NHS European Office


In your opinion, what is the impact of the current Working Time Directive giving workers the right to a limit to average weekly working time (currently set at 48 hours) and to minimum daily and weekly rest periods?

<table>
<thead>
<tr>
<th>Statement</th>
<th>Fully disagree</th>
<th>Tend to disagree</th>
<th>No opinion</th>
<th>Tend to agree</th>
<th>Fully agree</th>
</tr>
</thead>
<tbody>
<tr>
<td>It protects the health and safety of workers and people they work with</td>
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<td>It ensures a level playing field in working conditions across the Single Market, avoiding that countries lower their labour standards to gain a competitive advantage</td>
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<td>It boosts productivity notably by fostering a healthy European workforce</td>
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<td>It allows flexible organization of working time</td>
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<td>It allows workers to reconcile work and private life</td>
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<tr>
<td>It impacts on job creation</td>
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<td>Self-employment is used to circumvent the application of the limits imposed by the Directive</td>
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<tr>
<td>It impacts the costs of running a business</td>
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<tr>
<td>It has no major impact</td>
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Please elaborate on your opinion with regard to the impact on health and safety of workers and people they work with.

It is good to ensure that workers are not over-tired and do not endanger themselves or their patients and clients. However, the current directive as interpreted by the ECJ judgments is over-concerned with petty infringements of detailed rules rather than whether or not the worker is in fact safe to work.

Elaborate on your opinion with regard to the impact on the cost of running a business.

Yes, compliance with the WTD has incurred additional costs for employers, for example, by having to employ additional workers (sometimes expensive locums or agency staff). In some cases services
have been redesigned to ensure compliance, e.g. by changing working patterns or location of services.

If you see another impact, please specify.
Impact upon quality and quantity of training, as doctors get less experience of performing clinical procedures and less time interacting with their supervisors. This is not only because of shorter working hours overall, but because of the rest requirements requiring them to count time spent in the hospital resting as ‘work’ and to take compensatory rest breaks even when they are not tired. Quality of patient care can also suffer from less continuity of care and more frequent handovers.

2. Thematic questions

2. A. Scope
Concurrent contracts
A single worker may be employed under several concurrent contracts. Should the limits provided in the WTD apply to all contracts taken together or to each contract separately? If the directive applies per worker, this means for example that all the hours worked under the different contracts should be added together and cannot exceed 48 hours on average (unless the worker signed an opt-out).

If the directive applies per contract, this means for example that the worker can work 48 hours on average under each separate contract without an upper limit.

- It is up to Member States to decide whether working time rules shall apply per worker or per contract
- The directive should stipulate that working time rules shall apply per worker in situations where a worker has more than one contract with the same employer
- The directive should stipulate that working time rules shall apply per worker in situations where a worker has more than one contract in any event
- The directive should make it clear that it only applies per contract
- Other
- Do not know

2. B. Concept of working time
On-call time
On-call time corresponds to any period where the worker is required to remain at the workplace (or another place designated by the employer) and has to be ready to provide services. An example could be a doctor staying overnight at the hospital, where he can rest if there is no need to attend to patients.

Under the current WTD me Directive, as interpreted by the Court of Justice, on-call time is fully regarded as working time for the purpose of the directive, regardless of whether active services are provided during that time. The period of on-call time within which the worker actively provides services is usually referred to as ‘active on-call time’, while the period within which services are not provided can be referred to as ‘inactive on-call time’. (See in particular Cases C-303/98 Simap, C-151/02 Jaeger, C-14/04 Dellas).
Please give your opinion on the following options as regards possible changes in the treatment of on-call time under the Working Time Directive.

<table>
<thead>
<tr>
<th>Option</th>
<th>Very undesirable</th>
<th>Undesirable</th>
<th>No preference</th>
<th>Desirable</th>
<th>Very desirable</th>
</tr>
</thead>
<tbody>
<tr>
<td>No change to the current rules</td>
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<tr>
<td>Incorporate the interpretation of the Court into the directive (i.e. codification to clarify that all on-call time has to be counted as working time)</td>
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<tr>
<td>Set the principle that defining &quot;on-call time&quot; should be agreed in each sector by national social partners, for example determining that only part of inactive on-call time will be counted as working time</td>
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If you would like to add comments or indicate another option, please specify.

Member States should be able to decide at national level by legislation or by collective bargaining how inactive on-call time at the workplace should be treated. Our view is that from a health and safety perspective, if no work is done during inactive on-call time, then it should count as rest.

Stand-by time
Stand-by time corresponds to any period where the worker is not required to remain at the workplace, but has to be contactable and ready to provide services. An example could be when a technician of a nuclear facility is at home, but has to be ready to come to the plant to provide services in an emergency.

Under the current Working Time Directive, as interpreted by the Court of Justice, stand-by time does not have to be considered as working time for the purpose of the directive. Only active stand-by time, i.e. time in which the worker responds to a call, has to be fully counted as working time. (See in particular Cases C-303/98 Simap, C-151/02 Jaeger, C-14/04 Dellas)

Please give your opinion on the following options as regards possible changes in the treatment of stand-by time under the Working Time Directive.

<table>
<thead>
<tr>
<th>Option</th>
<th>Very undesirable</th>
<th>Undesirable</th>
<th>No preference</th>
<th>Desirable</th>
<th>Very desirable</th>
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</thead>
<tbody>
<tr>
<td>No change to the current rules</td>
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<tr>
<td>Incorporate the interpretation of the Court into the directive (i.e. codification to clarify that stand-by time does not have to be considered working time)</td>
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</table>
Introducing the obligation to partially count stand-by time as working time for the purpose of the directive
Introducing a limit to the maximum number of hours that a worker may be required to be on stand-by in a given period (for instance 24 hours a week), together with a derogation possibility to set a different limit via collective agreements

If you would like to add comments or indicate another option, please specify.
Time spent on standby when a worker is not working should count as rest.

2. C Derogations
Compensatory rest
Under the current Working Time Directive, as interpreted by the Court of Justice, a worker who by derogation from the general rules has not received his or her minimum daily rest of 11 consecutive hours in a 24-hour period, will have to receive an equivalent period of compensatory rest (i.e. 11 hours) directly after finishing the extended working time period. This sets a maximum of 24 hours to a single consecutive shift. (See in particular Case C-151/02 Jaeger)

How would you assess the possible introduction in the Working Time Directive of provisions regarding the period within which such a compensatory rest has to be taken.

<table>
<thead>
<tr>
<th>Very undesirable</th>
<th>Undesirable</th>
<th>No preference</th>
<th>Desirable</th>
<th>Very desirable</th>
</tr>
</thead>
<tbody>
<tr>
<td>No change to the current rules</td>
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<tr>
<td>Incorporate the interpretation of the Court into the directive (i.e. codification to clarify that compensatory rest has to be granted immediately after the extended period of work)</td>
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<tr>
<td>Allowing employers the possibility of granting compensatory rest within 2 days</td>
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<tr>
<td>Allowing the possibility of granting compensatory rest within 4 days</td>
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</table>

If you would like to add comments or indicate another option.
Ideally the period within which compensatory rest should be taken should be decided at local or national level, and should depend on a risk assessment of whether or not the worker is fit to work.
This will depend on a number of factors, such as timing and frequency of interruptions to the worker’s rest and the kind of work they are required to perform. It is not appropriate to set detailed rules about this at European level.

**Reference period**
The limit to weekly working time of 48 hours provided by the Working Time Directive is a limit to average working time. This means that in certain weeks the worker can be required to work more than 48 hours as long as this is balanced out by lower hours in other weeks. This average has to be calculated over a certain period, i.e. 'a reference period'.

Currently, the standard limit to the reference period is four months, which can in certain sectors be extended by law up to six months, and by collective agreement it can be set up to 12 months.

**What would be in your view the most appropriate approach to the limit set to the reference period to calculate average weekly working time?**

- [ ] No change in the current provisions
- [ ] Allow that reference periods can be set up to six months by law in any sector, and maintain that they can only be set up to 12 months by collective agreements
- [ ] Maintain that reference periods can be set up to four months by law in any sector, but allow that reference periods can be set up to 12 months by law in certain specific sectors (e.g. to take into account the size of the undertaking or to take into account fluctuations of demand)
- [ ] Allow both previous options (i.e. option two and option three), meaning that reference periods can be set up to six months by law for any sector and up to 12 months by law in certain specific sectors
- [ ] Allow that reference periods can be set up to 12 months by law in any sector
- [ ] Other
- [ ] Do not know

**Please specify.**
The most appropriate length of reference period should be decided at national level and will vary according to the characteristics of the country and the sector. It should be possible to set reference periods by national law or by collective bargaining.

**Opt-out**
Under the current Working Time Directive, Member States have the possibility not to apply the limit to average weekly working time of 48 hours, when the worker agrees to it individually and freely with the employer, and does not suffer prejudice for revoking such agreement (the 'opt-out').

What is your view on this opt-out clause?

- [ ] It should be maintained unchanged
- [ ] It should be maintained, but stricter conditions for the protection of the worker should be added in the Directive
It should be maintained, but it should be provided in the Directive that the opt-out cannot be combined with other derogations under the current Directive.

It should be abolished, but in compensation there should be additional derogations made available for employers (e.g. allowing not to count on-call time fully as working time).

It should be abolished.

Other

Do not know

### Autonomous workers

‘Autonomous workers’, such as for example managing executives, can fully determine their own working time (i.e. decide when and how many hours they work). Member States have the option to apply the main provisions of the Working Time Directive to these workers.

Please choose the most appropriate statement according to your views:

- The current Working Time Directive provides an adequate exemption as regards autonomous workers, and should not be changed.
- The current exemption should be maintained in substance, but more clearly formulated, in order to enhance legal clarity and to prevent abuse.
- The definition of autonomous workers is too narrow and should be expanded to other categories of workers who should be exempted too.
- The definition of autonomous workers is too wide and should be limited.
- Other
- Do not know

### 2. D Specific sectors and activities

#### Emergency services

The current Working Time Directive as interpreted by the Court of Justice applies to workers in emergency services, e.g. civil protection services like fire-fighting services, in the normal operation of these services.

The current Directive contains several derogations that can be applied to the working time and rest periods of these workers in order to ensure the effective provision of these services. In the event of a catastrophe/disaster, the Working Time Directive does not apply at all. (See in particular Cases C 397/01 to C 403/01 Pfeiffer and Case C-52/04 Feuerwehr Hamburg)

Please state your view on the application of the Directive to emergency services:

- The current rules adequately balance the need to protect the health and safety of the workers and the people they work with/for with the need to guarantee effective provision of emergency services, and should remain unchanged.
- The current rules should be maintained in substance, but clarified in light of the case law of the Court of Justice, to improve legal certainty.
There should be additional derogations applicable to all or some categories of these workers, addressing their specific situation.

The Working Time Directive should not be applied to workers in emergency services.

Other

Do not know

Please specify which additional derogations and why:
The WTD should apply to workers in emergency services in the normal course of their duties, for the same health and safety reasons that it applies to other workers. However, given the requirement for these workers to provide essential round-the-clock services, there must be greater flexibility in the derogations regarding the timing of the compensatory rest and the treatment of on-call time. The detail of these derogations should be agreed at MS level, rather than being prescribed in the Directive.

Health care sector
The current WTD provides a derogation for health care services when they require continuity of service, meaning particularly that the rest periods of health care staff can be postponed to some extent. Should there be a different provision on the working time organisation of health care staff with a view to safeguarding patient safety? Please state your view:

Should there be a different provision on the working time organisation of health care staff with a view to safeguarding patient safety? Please state your view:

The current rules provide enough safety for patients

The current rules should be maintained in substance, but clarified in light of the case law of the Court of Justice on on-call time and on timing of compensatory rest to improve legal certainty

There should be additional derogations applicable to workers in the health care sector in order to improve continuity of service

There should be a more narrow derogation applicable to workers in the health care sector in order to improve patient safety

Other

Do not know

Please specify which additional derogations there should be:
Derogations allowing flexibility at national level to decide on the timing of rest periods and the treatment of time spent on call. The important consideration should be whether or not the worker is fit to work, both for their own safety and that of others. Assessment of risk should be the underlying principle/yardstick, rather than adherence to over-complicated rules set at European level and stipulating in unnecessary detail exactly when and how rest should be taken.

Changes in working patterns
The Working Time Directive was conceived more than 20 years ago, when information and communication technologies were not as developed and many types of present jobs did not exist yet. In light of these changes in working patterns and organisation, should the Working Time Directive introduce specific rules regulating particular situations and types of contracts such as telework, zero-hour contracts, flexi time, and performance-based contracts without working time
Please state your view:

- The current rules are satisfactory and do not need to be changed
- The rules should be changed in light of increasing telework
- The rules should be changed in light of zero-hour contracts
- The rules should be changed in light of increased use of flexitime
- The rules should be changed in light of increased use of performance-based contracts without working time conditions
- Other
- Do not know

Please specify
The current rules are not satisfactory and this is why the directive needs to be changed. However, there is no need to make changes specifically to cater for each and every novel working pattern that arises.

The overall directive should concentrate on establishing health and safety principles for the protection of workers regardless of their precise working arrangements and should be sufficiently flexible to encompass situations where (e.g.) a worker can decide for themselves when to take breaks.

Reconciliation of work and private life
Do you think the Working Time Directive should support better reconciliation of work and private life by introducing any of the following specific rights?

<table>
<thead>
<tr>
<th>The right for a worker to ask for specific working time arrangements (e.g. flexitime, telework) depending on their personal situation, and to have their request duly considered</th>
<th>Very undesirable</th>
<th>Undesirable</th>
<th>No preference</th>
<th>Desirable</th>
<th>Very desirable</th>
</tr>
</thead>
<tbody>
<tr>
<td>The right for a worker to request to take daily rest in blocks of time instead of uninterruptedly, allowing the worker for example to go home early in the afternoon and later continue work from home at night, and to have their request duly considered</td>
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NHS European Office

Comments
We have no problem with these suggestions, but we do not consider they come within the scope of this directive.

3. Looking ahead
Objectives for the future of the Working Time Directive

For the future of the Working Time Directive, how important do you consider the following objectives?

<table>
<thead>
<tr>
<th>Objective</th>
<th>Not at all important</th>
<th>Of little importance</th>
<th>Quite important</th>
<th>Very important</th>
<th>Do not know</th>
</tr>
</thead>
<tbody>
<tr>
<td>While keeping the current Working Time Directive, to better ensure that Member States correctly and effectively put it into national law and practice</td>
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<tr>
<td>To improve legal clarity, so that the rights and obligations following from the directive are clearer and more readable and accessible to all</td>
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<tr>
<td>To provide more flexibility in working time organisation for workers</td>
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<tr>
<td>To provide more flexibility in working time organisation for employers</td>
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<tr>
<td>To provide a higher level of protection to workers</td>
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<tr>
<td>To protect third parties involved (co-workers, passengers, patients, etc...)</td>
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Approach for the future of the Working Time Directive
Which of the following approaches for the future of the Working Time Directive do you prefer?

- No new initiative (maintaining the current rules)
- No legislative changes but initiatives towards improved legal clarity so that the rights and obligations following from the directive are clearer and more readable and accessible to all (interpretative communication; 'codification' of the case law (i.e. clearly stating the case law of the Court of Justice in the legal text)
- Legislative changes but focused on the sectors where there is a specific need in terms of continuity of service (e.g. public services; sectors that work on a 24/7 basis like hospital services and emergency services)
- Legislative changes which would lead to an overall revision of the Directive, containing a mix of simplification and additional derogations while avoiding regression of the protection of workers
Please motivate your answer:
Legally, it would be clearer and simpler to change the Directive for all workers. It will be difficult to define precisely at European level which workers and / or sectors should be covered by special derogations as there will always be ‘special cases’ and ‘grey areas’. The Directive overall should be simplified but there should be flexibility for MS to decide what additional flexibilities should apply and to whom.

4. Other comments or suggestions
Do you have any other comment or suggestion on the review of the Working Time Directive that you would like to share?
The NHS Confederation’s European Office considers that the current directive is not fit for purpose. It has lost sight of its underlying purpose to protect health and safety of workers (and by extension, the public whom they serve), so that the spirit of the legislation has become less important than keeping the letter of an over-detailed law.
The directive should start from the principles of risk assessment and whether the worker is fit to work or poses a risk to themselves or others. This would obviate the need for very detailed rules at European level which try to cover every conceivable eventuality.

Starting from the principle that workers should have sufficient rest between periods of work and that those periods of work should not be excessively long, MS should be able to decide on sensible rules which enable quality services to be delivered, whilst respecting the needs of workers. The need for adequate time for education and training should also be taken into account, so that opportunities to gain valuable training experience are not lost because of inflexible rules.

In particular, greater flexibility is needed regarding the treatment of time spent on call at the work place when no actual work is done and there is therefore no risk to health and safety, and the timing of compensatory rest when in fact the worker has had adequate rest already. The health sector provides round-the-clock essential services: demand, especially in certain specialties or geographical areas, can be highly unpredictable.

Current WTD legislation is very rigid and does not fit comfortably with situations that require continuity of care and unconventional working patterns. Rather than trying to devise more complicated legal formulae to cope with these scenarios, a bold, imaginative and principled approach to overhauling this Directive is required to bring it into the 21st century.

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