Study exploring the social, economic and legal context and trends of telework and the right to disconnect, in the context of digitalisation and the future of work, during and beyond the COVID-19 pandemic

Annex 3 National regulation of working time

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Annex 3. National regulation of working time

Working time regulation can achieve some of the goals that a right to disconnect would provide. The protection of workers' health and safety is the objective of the Working Time Directive (Directive 2003/88; WTD), which assumes that lengthy working hours and a lack of opportunities for rest pose risks to workers' physical and psychosocial health (Bell et al., 2021)[1].

The implementation of the WTD rules on maximum working time and rest/breaks has, however, been constrained by certain problems of application (European Commission, 2017; Eurofound, 2015, 2020; Nowak, 2018). On the one hand, it appears that some countries have not applied the WTD as interpreted by the CJEU in the case of some public employees (Ireland, Cyprus, Italy), or have made use of derogations to exclude specific activities or categories of workers (e.g. the Netherlands, in cases where a worker earns three times the minimum wage, or in Hungary, when an employee occupies a position of considerable importance or trust and receives a salary seven times the mandatory minimum wage).

On the other hand, the issue of whether the Directive applies per worker or per contract appears to be a very important difference that is not addressed by the WTD. Each Member State is thus free on this point to decide how to apply the Directive, despite the European Commission's preference for application per worker (Nowak, 2018). According to the most recent evaluation report from the EC (2017, p. 5), Czechia, Denmark, Spain, Latvia, Hungary, Malta, Poland, Portugal, Romania and Slovakia apply the Directive per contract (European Commission, 2017).

The CJEU has, on numerous occasions, had the opportunity to interpret the scope of the WTD's provisions. Cases involving on-call work or standby work and, in particular, those situations that place obligations on employers to record working time in order to enforce contractual working time, are also connected with similar issues addressed by the right to disconnect. Moreover, these aspects have fostered national policy debates and, in some cases, legislative developments (Leccese, 2022).

Taking as a reference point the minimum standards laid down the WTD and the Court's case law, this annex provides an overview of how EU countries regulate working time, including:

- an analysis of regulation that sets limits to maximum working time and overtime;
- an analysis of the regulation of breaks and rest;
- an examination of the regulation of working time, including record-keeping obligations that can contribute to ensuring respect for contractual working time.

Maximum working time and overtime

Maximum weekly working time

According to the most recent EC evaluation report (European Commission, 2017), limits on working time have been transposed satisfactorily, with certain exceptions:

- Ireland (in the case of care workers) and Greece (in the case of doctors in public health) did not transpose maximum limits on weekly working time;
- Belgium provides for a weekly working time of up to 56 hours where a system of average calculation of weekly working time has been established, and does not limit the use of

[1] For a list of references, please see the References chapter of the main report.

compulsory overtime in the case of national defence forces, emergencies, the urgent restoration of public utilities or transport, and the provision of medical assistance;

- Germany and Spain exceed the four-month limit on calculating maximum working time, setting this at 6 and 12 months, respectively.

Based on data from the Eurofound database on wages, working time and collective disputes (2019, the last year available), three groups of EU countries can be distinguished in terms of the maximum duration of working week time regulated through statutory legislation:

- countries that set their maximum weekly hours at the 48 hours specified by the WTD (Denmark, Germany, Ireland and the Netherlands);
- countries that set their maximum weekly working time below 40 hours (38 hours in Belgium and 35 hours in France);
- countries that operate under a limit of 40 hours, which may be extended to 48 hours or more under certain conditions (the remaining EU countries).

Collective bargaining also plays a crucial role in determining the duration of weekly working time. However, its role and the main bargaining practices employed (sectoral, company, multi-tier, etc.) vary between EU countries and sectors, as reflected in comparative research on industrial relations and work-time regimes typologies (Sanz de Miguel et al., 2020; ILO, 2016). In several Eastern European countries, working time is generally not determined through collective bargaining, because collective bargaining either does not exist or does not play an important role. By contrast, in the Nordic countries, collective bargaining (mainly sectoral) is the predominant basis for the regulation of working time. In between these two models, there are several countries where statutory legislation predominates, although collective bargaining also plays an important or very important role, either at sectoral level (e.g. Austria, Belgium, France, Spain, the Netherlands) or company level (e.g. Italy, Malta).

Table 1. Importance of levels of collective bargaining in the setting of working time

	Predominant level	Important level, but not predominant	Existing level, but not important	Not applicable
Central or cross-sectoral	BE	IE	AT, DE, EL, ES, FI, LV, RO, SE	BG, CY, CZ, DK, EE, FR, HR, HU, IT, LT, LU, MT, NL, PL, PT, SI, SK, UK
Sectoral	DK, ES, IT, NL, PT	AT, BE, CY, DE, FI, FR, HR, LU, MT, SE, SI	EE, GR, HU, IE, LV, PL, RO, SK	BG, CZ, LT
Company	FR	AT, BE, CY, CZ, DE, DK, ES, FI, HR, HU, IT, LU, LV, MT, NL, PL, RO, SE, SI, SK	BG, EE, GR, IE, PT	LT

Source: Eurofound database on wages, working time and collective disputes.

As shown in Figure 1 below, the average collectively agreed normal weekly working time is lower than 40 hours in most of the EU countries with estimates available.

In certain countries, significant differences exist between the maximum statutory weekly working time and the collectively agreed weekly working time. In particular, this applies to Germany and Denmark, where the maximum weekly working time is set at 48 hours, while the collectively agreed working week is estimated at 37 hours. In contrast, there are countries in which collective bargaining tends to mirror statutory limits (Croatia, Greece and Malta).

Member States also set restrictions on maximum daily working hours. For most countries, eight hours is the daily maximum, but it can be higher: nine hours in Spain and 12 hours in Czechia (Eurofound, 2021).

Overtime

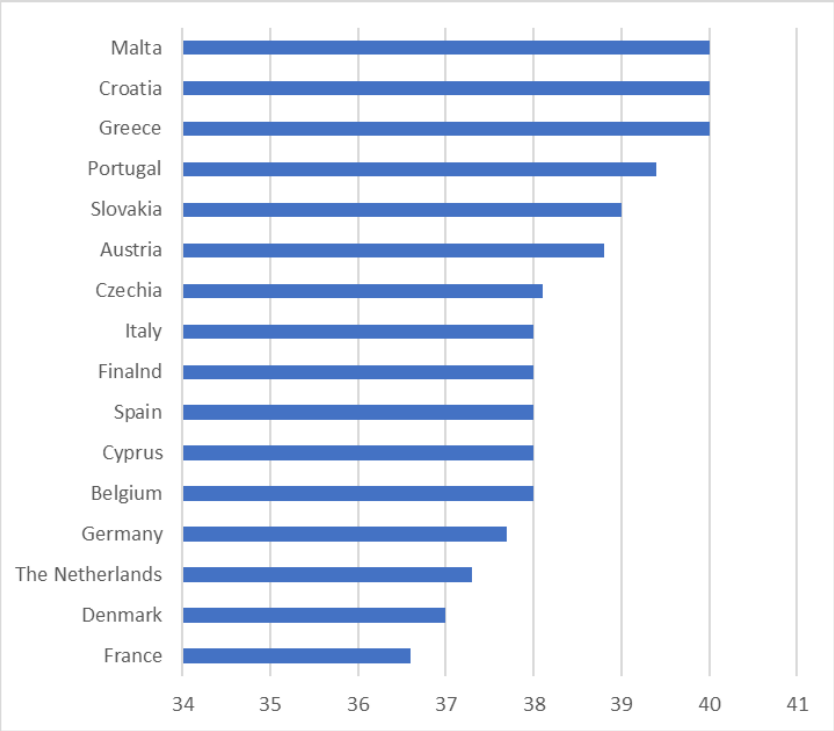
Most Member States regulate overtime by means of statutory legislation. Only in Denmark is overtime exclusively regulated through collective bargaining (Eurofound, 2022). One crucial aspect of the regulation of overtime is whether or not it is considered a normal obligation of a worker or, rather, an exceptional measure to be used only in specific circumstances. According to a recent Eurofound report (2022), three different approaches can be distinguished across Europe:

- countries in which the starting point is to consider overtime work as abnormal (e.g. Belgium,[2] Bulgaria and Czechia);
- countries in which an employer can require a worker to work overtime under normal circumstances (e.g. Estonia, Hungary and Malta);
- countries in which there is no general legal prescription on this matter (e.g. Ireland and the Netherlands).

The distinction between overtime and normal working time is more complex in those countries in which a third category of ‘overwork’ or ‘additional work’ exists (see Box 1 below).

[2] In Belgium, a legal ground is required when granting overtime, such as an exceptional increase in workload, a situation of *force majeure* (i.e. unforeseeable circumstances) or the employee’s explicit prior consent (also called “voluntary overtime”), usually allowing work up to a maximum of 11 hours per day and 50 hours per week.

Figure 1: Average collectively agreed usual weekly working time (2019)



Source: Eurofound database on wages, working time and collective disputes.

Box 1. Overtime vs. overwork

In Greece, overtime is distinguished from 'overwork', which is work that can be required at the employer's discretion (and the employee cannot refuse): up to an additional five hours per week (from the 41st to the 45th hour) for employees who work five days per week, or eight hours (from the 41st to the 48th hour) for those on a six-day working week. Compensation takes the form of a pay premium that is lower than that for overtime (20% for the former, and 40% or more for the latter). In Finland, overtime (in Finnish *ylityö*) is distinguished from 'additional work' (*lisätyö*). Additional work is work that exceeds the working hours agreed either in the individual employment contract or in a collective agreement, but does not exceed the daily (eight hours) or weekly (40 hours) working hours defined in the Working Time Act (for instance, extra hours worked by a part-time employee up to eight hours per day or 40 hours per week). Pay for additional work must be at least equal to regular pay. The definition of overtime depends on how regular working time is organised, and may be based on hours worked over a day, a week or a period of several weeks (Eurofound, 2022).

Limits on total overtime are only established in some Member States. However, in practice, the limit is 13 hours, due to the minimum period of rest between two working days of 11 hours set by the WTD.

In all Member States, national legislation provides for **overtime compensation**, which can be monetary (additional wages) and/or time off (additional leave). In some countries, such as Hungary, the rules on compensation for overtime have been highly controversial. In December 2018, a bill amending the country's labour code was passed, allowing extreme flexibility in employment – up to

400 hours of compulsory overtime per year, with up to three years to pay it. This bill was dubbed the 'slave labour law' by trade unions (Kertés, 2019).

Member States have also tended to enact **derogations from overtime rules**. Two types of derogation have been identified, each with a different purpose (Eurofound, 2022). First, most countries exclude certain workers who require a higher level of protection (e.g. pregnant workers or trainees). Second, several countries partially exclude certain categories of workers, such as senior managers, from these rules (e.g. Cyprus, Finland, France, Lithuania, Luxembourg, Malta, Norway and Sweden).

Policy debates and regulatory developments in the context of the pandemic

In the context of the COVID-19 pandemic, regulation of the maximum duration of weekly working time was discussed in a number of Member States. In some countries, the pandemic gave rise to new debates or intensified existing ones regarding the reduction of weekly working time (e.g. Czechia, Spain, Luxembourg). However, so far, no country has legislated any reduction. Instead, the main legislative developments in the context of the pandemic have concerned temporary derogations of maximum working time regulations with regard to essential services (e.g. in Finland, France, Italy, Luxembourg, Poland and Portugal).

Compensation for overtime in some activities, such as in the health sector, has been addressed through social dialogue processes. For instance, in Croatia, negotiations on compensation for overtime were in progress prior to the pandemic. Since 2017, trade unions had demanded that overtime rates should take into account other factors relating to job responsibilities – in particular, working conditions. The agreed solution took the form of a draft bill submitted by the government to Croatia's parliament in June 2021. In Finland, different forms of compensation for additional working time availability and flexibility were agreed at hospital level. In Sweden, compensation for overtime and increased flexibility over working time was addressed within the framework of a Crisis Agreement that had already been in force since 2019. This agreement was adopted in the aftermath of the 2018 forest fires, and responded to the need to provide more flexible rules in terms of working time regulation for the management of emergency situations. The agreement was renewed in June 2021, and was signed by nearly all trade unions representing employees in the local public sector (Eurofound, 2022).

Minimum rest periods

The WTD provides for three types of minimum rest period (as well as paid annual leave); namely, rest breaks, minimum daily rest and minimum weekly rest. The CJEU has emphasised that these minimum rest requirements "constitute rules of Community social law of particular importance from which every worker must benefit as a minimum requirement necessary to ensure protection of his safety and health."[3]

Rest breaks

According to the WTD, employees working more than six hours a day must be given a break, the details of which are left to national law or collective agreements. Thus, the duration and timing of breaks is regulated at national level.

[3] Judgment of 7 September 2006, *Commission of the European Communities v United Kingdom of Great Britain and Northern Ireland*, C-484/04, ECLI:EU:C:2006:526, paragraph 38; Judgment of 14 October 2010, *Union syndicale Solidaires Isère v Premier ministre and Others*, C-428/09, ECLI:EU:C:2010:612, paragraph 36.

In relation to the duration of breaks, the most recent evaluation report published by the EC (2017) found that only four Member States did not set a minimum duration or specify the timing of rest breaks by law: Denmark, Luxembourg, Romania and Sweden. More recently, Eurofound (2019) found that only Denmark and Romania did not stipulate a minimum duration. The remaining countries establish a minimum duration for breaks ranging from 10 minutes (Italy) to 60 minutes (Finland and Portugal). Some countries set a minimum of 15 minutes, while others specify a minimum of 20 minutes. The largest group of countries consider 30 minutes to be the minimum duration for rest breaks from work during the working day (Eurofound, 2019).

With regard to timing – i.e. when such breaks can be taken – most countries leave it to collective bargaining to regulate these details. In several Member States, legislation also establishes certain basic rules. For example, in many cases, legislation states that breaks cannot be taken at the start or end of the working day. In addition, many national provisions allow for the minimum break to be split into two or more periods of time (e.g. Austria or Czechia) (Eurofound, 2019).

Most Member States also have specific legal provisions aimed at protecting certain workers who are entitled to longer breaks at shorter intervals. Such provisions apply to pregnant and breastfeeding women; workers in sectors or undertaking activities in which they are more exposed to dangerous or risky work, or where longer breaks are needed to ensure safe working conditions (e.g. the transport sector); young workers[4]; and workers using visual display screens (Eurofound, 2019).

Rest breaks are also regulated through collective bargaining. Nevertheless, research on this issue is scarce and provides only anecdotal evidence. For instance, Eurofound (2019) gathered three examples per country of how collective agreements determine the conditions under which rest breaks should be taken. Based on this information, comparative analysis has shown that the regulation of rest breaks under collective agreements (sectoral or company-based) does not significantly differ from that under statutory provisions. Longer rest breaks (e.g. meal breaks) are usually not considered as working time and are not paid, while shorter breaks (e.g. pauses for coffee) are. Also, timing is not always specified in agreements; usually, this is left to internal company rules or to workers' immediate supervisors.

Interestingly, in several countries, the question of the interruption of rest breaks does not appear to be subject to specific regulation, either through statutory legislation or collective bargaining. Instead, it is left to company rules, individual agreements or informal practices.

Minimum daily rest

The requirement on minimum daily rest appears to have been satisfactorily transposed into national law by the Member States (EC, 2017). Indeed, EU countries tend to apply these rules similarly. However, some ambiguities remain with regard to sectors or groups of workers that are not included or are exempted from national working time legislation (e.g. civil servants in Spain).

Most Member States require a minimum of 11 consecutive hours of rest, as required by the WTD. However, some countries go further by requiring a minimum rest period of 12 consecutive hours (Bulgaria, Spain (private sector), Croatia, Latvia, Romania and Slovenia). In this regard, worldwide comparative research conducted by the ILO has found that national legislation in European countries, particularly those in the EU, yields the highest proportion of countries in any region in the world with 11+ hours of daily rest (ILO, 2016).

[4] According to Council Directive 94/33/EC on the protection of young people at work, young workers are entitled to a break of at least 30 minutes when their daily working time is more than four hours and 30 minutes.

In several Member States (e.g., Belgium, Portugal and others), legislation allows for the interruption of daily rest under certain circumstances such as *force majeure*.

Minimum daily rest is also regulated through collective bargaining. However, research on this specific issue is scarce, and no harmonised comparative data are available.

Minimum weekly rest

Article 5 of the WTD provides that Member States must take the necessary measures to ensure that for each seven-day period, every worker is entitled to a minimum uninterrupted rest period of 24 hours, plus the 11 hours' daily rest referred to in Article 3.

The WTD's provision regarding weekly rest has also been transposed satisfactorily into national law by the majority of Member States. While around half of Member States stick to the minimum requirement set out in the WTD (35 hours), several go beyond this minimum (EC, 2017). These are:

- 36 hours: Spain (private sector) Croatia, Netherlands, Austria and Sweden
- 42 hours: Latvia
- 44 hours: Luxembourg
- 48 hours: Bulgaria, Estonia, Hungary[5], Romania, Slovakia and Spain (Guardia civil and police)

Some Member States also establish additional rules such as a requirement to grant weekly rest as far as possible simultaneously for all employees, or whenever possible, on the same day for workers in the same household.

Breaks and working time

Most Member States do not have a statutory definition of a break from work, even though legislation in some countries specifies what breaks are intended for or may be used for (Eurofound, 2019).[6]

A crucial issue in terms of definition under national law is whether or not a break is considered working time, and is therefore paid. In most countries, at least some rest breaks (usually common breaks and pauses) are included within paid working time (Austria [only in the public sector], Croatia, Denmark [only in the public sector], Poland, Portugal, Slovenia, Spain, Sweden, and others) (Eurofound, 2019).

Disputes have arisen in some countries regarding the interpretation of whether rest breaks should count as working time. Although this is not an issue from the standpoint of the WTD[7], they illustrate problems regarding the clarity of national laws. For instance, in Bulgaria, various provincial courts have issued contradictory decisions on this issue. One of these decisions stipulated that in continuous work processes (for example, in shift work), the legally defined time for a meal is included in working time if the worker is obliged to be physically available at a place determined by the employer. However, another court established that meal breaks are not considered working time during work shifts. In its Interpretative Decision 8/2013 of 14 November 2014, the General Assembly of the Citizens' College of the Supreme Court of Cassation decided that the former decision was

[5] The 48 hours of weekly rest may also be split into two non-consecutive weekly rest days.
[6] For instance, in Austria, the Working Time Act provides that during a rest break, employees must be able to dispose of their time in whatever way they wish. In Finland, the Working Hours Act specifically mentions that during a break, employees are free to leave the workplace. An example of a very comprehensive definition is provided in the Italian law covering breaks from work. Breaks are defined as any moment of inactivity within the entire daily working period for the purposes of restoring a worker's 'psychophysical energies', consuming a meal or as a relief from monotonous and repetitive tasks.
[7] The interpretative communication on the WTD explains that Member States can choose to count the break as working time, as long as they provide for a break as *de facto* rest.

correct. The law establishes that in continuous production processes and at workplaces where work is uninterrupted, the employer should provide the worker with time for a meal during working time if the worker is obliged to be physically available at a place determined by the employer (Eurofound, 2019).

In Estonia, one company engaged in a dispute with the labour inspectorate, arguing that additional breaks during the working day should not count as working time (in opposition to the inspectorate's position). In its resolution of June 2016, a court of first instance concluded that where employees mainly work while standing up, such work can be characterised as involving a considerable physical burden and that Article 9 of the Occupational Health and Safety Act should thus apply, granting additional rest breaks to employees as part of working time (Eurofound, 2019).

Policy debates and regulatory developments in the pandemic context

During the pandemic, essential workers were affected by the suspension of rights to rest in countries such as Finland, France, Italy, Luxembourg, Poland and Portugal (Eurofound, 2021). Such suspensions applied in particular to the health sector in some countries. For example, in Finland, there was a derogation from the provisions of the Working Hours Act and the Annual Holidays Act in both the private and public sectors, to enable trained professionals in healthcare, social care and internal security to perform work as and when required. In particular, provisions concerning weekly rest periods and breaks were not applied where this was not viable, and as long as this did not jeopardise the health and safety of the employees (Eurofound, forthcoming).

Recording of working time

The WTD (2003) does not explicitly contain any obligation to record working time. In fact, it only states that the employer must keep records of the worker if Member States opting out – i.e., Member States not applying Article 6 (Leccese, 2022; DLA Piper, 2020). However, in the case of the Spanish trade union Comisiones Obreras (CCOO) v Deutsche Bank (Case No. C-55/18), the CJEU ruled that Member States are required to provide for record-keeping in domestic implementing legislation. In particular, it has stated that the recording of working time in the Member States must be carried out through an "objective, reliable and accessible system" (Helmerich, 2021; DLA Piper, 2020). According to the Court's argument, Member States can, however, choose the "necessary measures" required to ensure compliance with WTD (Leccese, 2022).

In light of this relevant case law, this section first reviews the comparative research on the statutory legislation of working time, and then analyses selected cases illustrating different regulatory approaches.

Recording of working time in EU Member States: a comparative analysis

Eurofound has conducted a comparative analysis of working time recording in EU countries (Eurofound, 2020), which analysed and clustered EU countries (including the UK, which at the time was a Member State) and Norway, on the basis of their legislative approaches to regulating the "recording, monitoring and controlling of working time", based on data for 2019. More specifically, the Eurofound analysis considered:

- the extent to which specific legislation exists for 'recording, monitoring and controlling of working time';
- the extent to which such legislation applies to all workers, covers specific workers, or specifically targets teleworkers.

Based on these two criteria, three groups of countries were distinguished:

- countries with legislation that applies to all workers, without making specific reference to teleworkers or remote workers: Estonia, Finland, France, Hungary, Ireland, Italy, Latvia, the Netherlands, Poland, Portugal, Slovakia and Norway;
- countries that have such legislation, but only in relation to specific workers or arrangements such as standby or night work: Belgium, Cyprus, Czechia, Germany, Luxembourg, Sweden and the UK;
- countries that only possess specific provisions for recording the working hours of teleworkers: Austria, Bulgaria, Croatia, Denmark, Lithuania, Malta, Romania, Slovenia and Spain.

Recording of working time in selected EU Member States

This section reviews the cases of Spain, Portugal, Greece, Italy and Germany, which illustrate different approaches to the regulation of the recording of working time (Eurofound, 2020).

Spain and Portugal: strict legislation and enforcement regime prior to CJEU judgment

Spain updated its legislation shortly before the CJEU judgment through an amendment to Article 39 of its Workers' Statute (*Estatuto de los Trabajadores*). This amendment imposes an obligation on employers to keep a daily record of working time, recording the actual start and end time of each workday. In addition, these records must remain accessible to employees, their lawyers and labour inspectors for four years (Leccese, 2022, p. 4).

Leccese (2022, pp. 4-5) positively highlights the following aspects of the Spanish legislation for the purpose of ensuring compliance with working time regulation:

- the time recording system applies to flexible working arrangements and, in particular, to remote work, as it "must faithfully reflect the time the remote worker performs work" (Leccese, 2022, p. 9);
- the recording system must reflect the actual performance of work without the possibility of this information being altered or manipulated, and must be accessible to all concerned parties at any time;
- any type of recording system can be used (for instance, hard copies and/or digital copies or both), provided that it guarantees reliable and non-modifiable traceability of the recorded working time.
- workers' privacy rights must be respected.

Portugal also imposed an obligation on employers to record all working time even before the judgement of the CJEU. More specifically, Article 202 of the Portuguese Labour Code provides that working time records must indicate the start and end time of working hours, as well as interruptions or intervals that are not included, to determine the number of hours actually worked on a daily and weekly basis. The record must be kept in an accessible place for five years, and must be immediately available for inspection and review (Leccese, 2022).

Greece: recent legislation potentially improving enforcement capacity

In Greece, a comprehensive reform of the labour code was passed in 2021. This provides that employers are obliged to acquire and operate an electronic system for measuring in real time the

working time of their employees that must be directly connected and interoperable (article 74, Law No. 4808-19-06-2021). This provision aims to combat undeclared work and undeclared overtime.

The legislation introducing digital recording of working time aims to provide a comprehensive record of working hours and to minimise undeclared and uninsured work, including falsely declared part-time work. The electronic system must record the time of arrival and departure of employees in real time, and must automatically transmit these data to the Labour Ministry's ERGANI II system, where the data will be cross-checked against those reported by the employers.

The use of electronic work cards has begun on a pilot basis in large supermarket and banking businesses (companies with more than 250 employees). Such companies are required, from 1 July 2022 to possess and operate a digital work card system for all employees with a contract or employment relationship who work on the company's premises, including workers employed through employee lending[8].

Italy: insufficient legislation to ensure compliance with and the enforcement of working time regulation

In Italy, the Labour Code (*Libro Unico del Lavoro*) only requires the total daily number of hours worked to be recorded, and there is no obligation to record the times of entry and exit of the workers.

Recording is made simpler in the case of workers who receive "a fixed salary for either a full day or longer", in which case it is not necessary to note the details of working hours for a given day, but "only the day of attendance at work". According to Leccese (2022), this rule is insufficient to account for the actual duration of working time, as well as to verify compliance with the maximum working time limits and the minimum rest periods.

In addition, attention must be drawn to flexible teleworking arrangements, regulated in Italy as smart or agile work. Agile work is supposed to be carried out "without specific constraints of time and place of work". It has been argued that such arrangements preclude the measuring and recording of working time. In the view of Leccesse (2020), if agile work must respect the "limits of the maximum duration of daily and weekly working hours", there is a need to measure each worker's daily working time through an objective, reliable and accessible system.

Germany: no specific legislation, but ongoing discussions on works councils' rights of initiative

German legislation has not yet been updated to incorporate the requirements of CJEU case law. So far, no fundamental obligation has been imposed on employers to fully record the working time of their employees (Lott et al. 2021). The Working Hours Act only obliges employers to record the working time of employees exceeding the working day (Lott et al. 2021).

New legislation requiring the recording of working time was expected at the beginning of 2020, when a draft was scheduled to be prepared. Moreover, the Coalition government agreement included a commitment to discuss the topic with the social partners: "In dialogue with the social partners, we are examining the need for adjustments in the light of the case law of the European Court of Justice on working time law." (Coalition government contract, p.54).

Nevertheless, the CJEU's decision has already influenced the German Labour courts in certain cases. For example, the Emden Labour Court decided on 20 February 2020 that an employer was obliged to pay overtime compensation because it had failed to establish a time recording system.

[8] See https://greecevichpunjabi.com/this-is-how-black-work-will-be-done-what-comes-with-the-digital-work-card/

This is a controversial decision, however, and the prevailing assumption is that there is no general requirement for recording.

Conversely, recent case law has provided a different interpretation in relation to the question of whether a works council is entitled to a right to initiate the introduction of a time recording system. According to previous case law (1989), the works council has a right of co-determination (BetrVG), but no right of initiative with regard to the introduction and use of technical equipment designed to monitor the behaviour or performance of employees. In contrast, the decision by the Labour Court of Appeal of Hamm (LAG Hamm) on 27 July 2021 ruled that the works council has the right of initiative to introduce an electronic time recording system pursuant to the German Works Council Constitution Act (BetrVG). However, this decision is not legally binding. The Federal Labour Court (BAG) will now have to decide whether it will deviate from its previous decision of 1989. If the BAG follows the reasoning of the LAG Hamm, employers may henceforth not only be exposed to initiatives of the works council with regard to electronic time recording, but also, if applicable, to other technical devices suitable for monitoring the conduct or performance of employees, and which are deemed expedient by the works council (Helmerich, 2021).

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