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**APPLICATION AND FUNCTIONING OF THE EU  
WORKING TIME DIRECTIVE 2003/88/EC**

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**EUROPEAN COMMISSION  
CONSULTATION CONTRIBUTION**

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*The European Confederation of Independent Trade Unions (CESI) is a confederation of more than 40 national and European trade union organisations from over 20 European countries, with a total of more than 5 million individual members. Founded in 1990, CESI advocates improved employment conditions for workers in Europe and a strong social dimension in the EU. Most of CESI's members represent workers in the fields of central, regional and local administration, education, training and research, security and justice, healthcare, postal services and telecommunications, defence and transport. CESI represents public and private sector unions and is a recognised European social partner organisation.*

### **On the transposition of the directive**

Several members of CESI reported issues with opt-out clauses from the directive:

- Army leaderships together with the involved ministries have in the past attempted to exempt **soldiers and military personnel of the armed forces** from provisions of the working time directive. According to CESI, there is no objective ground to exempt the personnel of armed forces per se from the directive. So far, no mission or intervention of the armed forces has been rendered impossible by working time arrangements. It can be acceptable that the armed forces leadership/the competent ministries orders, on an ad-hoc and justified case-by-case basis, that working time needs to exceed the provisions of the directive temporarily for a certain operation – in which case compensation payments are in order. However, a flat-rate exemption of military staff from the directive during their daily work in principle is not justified. Indeed, the Court of Justice of the EU [ruled](#) on July 15 2021 in case [C-742/19](#) that not all members of the armed forces of the Member States can be permanently excluded from the scope of Directive 2003/88 and that “those activities connected to administrative, maintenance, repair and health services, as well as services relating to public order and prosecution, do not, as such, have particularities which make it impossible to plan working time in a manner compliant with the requirements laid down in Directive 2003/88.” CESI considers it vital that this judgment is followed in all Member States. It should not be possible for Member States to deploy exemptions and derogations from ordinary working time to burden staff and make up for failed personnel management and a structurally lack of hiring and recruiting adequate staff numbers. Derogations and exemptions as are possible under the directive should be used only for unforeseen and exceptional circumstances.

- In countries such as France, the state seems to apply on a continuous basis a derogation from Article 16(b) **for instance for firefighting** to extent the reference period for maximum weekly working time of 48 hours per week for periods of 6 months. It appears as though the state is deliberately engaging in this practice in order to avoid having to raise personnel levels to sufficient levels to cope with working time provisions under the directive under normal circumstances. Again, it should not be possible for Member States to deploy exemptions and derogations to burden staff with working time beyond the provisions of the directive in order to make up for failed personnel management and a structurally lack of hiring and recruiting adequate staff numbers. Derogations and exemptions should be used only for unforeseen and exceptional circumstances.

According to CESI, such questionable practices should trigger the attention of the European Commission. CESI also deems it a task of the European Commission to inquire which measures for adequate occupational health and safety are put in place by employers as they require personnel to work under opt-out conditions.

### On the monitoring and implementation of the directive

The correct implementation and application of the directive presumes that working time can and is measured. The Court of Justice of the EU ruled on May 14 2019 in case [C-55/18](#) in relation to a Spanish lawsuit that Member States must oblige employers to set up an objective, reliable and accessible system that can be used to **measure daily working time**. Despite this decision, there is still no general legal obligation in countries like Germany to record daily working hours immediately. (See the attached position of the German Civil Service Federation dbb for a detailed account of the state of play in the public sector in Germany.) It is plausible that the situation is similar in other Member States.

N.B.: CESI believes that trust-based working hours must still be permitted for certain job functions where this is, based on objective grounds, useful and indeed indispensable.

### On the evaluation on the functioning and flexibility of the directive in unforeseen circumstances and crises

- *On the fitness of the directive to cope with unforeseen circumstances and crisis:* In times of **unforeseen circumstances and crisis**, as during the current Corona pandemic, the current provisions of the EU working time directive offer flexibility for employers to quickly increase human resource (i.e. personnel) availability by means of fully exploiting a maximum level of 48 work hours per week for workers and by applying this for extensive reference periods of four, six or even twelve months.

Further flexibility on the back of the workers should not be allowed; from their health and safety perspective, no more flexibility is possible. This has been clearly demonstrated by the Covid pandemic, which still causes widespread absenteeism for overload-related stress, burnout and illness reasons.

When exploiting fully the provisions of the existing directive, employers have up to four, six or even twelve months to react and hire the additional personnel needed to cope with the applicable unforeseen circumstance or crisis. This is considered absolutely sufficient – and in any case, in particular public services and administrations should not have personnel levels which are just thin enough to cope with service provision during normal circumstances. They need to be more performing and resilient and have sufficient personnel to not collapse as quickly as has happened in many places during the Corona crisis.

It is vital that even in times of crisis, the EU working time directive is applied and respected.

- *On fitness of the directive to manage fair teleworking:* It goes without saying that the working time directive also applies for **remote work and telework**. However, the practical measurement of work in these settings is a challenge which needs to be addressed. Indeed, for instance in Lithuania, it seems that attempts to introduce a legal framework for a right to disconnect failed as it was decided that this would be redundant because there is already applicable national legislation on minimum resting time and maximum working hours under the EU working time directive. Such an approach seems insufficient to CESI.

It is clear that in practice mobile working and telework results in many cases in a blurring between resting and working time, extended working hours including during evenings and weekends, and constant availability requirement or expectations by employers – to the detriment of workers.

According to CESI, clear rules for remote working and a right to disconnect should be ensured in a binding way – in line the core provisions of the working time directive especially in terms of minimum resting time and maximum working hours. After all, there is no reason to suggest why there should be less resting time and higher work hours as employment models digitalise.

### **On the outlook of the directive**

In countries like Austria, there have been tendencies and pressures of **golden plating**, i.e. to cut existing rights and benefits for workers that go beyond the provisions of the directive. Such practice is incompatible with the directive's article 15 on more favourable provisions in Member States and should trigger the attention of the European Commission.

Generally, a legislative revision of the directive should not be pursued. Rules for practical arrangements to ensure a proper and precise measurement of working time in remote work and telework (see above) should be established in respect of the provisions of the directive but not via a legislative revision of the directive as such.

*Annex: Position of the German Civil Service Federation dbb, a member of CESI, on the application of the working time directive in the public sector in Germany.*