states that the working time limit referred to in the Directive applies “per worker”. But here too the conclusions

are not far-reaching enough. Though it is a very positive first step to say that the working time of a worker with several contracts with the same employer needs to be calculated on a per-worker basis, this is a principle which also needs to be applied when we speak about contracts with different employers. Otherwise, the health and safety objectives of the Directive cannot be met.

## **ETUC VIEWS ON THE QUESTIONS BY THE COMMISSION**

The ETUC has carefully built up its position concerning the Working Time Directive over the last decade, taking full account of the wealth of evidence that justifies the need to limit working time.

**The ETUC is of the opinion that TU concerns have not sufficiently been addressed by the Commission and that furthermore the Commission has not lived up to its obligation to take into account the findings of the impact assessment.**

Backed by the impact assessment the Commission should:

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

The ETUC 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;
- and ensuring compliance of the ECJ judgments on on-call time and compensatory rest.