The turbulent life of the Working Time Directive

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Abstract
The case of the Working Time Directive (WTD) is a prime example of a failed attempt by the Member States and the Commission to counter rulings of the European Court of Justice (CJEU) by legislative overrule. Outsourcing the decision making process to the social partners also did not deliver the desired results. After years of trying to reform the WTD, the Commission changed its strategy and issued an interpretive communication instead. However, it is doubtful that this communication will solve all that is wrong with the WTD. What were the obstacles to legislative overrule in this case? What other strategies in avoiding the consequences of CJEU rulings do the Member States apply? What will the future of WTD look like?

Keywords
Working Time Directive, Court of Justice of the EU, interaction of law and politics, EU legislative process, (failed) legislative overrule

1. Introduction
The Working Time Directive (WTD)¹ has been subject to an action for annulment, some infringement proceedings, numerous preliminary rulings, a number of unsuccessful social dialogues and successful amendments of minor provisions, but failed attempts to reformulate its most controversial provisions. Frustrated by a decade-long deadlock of the legislative process, the

¹ Starting out as Council Directive 93/104/EC concerning certain aspects of the organization of working time, [1993] OJ L 307/18 and is now Directive 2003/88/EC of the European Parliament and of the Council of 4 November 2003 concerning certain aspects of the organisation of working time, [2003] OJ L 299/9 (WTD 2003).
Commission finally gave up its effort to reform the WTD. In May 2017 the Commission published guidelines on how to interpret the directive in a rather unusual, detailed interpretative communication instead. This eventful history of the WTD makes it an excellent case study of how political actors try to rein in the European Court of Justice (CJEU) by reformulating the law so that the CJEU cannot rule the same way in future cases. It is also an example of how difficult this can be. After the CJEU declared several practices of Member States incompatible with EU law concerning the treatment of on-call duty, the Commission, under pressure from the Member States, drafted an amending directive that was meant to make it impossible for the CJEU to continue ruling in the same way. This strategy of legislative overrule failed because the amending directive was rejected by the European Parliament (EP) and no agreement could be reached between the EP and the Council of Ministers in the conciliation committee. The fact that the conciliation committee could not reach an agreement was, until then, unparalleled. Subsequently, the Commission initiated a social dialogue based on Articles 151–156 of the Treaty on the Functioning of the European Union (TFEU) in the hope that the social partners would come to an agreement where Council and EP could not. However, no agreement was reached. The Commission then announced it would carry out what it calls ‘a detailed impact assessment of the directive’ to explore different options of how to proceed. However, the interpretative communication seems to be the final attempt to bring some clarity to how to apply the WTD, at least for the time being. These recent events are a good reason to take a closer look at the rich history of this directive, in the hope that it will increase our understanding of how rulings of the CJEU influence the legislative process of the EU in general.

A short historical overview of the case law and the reactions of the legislators will place the recent developments concerning the WTD into context and give an answer to the question of why a new proposal was introduced at all. At this early stage, on-call duty was the most disputed issue connected to the WTD. The major provisions of this new proposal will be described briefly. However, the focus of the article lies on the events triggered by the proposed amendments. We see an Advocate General (AG) calling upon the CJEU to take a more flexible approach that would reflect the wishes of the Member States, a legislative process that ended with rejection of the proposal, a failed social dialogue, a new attempt by the Commission to revive the process of

2. See, for example, Case C-303/98 Sindicato de Médicos de Asistencia Pública (Simap) v. Conselleria de Sanidad y Consumo de la Generalidad Valenciana, EU: C:2000:528; Case C-241/99 Confederación Intersindical Galega (CIG) v. Servicio Galega de Saúde (Sergas), EU:C:2001:371; Case C-151/02 Landeshauptstadt Kiel v. Norbert Jaeger, EU:C:2003:209; Case C-14/04 Abdelkader Dellas and Others v. Premier ministre and Others, EU:C:2005:728.

3. For a detailed overview of the history of the WTD until 2007, see T. Nowak, ‘The Working Time Directive and the European Court of Justice’, 15 Maastricht Journal of European and Comparative Law (2008). For a somewhat shorter, but more recent overview, see A. Bogg, ‘The Regulation of Working Time in Europe’, in A. Bogg, C. Costello and A.C.L. Davies (eds.), Research Handbook on EU Labour Law (Edward Elgar Publishing, 2016), p. 267–298.

4. See L. Conant, Justice Contained. Law and Politics in the European Union (Cornell University Press, 2002), p. 33 for possible reactions to rulings of the CJEU.

5. It is now one of two conciliation procedures in which no agreement could be reached. In 2011 the conciliation talks on the Novel Foods Regulation (Regulation No. 258/97/EC of the European Parliament and of the Council of 27 January 1997 concerning novel foods and novel food ingredients, [1997] OJ L 43/1) also ended without agreement.

6. European Commission, ‘Working Conditions – Working Time Directive’, European Commission (2018), http://ec.europa.eu/social/main.jsp?catId=706&langId=en&intPageId=205.

7. ‘In view of these failed attempts to revise the Directive and of the substantial amount of case-law from CJEU (more than 60 judgments since 1993), the Commission decided to take a non-legislative approach in order to ensure a better implementation of the Working Time Directive.’ Email communication between the author and the Commission, 6 October 2017.
amending the directive and different strategies employed by Member States to circumvent the contested provisions of the directive.

2. The early years

The WTD prescribes: minimum daily rest periods of 11 hours; breaks when working days are longer than six hours, the details of which are left to collective agreements; a weekly rest period of 24 uninterrupted hours; weekly working hours of not more than 48 hours; annual leave of at least four weeks; and night work to be no longer than an average of eight hours in a 24 hour period. It also addresses, rather superficially, shift work and patterns of work. It defines working time as ‘any period during which the worker is working, at the employer’s disposal and carrying out his activity or duties, in accordance with national law and/or practice’, and rest period as ‘any period which is not working time’. In certain cases the directive allows for derogations from these rules. Additionally, Article 18 of the WTD provides for the possibility that weekly working time could exceed 48 hours with the consent of the individual worker.

The birth of the WTD in 1993 foreshadowed a turbulent life. The United Kingdom (UK) did not agree with the legal basis used by the Commission, namely Article 118a EEC on the health and safety of workers, which allowed for Qualified Majority Voting (QMV) in the Council of Ministers. Instead, the UK wanted the directive to be based on Article 235 EEC on measures necessary to attain the goals of the Treaty but for which no powers are provided in the Treaty, which required unanimity. QMV was nevertheless applied and the UK abstained in the final vote in the Council. The UK then brought an unsuccessful action for annulment against the WTD claiming that the wrong legal basis was used and several other procedural requirements were breached. Four years later, the CJEU found Italy and France in breach of their obligations under the WTD in infringement proceedings. After that, the CJEU delivered a number of preliminary rulings on the WTD, the majority of which concerned the definition of working time found in Article 2 of the directive and its meaning for time spent on-call. In all of the cases dealing with on-call duty, the employers, all

8. Articles 2(1) and (2) of the WTD 2003.
9. Article 17 of the WTD 2003. Actually, one can distinguish between two kinds of derogations. First, for certain activities, Article 17 allows for derogations from the provisions on daily and weekly rest, breaks, weekly working time, annual leave, length of night work and the reference period. These possible derogations concern managing executives, family workers and workers officiating at religious ceremonies (a list the Commission considers not to be exhaustive (Report from the Commission, State of Implementation of Council Directive 93/104/EC of 23 November 1993 Concerning certain aspects of the organisation of working time, COM(2000) 787 final, p. 3)). Second, for some other activities, derogations on the provisions named above are possible, except on the weekly working time. These activities include, among others, ‘services relating to the reception, treatment and/or care provided by hospitals or similar establishments, residential institutions and prisons’ (Article 17(3)(c)(i) of the WTD 2003).
10. Case C-84/94 United Kingdom of Great Britain and Northern Ireland v. Council of the European Union, EU:C:1996:431.
11. Case C-386/98 Commission of the European Communities v. Italian Republic, EU:C:2000:115; Case C-46/99 Commission of the European Communities v. French Republic, EU:C:2000:307.
12. Case C-303/98 Sindicato de Médicos de Asistencia Pública (Simap) v. Conselleria de Sanidad y Consumo de la Generalidad Valenciana; Case C-241/99 Confederación Intersindical Galega (CIG) v. Servicio Galega de Saúde (Sergas) and Case C-151/02 Landeshauptstadt Kiel v. Norbert Jaeger on time spent on-call; Case C-173/99 Broadcasting, Entertainment, Cinematographic and Theatre Union (BECTU) v. Secretary of State for Trade and Industry, EU:C:2001:356 on qualifying period before a worker was entitled to take vacation; Case C-133/00 Bowden, Chapman and Doyle v. Tuffnells Parcels Express Ltd., EU:C:2001:514 on paid annual leave or, rather, on the scope of the WTD.
of them public health and emergency services, did not calculate time spent on-call as working time. The CJEU consistently declared this practice incompatible with the directive, arguing that inactive time spent at the disposal of the employer has to be counted as working time in its entirety.

Unrelated to the rulings of the CJEU on the WTD, the Council and the Parliament adopted a revised version of the WTD in 2003, Directive 2003/88, which included sectors that had been excluded from its scope and dropped the provision that Sunday should, in principle, be part of the weekly rest period.

To sum up, the rulings of the CJEU on on-call duty caused some concern in the Member States. They argued that defining time spent on-call as working time, as the CJEU did, would lead to unbearable costs and a shortage of personnel. Consequently, they asked the Commission to initiate a reform of the WTD.

3. Attempting to amend

In 2004 a new phase in the life of the WTD began with the Commission sending a proposal to amend the Directive to the EP and the Council after the social partners declined to start a social dialogue.13 The proposal and the accompanying explanatory memorandum left no doubt that the main purpose of the proposal was to make it impossible for the ECJ to rule in the same way in the future.14 In contradiction to all CJEU rulings on working time, the proposal defined inactive on-call time as not being working time, ‘[on-call time is the] period during which the worker has the obligation to be available at the workplace in order to intervene, at the employer’s request, to carry out his activity or duties’, and the inactive part of on-call time as the ‘period during which the worker is on call […] but not required by his employer to carry out his activity or duties’.15 The proposal makes clear that inactive on-call time ‘shall not be regarded as working time’.16 Under certain conditions the proposal also retained the possibility for individual opt-outs from the maximum weekly working time.17 Around that time the CJEU decided in Pfeiffer and Others, seven joined cases from Germany, that in order to exceed the allowed weekly working time, consent must be given individually and freely. On-call duty was not discussed in this ruling.18

The Council of Ministers welcomed the proposal, claiming that after SIMAP and Jaeger it would introduce legal certainty by defining ‘on-call time’ and ‘inactive part of on-call time’.19 However, the Council of Ministers could not agree yet on the opt-out provisions concerning maximum weekly working time. In 2005, the Committee of the Regions (CoR) supported the proposal, but suggested the removal of several opt-out possibilities and the gradual phasing out of the remaining opt-out possibilities.20 The opinion of the Economic and Social Committee (ESC) from the same year included something for everyone. The ESC would have liked to leave the regulation of on-call duty to the social partners so that different industries could adopt different rules.

13. Second phase of consultation of the social partners at Community level concerning the revision of Directive 93/104/EC concerning certain aspects of the organization of working time, SEC(2004) 610 final.
14. Proposal for a Directive of the European Parliament and of the Council amending Directive 2003/88/EC concerning certain aspects of the organisation of working time, COM(2004) 607 final (the WTD proposal).
15. Article 1 of the WTD proposal.
16. Article 1(2) of the WTD proposal.
17. Article 1(8) of the WTD proposal.
18. Joined Cases C-397/01 to C-403/01 Pfeiffer and Others, EU:C:2004:584.
19. Council sessions 2606 on 04.12.04, 2627 on 07.12.04 and 2644 on 03.03.05.
20. OJ C, 20.09.2005, 69–72.
At the same time, it criticized the Member States for not complying with the rulings of the ECJ and supported the phasing out of the opt-out possibility. However, the EP wanted a general reference to the case law of the ECJ and to the Court’s definition of working time to be added to the recitals. In stark opposition to the Commission’s proposal, the EP’s amended proposal stated that all on-call time, including inactive on-call time, should be counted as working time. However, under certain circumstances, the EP’s version allowed for the calculation of inactive on-call duty in a specific manner. The report does not specify what ‘specific manner’ exactly means. However, it can be assumed that it includes the possibility to count time spent inactive on-call not fully but to a lesser degree as working time. The social partners reacted to the position of the EP with press releases. The European Trade Union Confederation (ETUC) welcomed the decision, while the Union of Industrial and Employers’ Confederations of Europe (UNICE) deplored it.

In its amended proposal, the Commission did not incorporate the most important points of the EP’s position and simply kept its original definition of time spent on-call not being working time. The Commission argued that, otherwise, no agreement could be reached in the Council of Ministers. Nevertheless, subsequent discussions of the proposal in the Council in June and December 2005 did not go smoothly. Member States could not agree on what to do with the opt-out possibility. The Council discussed the WTD again in June 2006 and in November and December 2007 without making a final decision. The proposal basically affirmed the concept of ‘inactive on-call time’ as formulated by the Commission. Again, the press releases leave no doubt concerning the intention of the proposal as far as on-call duty is concerned, namely ‘[...] to avoid any consequences of the European Court of Justice’s case law [...]’.

21. OJ C, 27.10.2005, 16–21. http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=OJ:C:2005:267:TOC, last accessed 1 May 2018.
22. European Parliament, ‘Report on the proposal for a Directive of the European Parliament and of the Council amending Directive 2003/88/EC concerning certain aspects of the organisation of working time’, European Parliament (2005), http://ec.europa.eu/social/BlobServlet?docId=4091&langId=en.
23. ETUC, ‘ETUC welcomes the decision of the European Parliament on the working time directive’, ETUC (2008), https://www.etuc.org/press/etuc-welcomes-decision-european-parliament-strengthen-rights-european-works-councils#.WoVvOIPFKM8; and UNICE, UNICE deplores European Parliament decision on Working Time Directive, Press Release 11.05.05. https://www.businesseurope.eu/sites/buseur/files/media/imported/2005-00869-EN.pdf, last accessed on 1 May 2018.
24. Amended proposal for a Directive of the European Parliament and of the Council amending Directive 2003/88/EC concerning certain aspects of the organisation of working time, COM(2005) 246 final.
25. Council meeting 2663, http://europa.eu/rapid/press-release_PRES-05-117_en.htm, last accessed 1 May 2018. and Council meeting 2699. http://data.consilium.europa.eu/doc/document/ST-15574-2005-INIT/en/pdf, last accessed on 1 May 2018.
26. Interviews with senior Commission officials by the author of this article left no doubt that agreement had already been reached on the definition of on-call time in June 2006. The problems remaining mainly concerned op-out provisions. The later reaction of the Commission to the common position seems to support this information: ‘The future of the opt-out was the single most controversial point during the prolonged and difficult Council discussions during the first reading’ (Communication from the Commission to the European Parliament pursuant to the second subparagraph of Article 251(2) of the EC Treaty concerning the common position of the Council on the adoption of a proposed Directive of the European Parliament and of the Council amending Directive 2003/88/EC on certain aspects concerning the organisation of working time, COM(2008) 0568 final, para. 3.1.2.3).
27. European Commission, ‘Press Release: Extraordinary Council Meeting Employment, Social Policy, Health and Consumer Affairs’, European Commission (2006), http://europa.eu/rapid/press-release_PRES-06-298_en.htm; European Commission, ‘Press Release: 2837th Council Meeting, Employment, Social Policy, Health and Consumer Affairs’, European Commission (2007), http://europa.eu/rapid/press-release_PRES-07-284_en.htm.
Only in September 2008 did the Council agree on a common position on the proposal by QMV.\textsuperscript{28} Belgium, Cyprus, Greece, Hungary, Malta, Portugal and Spain did not support the proposal. Some of them stated the reasons for their rejection in a statement to the Council minutes. Of these states, all regret that the possibility for opt-out was still part of the proposal and ‘some of them still insist that the inactive part of on-call time cannot be considered as rest time’.\textsuperscript{29} Despite voting in favour of the proposal, France shared the last objection and announced that it would not transpose the option of counting on-call duty as rest period contained in the proposal.\textsuperscript{30} The Commission recognized that the common position of the Council and the line taken by the EP were difficult to reconcile.\textsuperscript{31} Nevertheless, ‘[t]he Commission has supported the overall agreement [the common position of the Council], having regard to the urgent need to clarify the legal situation and thus to allow more coherent application of the Directive across all Member States’.\textsuperscript{32} The list of differences is severe. The EP wanted to make clear that the provisions of the WTD apply per worker, not per contract. The Council was unable to reach an agreement on this point because half of the Member States used the per worker rule and the other half used the per contract rule, and neither half wanted to give up their respective practice. The Commission argued in favour of regulating this issue at a later time. Moreover, the common position left it to the Member States to either count inactive on-call duty as working time or as rest period. The common position of the Council retained the opt-out possibilities, a phasing out of this option was not included. As a reaction to this common position, the EP basically repeated its position from 2005 in the second reading of the proposal and rejected most changes made by the Council.\textsuperscript{33} The Commission, in its opinion on this second reading in the EP, rejected the phasing out of the opt-out possibility and the calculation of the weekly work period per worker, but basically accepted the amendments concerning on-call duty.\textsuperscript{34} The Council rejected all major amendments proposed by the EP and a conciliation committee under Article 251 TEC (now Article 294 TFEU). Shortly after, the committee ended its work without an agreement. No

\textsuperscript{28} Common Position No. 23/2008/EC adopted by the Council on 15 September 2008 with a view to the adoption of Directive 2008/.../EC of the European Parliament and of the Council of [...] amending Directive 2003/88/EC concerning certain aspects of the organisation of working time, [2008] OJ C 254E/26.

\textsuperscript{29} Council of the European Union, ‘Amended proposal for a Directive of the European Parliament and of the Council amending Directive 2003/88/EC concerning certain aspects of the organisation of working time – political agreement on a common position’, Council of the European Union (2008), http://register.consilium.europa.eu/doc/srv?l=EN&f=ST%2010583%202008%20ADD%201, last accessed on 1 May 2018.

\textsuperscript{30} Council document 10583/08 ADD 1, 3. http://register.consilium.europa.eu/doc/srv?l=EN&f=ST%2010583%202008%20ADD%201, last accessed on 1 May 2018.

\textsuperscript{31} Communication from the Commission to the European Parliament pursuant to the second subparagraph of Article 251(2) of the EC Treaty concerning the common position of the Council on the adoption of a proposed Directive of the European Parliament and of the Council amending Directive 2003/88/EC on certain aspects concerning the organisation of working time, COM(2008) 0568 final.

\textsuperscript{32} Ibid., para. 3.1.1.

\textsuperscript{33} European Parliament, ‘Organisation of working time (A6-0440/2008, Alejandro Cercas (Vote))’, European Parliament (2008), http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+CRE+20081217+ITEM-005-07+DOC+XML+V0//EN.

\textsuperscript{34} Opinion of the Commission pursuant to Article 251(2), third subparagraph, point (c) of the EC Treaty on the European Parliament’s amendments to the Council’s common position regarding the proposal for a Directive of the European Parliament and of the Council amending Directive 2003/88/EC concerning certain aspects of the organisation of working time amending the proposal of the Commission pursuant to Article 250(2) of the EC Treaty, COM(2009) 0057 final.
consensus could be reached on the opt-out possibility, the treatment of on-call duty and how to regulate multiple contracts.\textsuperscript{35}

In the meantime, the CJEU, unimpressed by this slow and difficult legislative process, continued to rule that inactive time spent on-call is working time.\textsuperscript{36} In addition, the Court of Justice decided, in a case brought by the Commission, that the UK had failed to fulfil its obligations by allowing for more derogations than the directive did.\textsuperscript{37} The CJEU also delivered a number of preliminary rulings concerning annual leave provisions.\textsuperscript{38} In these cases, the CJEU decided predominantly in favour of the employees and against national or company practices.

In 2008, Eurofound, an EU agency tasked with providing information in the field of social policy, published a study on working time in order to provide some data for the discussion on the WTD.\textsuperscript{39} Although it came too late to influence the decision-making process, it is the first in a series of studies that run parallel to the legislative process.

In conclusion, this five-year-long attempt to amend the WTD was a direct reaction to the rulings of the CJEU, which kept true, despite the political headwind, to its established line of reasoning: on-call duty spent at the workplace is working time in its entirety. The Commission argued, after the Council had rejected the amendments proposed by the EP, ‘[. . .] that the present situation regarding on-call time and compensatory rest still urgently requires clarification through legislative change’.\textsuperscript{40} It was not long before the Commission started another attempt to amend the WTD.

4. The Commission and the social partners try again

In 2010, a year after the conciliation committee had failed to reach an agreement, the Commission again asked the social partners to initiate a social dialogue.\textsuperscript{41} It did so in a rather comprehensive communication from the Commission to the EP, the Council, the EESC and the CoR explaining

\begin{thebibliography}{99}
\bibitem{35} 2004/0209(COD) – 29/04/2009 Final decision by conciliation committee. http://www.europarl.europa.eu/oeil/popups/summary.do?id=1075800&l=e&en, last accessed on 1 May 2018.
\bibitem{36} Case C-52/04 Personalrat der Feuerwehr Hamburg v. Leiter der Feuerwehr Hamburg, EU:C:2005:467; Case C-14/04 Abdelkader Dellas and Others v. Premier ministre and Others, and Case C-437/05 Jan Vorel v. Nemocnice Cesky Krumlov, EU:C:2007:23. However, see the Opinion of Advocate General Colomer in Case C-14/04 Abdelkader Dellas and Others v. Premier ministre and Others, EU:C:2005:448, who refers to the then ongoing legislative process and criticizes the existing case law on working time as being too rigid because it knows only two categories – work and rest.
\bibitem{37} Case C-484/04 Commission of the European Communities v. United Kingdom of Great Britain and Northern Ireland, EU:C:2006:526.
\bibitem{38} Joined Cases C-131/04 and C-257/04 C.D. Robinson-Steele v. R.D. Retail Services Ltd and Michael Jason Clarke v. Frank Staddon Ltd, J.C. Caulfield and Others v. Hanson Clay Products Ltd, EU:C:2006:177; Case C-124/05 Federatie Nederlandse Vakbeweging v. Staat der Nederlanden, EU:C:2006:244; Case C-350/06 Gerhard Schultz-Hoff v. Deutsche Rentenversicherung Bund, EU:C:2009:18; Case C-520/06 C. Stringer and others v. Her Majesty’s Revenue and Customs, EU:C:2008:38 and Case C-277/08 Francisco Vicente Pereda v. Madrid Movilidad S.A., EU:C:2009:542.
\bibitem{39} Eurofound, ‘Revisions to the European working time directive: recent Eurofound research’, Eurofound (2008), https://www.eurofound.europa.eu/publications/customised-report/2008/working-conditions/revisions-to-the-european-working-time-directive-recent-eurofound-research-background-paper.
\bibitem{40} Communication from the Commission to the European Parliament pursuant to the second subparagraph of Article 251(2) of the EC Treaty concerning the common position of the Council on the adoption of a proposed Directive of the European Parliament and of the Council amending Directive 2003/88/EC on certain aspects concerning the organisation of working time, COM(2008) 0568 final.
\bibitem{41} Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee, and the Committee of the Regions Reviewing the Working Time Directive (first-phase consultation of the social partners at European Union level under Article 154 of the TFEU), COM(2010) 106 final.
\end{thebibliography}
the need to reform the WTD. In this request, the Commission paints a picture of a new knowledge-based economy with new lifestyles and demand for more working time flexibility. Nevertheless, the Commission acknowledges that there are some sectors, namely those where the worker is under close supervision of the employer, that need safeguards against unhealthy working conditions. The issue of on-call duty is also addressed. The Commission proposes that: ‘For example, inactive periods of on-call time at the workplace could be disregarded when calculating working time. Or inactive periods could be calculated less than 100% as working time, proportionate to the level of attention required (the so-called equivalence system).’ 42 A list of questions concerning proposed changes addressed to the social partners concludes the communication. The Commission received replies from 47 business associations and worker organizations, a majority of which were officially recognized social partners. 43 While the business organizations argued for more flexibility, the worker organizations stressed the importance of collective bargaining. However, most of them were rather vague on the question of whether they wanted to open a social dialogue on the WTD or not. At the same time, the Commission fulfilled its obligation under Article 24 of the WTD and published a report on how the Member States regulate working time. 44 From this report it became clear that compliance with the WTD is, at best, shady. Often, Member States’ laws allow for more than the 48 hours weekly working time limit contained in the directive, and in some states the reference period is (contrary to Article 18 WTD) set to 12 months without collective agreement. Time spent on-call seems to be treated as working time in its entirety in about half the Member States, often with exceptions for certain sectors. In the other Member States, inactive on-call time is not fully counted as working time. The Member States also show low compliance with the rules on the rest period, allowing for all kinds of derogations, excluding specific sectors or delaying the prescribed compensatory rest period. The list of insufficient transposition of the WTD continues: in some states, doctors in training do not fall under the national transposition despite the fact that the WTD explicitly includes them; some states exclude police and armed forces despite the fact that the ECJ ruled that exceptions could only be made in times of crisis; in Italy even employers of libraries, museums and archaeological sites are excluded. The most bizarre feature of the WTD and its application is that it does not say whether the working time limit should be applied per worker or per contract. Although, the Commission recommends application per worker, 11 of the 25 Member States at the time of the report applied it per contract. The report states that while in the 2000 only the UK allowed for workers to opt-out, in 2010 the national legislation of 16 Member States included the possibility of some kind of opt-out. The Commission also identified minor problems concerning annual leave and night work.

Considering all of the shortcomings in transposition found in this 2010 report of the Commission, many of which have at their root the badly formulated WTD (missing definition of working time, no mention of whether it applies per worker or per contract, generous possibilities for opt-outs, etc.), a reform of the WTD seems more pressing than ever if one wants the WTD to be taken seriously. That the Commission continuously praises the efforts of the Member States in the report before it gives its long lists of shortcomings, seems to be more a diplomatic rhetorical device than

42. Ibid., p. 8.
43. Commission Staff Working Paper: 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, SEC(2010) 1610 final and COM(2010) 801.
44. Commission Staff Working Paper: Detailed report on the implementation by Member States of Directive 2003/88/EC concerning certain aspects of the organisation of working time (‘The Working Time Directive’), SEC(2010) 1611 final and COM(2010) 802. See ec.europa.eu/social/BlobServlet?docId=6420&langId=en, last accessed on 1 May 2018.
coming from the heart. Accompanying these first steps towards a new attempt to reform the WTD, a number of studies on the WTD commissioned by the Commission were published. The publication of these reports is a feature distinguishing this new attempt from earlier attempts to reform the WTD. As we will see, it will be in vain.

Following the invitation of the Commission, the social partners then started with a new attempt to amend the WTD in 2011. Foreshadowed by the irreconcilable positions displayed by the social partners in the previous attempts to amend the WTD, the talks were abandoned without result a year later.

Several cases on the WTD were decided by the CJEU between 2010 and 2013, the year the Commission reopened the consultation process. All of these cases were requests for preliminary rulings, except one, which was an infringement proceeding brought by the Commission. In this infringement proceeding, the ECJ found that Spain had failed in its obligations under the WTD by not applying it to civilian personnel in public authorities. Of the preliminary rulings, a few concerned weekly rest and weekly working time, a small number concerned the scope of the directive and one concerned the definition of working time. However, a majority of the cases concerned annual leave and sick leave. Again, the CJEU primarily decided in favour of the employees.

To recapitulate, in this failed attempt to reform the WTD, the Commission changed its argumentation from wanting to counter rulings of the CJEU to overall developments of the economy that would call for an overhaul of the WTD. Although on-call duty was still an issue, it became less prominent as other issues received equal attention. And, indeed, the report on how the Member States regulate working time showed many more application problems than just the handling of time spent on-call. The report makes clear that many states do not even apply the WTD as interpreted by the CJEU to their own public employees. Moreover, whether the Directive is applied per worker or per contract seems to be a very important difference that the WTD does not address. Each Member State is thus free on this point to decide how to apply the directive, despite the Commission’s preference for an application per worker. The fact that the use of the op-out option has spread significantly is arguably a reaction to the strict and consistent interpretation of the WTD

45. Eurofound, ‘Changes over time: First findings from the fifth European Working Conditions Survey’, Eurofound (2012), https://www.eurofound.europa.eu/publications/resume/2010/working-conditions/changes-over-time-first-find ings-from-the-fifth-european-working-conditions-survey-resume; Eurofound, ‘Comparative Analysis of Working Time in the European Union Introduction’, Eurofound (2009), https://www.eurofound.europa.eu/observatories/eur work/comparative-information/comparative-analysis-of-working-time-in-the-european-union; J. Plantenga and C. Remery, ‘Flexible Working Time Arrangements and Gender Equality. A Comparative Review of 30 European Countries’, European Commission (2009), http://ec.europa.eu/social/BlobServlet?docId=6182; Deloitte, ‘Study to Support an Impact Assessment on Further Action at European Level Regarding Directive 2003/88/EC and the Evolution of Working Time Organization’, Deloitte (2010), http://csdle.lex.unict.it/Archive/LW/Data%20reports%20and%20studies/Others%20reports%20and%20studies/20110127-014548_Deloitte_1A_workingtime_directive_Dec10pdf.pdf.

46. Case C-158/09 Commission v. Spain, EU:C:2010:292.

47. Case C-227/09 Accardo and Others, EU:C:2010:624; Case C-243/09 Fuß, EU:C:2010:609.

48. Case C-428/09 Union syndicale Solidaires Isère, EU:C:2010:612; Case C-519/09 May, EU:C:2011:221.

49. Case C-258/10 Grigore, EU:C:2011:122.

50. Case C-519/09 May; Case C-155/10 Williams and Others, EU:C:2011:588; Case C-78/11 ANGED, EU:C:2012:372; Case C-229/11 Heimann and others, EU:C:2012:693; Case C-214/10 KHS AG, EU:C:2011:761; Case C-194/12 Maestre García, EU:C:2013:102; Case C-219/14 Greenfield, EU:C:2015:745; Case C-178/15 Sobczyszyn, EU:C:2016:502; Case C-337/10 Neidel, EU:C:2012:263; Case C-341/15 Maschek, EU:C:2016:576.
by the CJEU. It also does not bode well for demands coming from the EP and the employee
organizations to terminate the possibility for opt-outs. A shift of focus can also be seen in the cases
reaching the ECJ. Disputes about annual leave replaced disputes on the definition of working time.

5. The latest implementation report and the Commission’s interpretative communication

Shortly after the social partners failed to open a social dialogue, the Commission started again with
a review process of the WTD. The Commission conducted a public consultation and assessed
options for further action. In the end, the Commission decided to apply a non-legislative strategy
in the form of a communicative interpretation, which will be discussed below. During this time, the
CJEU decided a number of cases on the WTD, starting with infringement proceedings against
Ireland and Greece brought by the Commission. The case against Ireland was dismissed because
the Commission did not provide enough evidence. Greece, on the other hand, was found in
breach of the directive for excluding doctors in public health services from its scope. The other
cases were preliminary rulings on the definition of working time and on possible derogations. In
both cases the ECJ decided in favour of the employees. A case on on-call duty is still pending at
the time of writing.

In April 2017, again following the instructions of Article 24 of the WTD, which calls for an
evaluation of the application of the directive every five years, the Commission published another
report on the implementation of the WTD. This newest report does not read much differently
from the one from 2010 discussed above. Some Member States apply the weekly working time
limit per worker, others per contract and still others per worker, if the worker has more than one
contract with the same employer, but per contract if the worker has contracts with different
employers. Workers in the public sector especially are often still excluded from the scope of the
directive by national legislation. Most Member States do not define the status of on-call duty and
practices differ between Member States. The report states that Member States make use of the
derogations allowed for by Articles 17, 18 and 22 of the directive concerning autonomous workers,
compensatory rest and the opt-out possibility. In some cases, the Member States exceed the limits
of what is allowed according to these Articles. Asked to give their view on the application of the
WTD, the trade unions, represented by ETUC, express their dissatisfaction with the transposition
of the WTD concerning on-call, compensatory rest, reference periods, op-out and derogation for
autonomous workers. The employers, represented by BusinessEurope, on the other hand, express
their satisfaction with how the directive is transposed in the Member States, but at the same time
acknowledge the existence of problems of non-compliance with the rules on on-call time and rest

51. European Commission, ‘Public Consultations and other Consultation Activities’, European Commission (2018), http://
et.europa.eu/social/main.jsp?catId=333&consultId=14&visib=0&furtherConsult=yes&langId=en/.
52. Case C-87/14 Commission v. Ireland, EU:C:2015:449.
53. Case C-180/14 Commission v. Greece, EU:C:2015:840.
54. Case C-266/14 Federacio´n de Servicios Privados del sindicato Comisiones obreras, EU:C:2015:578.
55. Case C-175/16 Hálvá and Others, EU:C:2017:617.
56. Case C-518/15 Matzak, pending. See Opinion of Advocate General Sharpston in Case C-518/15 Matzak,
EU:C:2017:619.
57. Report from the Commission to the European Parliament, the Council and the European Economic and Social
Committee, Report on the Implementation by the Member States of Directive 2003/88/EC concerning certain aspects
of the organisation of working time, COM(2017) 254 final.
periods in certain sectors. The report points to the failure of the Member States, with the exception of the UK, to provide an evaluation of the socioeconomic effects of the directive.

In May 2017, just a month later, the Commission issued a long non-binding interpretative communication on the WTD.\textsuperscript{58} In this communication, the Commission stresses the importance of the WTD for European social rights in general and hopes that its communication will contribute to a better application of the WTD by creating legal clarity and certainty. The Commission identifies the many cases on the WTD brought to the CJEU as a source of confusion, ‘[…] since misunderstandings or lack of awareness of the latest developments in case-law may in turn lead to compliance issues and to avoidable complaints or litigation’.\textsuperscript{59} The Commission tries to remedy this problem by incorporating the case law of the CJEU into the communication. It argues that the communication will help Member States to anticipate the behaviour of the Commission concerning potential infringement proceedings.\textsuperscript{60} The communication deals with the scope of the directive, the definition of working time including on-call duty, the maximum weekly working time, paid annual leave, possible derogations and individual op-outs, or, in other words, with all articles of the WTD. Concerning the scope, the Commission repeats its point of view from earlier publications, namely that the WTD ‘should as far as possible, apply per worker’ and not per contract;\textsuperscript{61} a rather weak formulation that, arguably, does not really create legal clarity or certainty as envisaged by the communication. The Commission continuously points out the room of discretion Member States have in applying the WTD, for example in determining when to grant the weekly rest periods, but also by pointing out that the Member States can, if they so wish, adopt rules more favourable for the health and safety of workers than the minimum requirements laid down in the WTD. The communication as a whole is a mix of interpretations of all the articles of the WTD based on rulings of the CJEU and of the Commission’s own view in cases where no CJEU ruling exists. Although the communication addresses all the controversial issues that have accumulated over the years (on-call, opt-outs, derogations, annual leave, etc.), many of them are only superficially resolved by stressing the flexibility inherent in the WTD. The fact that ‘[…] the Commission stresses that the interpretative communication is not binding and does not intend to create new rules’,\textsuperscript{62} a feature which is naturally inherent in these kinds of interpretative communications from the Commission, makes clear that this communication is not the last word on the WTD as all the problems that come with the WTD still exist. Nevertheless, this elaborate communication shows the commitment of the Commission to improve the application of the WTD in the Member States.

In the end, the second report on the application made clear that nothing has changed in the seven years since the first report was published.\textsuperscript{63} Neither could the conflict between the social partners be resolved, making a social dialogue impossible. In addition, the WTD reliably continues to produce court cases on a yearly basis. The interpretative interpretation is an attempt by the Commission to somehow bring an end to the continuous stream of unsuccessful initiatives to

\textsuperscript{58} Interpretative Communication on Directive 2003/88/EC of the European Parliament and of the Council concerning certain aspects of the organisation of working time, [2017] OJ C 165/1.

\textsuperscript{59} Ibid., p. 6.

\textsuperscript{60} Ibid., p. 7.

\textsuperscript{61} Ibid., p. 10.

\textsuperscript{62} Ibid., p. 7.

\textsuperscript{63} See also the case studies on the application in several Member States in J.-C. Barbier, R. Rogowski and F. Colomb (eds.), The Sustainability of the European Social Model: EU Governance, Social Protection and Employment Policies in Europe (Edward Elgar Publishing, 2015).
reform the WTD. In other words, after more than ten years of trying without any breakthrough, the Commission gave up.

6. Conclusions

The WTD is either being criticized for being too rigid or too flexible, a dichotomy reflected in the discussion to reform the WTD. It is supposed to fit all kinds of industries, making it too rigid for certain industries. At the same time, full application can be avoided by use of the individual opt-out option and the numerous derogations, making it too flexible. However, this seems to be a conscious choice in order to give quite some room for discretion to the Member States, on the sides of both industry and to individuals. A more serious issue with the WTD is that from the start it left many important and basic issues unaddressed. For example, does the WTD apply per worker or per contract? If guaranteeing the health and safety of workers is the main goal, then it can only apply per worker; to apply it per contract would make no sense from this perspective, as the health and safety of workers with multiple contracts would be endangered. If giving workers flexibility, and at the same time a legal tool in case they feel exploited, then the per contract practice is plausible. The Commission clarified its own view in a number of documents, but only a decision of the CJEU on this point could bring legal certainty. An infringement proceeding against a Member State applying it per contract would give the CJEU the opportunity to clear things up. Moreover, the WTD still does not address time spent on-call, so that the rulings of the CJEU apply as long as employees have not opted-out. In recent history, the annual leave provisions seem to be the dominant issue before the Court of Justice. The CJEU repeatedly emphasized the importance of the (vertically directly effective) paid annual leave provision for EU social law, showing, as in the case of time spent on-call, that it is ready to defend the rights of employees against Member States’ practices. This firm stance and the shortcomings of the WTD give the ECJ quite some influence as it is asked to fill in the gaps, especially because the European legislators are deadlocked and are unable to provide guidance. The Community method proved to be the main obstacle to legislative overrule. As the positions of the two sides of industry are equally irreconcilable, they could not break this political impasse either. However, the other actors successfully avoid the consequences of such rulings as best as they can by making use of the derogations and opt-outs. Throughout its interpretative communication, the Commission points to unresolved issues. The story is, thus, far from over and the number of rulings on the WTD will increase further, maybe with the help of infringement proceedings initiated by the Commission, but for sure by preliminary rulings initiated by national courts.

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64. A.C.L. Davies, Research Handbook on EU Labour Law.
65. B. De Witte, ‘Democratic Adjudication in Europe: How Can the European Court of Justice be Responsive to the Citizens?’, in M. Dougan, N. Nic Shuibhne and E. Spaventa (eds.), Empowerment and Disempowerment of the European Citizen (Hart Publishing, 2012), p. 142–144.
66. But see Rayer, who explores possible paths forward by looking at national rules negotiated between national governments and the national social partners (C. Rayer, ‘The Review of the EU Working Time Directive: Mediating Flexibility and Security. The Dialogue of the European Legislator, ECJ and the Social Partners’, in T. Davulis and D. Petyraite (eds.), Labour Regulation in the 21st Century: In Search of Flexibility and Security (Cambridge Scholars Publishing, 2012), p. 225–240).