

Summary report

Implications of the EU Working Time Directive on working conditions in Social Care and Support Services for Persons with Disabilities: Cases



The European
Association of
Service providers for
Persons with
Disabilities

This report was prepared for the European Association of Service providers for Persons with Disabilities (EASPD) by:

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Key Points:

1. The European Working Time Directive (WTD) is not working well in social care and support services (SCSS) for persons with disabilities.
2. Human rights are absolutely non-negotiable. They serve the essential purpose of protecting all human dignity and their importance is especially relevant for people with disabilities and all those needing support services.
3. Innovation in the provision of care and support services is being stifled as a result of working time regulations.
4. Social care and support is a special case, especially in small scale services, often provided to one or two people in their own homes, where the key objective is to maintain as normal a life-style as possible with the service user in control of their own life.
5. With forethought it is possible to uphold human rights for PWD and provide sufficient protection for workers.

Report objective

This report aims to provide evidence on the implications of the Working Time Directive 2003/88/EC on working conditions in the sector of social care and support services (SCSS) for persons with disabilities.

The study included cases of four countries representing different European welfare models: Austria (Continental), the United Kingdom (Anglo-Saxon), Slovakia (Central European) and Spain (Mediterranean)¹.

What is the WTD?

It is a Directive of the European Union that gives EU workers the right to at least 4 weeks (20 days) in paid holidays each year, rest breaks, and rest of at least 11 hours in any 24 hours; restricts excessive night work; a day off

¹ The fifth model, the Nordic, is not included in this study

I. What is happening now?

Based on our research in SCSS for persons with disabilities (fuller details can be found in the country) we have found the following current aspects of employment in SCSS for persons with disabilities relating to the WTD across the four basic models:

The length of the normal working week

- For all type of European welfare models, the usual **weekly working time** for staff in SCSS for PwD is approximately 37,5 - 38,5 hours; staff in SCSS for PwD often work within usual working hours (eg; 08:00 till 16:00 in Slovakia, 09:00 till 17:00 in Austria). **Average annual hours** worked per person varied considerably between Member States - ranging from over 2,100 hours a year mostly for Mediterranean (Greece) and Central European social model (Poland) to under 1,500 hours in Continental (Germany) or Nordic (Netherlands and Norway) social model - and these levels are rather highly (inversely) correlated with levels of hourly productivity.² There are also 'unusual' working hours (e.g weekend, afternoons, 3-shift cycles etc.) especially in residential facilities and in flexible models of peripatetic services or for working patterns for some senior staff.

Stand-by time, on-call time or additional availability

- This issue is complicated and differs considerably between countries. In the Anglo-Saxon model (UK) **stand-by time** is not much used in the SCSS for PwD. Instead, "sleep-ins", sometimes called "on-call", are used extensively. There are current legal disputes about whether this time should be considered full working time (and paid as such) when the worker is asleep. Or, should time asleep not be counted as working time, but paid at a flat rate instead - which is commonly done? In the Mediteranean model (Spain) the hours of availability that must be carried out *within* the premises of the employer are hours of work that are paid normally. However, in a national agreement 'additional availability' is defined and is paid to workers who volunteer to be available *outside* the employers premises to meet requirements due to work needs. This agreement specifies that this kind of 'availability time' will not be included in the computations of the ordinary working day. If actually called on to work, the period of extra time actually worked will count from the time of the call to thirty minutes after

²European Foundation for the Improvement of Living and Working Conditions (2009): Comparative analysis of working time in the European Union, <http://www.eurofound.europa.eu/observatories/eurwork/comparative-information/comparative-analysis-of-working-time-in-the-european-union>

the end of the service that had been provided. In the Continental model (Austria) **on-call time** at the workplace in SCSS for PwD is common in residential facilities, where special working time provisions allow 24 hour shifts. For on-call time outside the workplace, travelling time to the workplace is usually fully paid, when the worker is “activated”. The Central European model (Slovakia), uses on-call time very rarely but, when it does, it is either mostly unpaid (and classified as “voluntary work”) or (in a very few cases) it is paid as overtime.

Reference Periods for calculating a worker’s average working time

- In the Continental model (Austria) the **reference periods** according to collective agreements in SCSS for PwD sector is variable; 3 months (with a 48 hours per a week maximum), or 6 months (with a 45 hours max), or 12 months (with a 42 hours max). For the Central European and Anglo Saxon models the reference period is 4 usually months, with some provision for extending this by agreements. In the Mediteranean model (Spain), there is an annual computation of a 40 hour average weekly in general law but some national agreements in SCSS have reduced this to around 34 hours for some workers.

Night work, night workers & shift work

- the Central European model (Slovakia) uses **night work** in SCSS for PwD mostly in 24/7 residential services. 35-70% of all staff do a night shift around 6-times per a month (with a max 10-times). Most carers for PwD work in 2 or 3-shift cycles. In the Mediteranean model night-work may not exceed eight hours within each 24-hour period on average within a reference period of fifteen days and night workers may not work overtime. National Agreements provide for a bonus for night work and provide some flexibility to accumulate accrued time off which can then be added to rest days when the worker has agreed shorter rest periods between hours of work. In the Anglo-saxon model nearly all work in SCSS for PwD involves **shift work**. A popular pattern is 3-shifts, covering a 24 hour period (ie; an evening shift, a sleep in and the next morning shift because this limits travel time and disruption to home life). Live-in workers may work two weeks on and one week off. This model includes the usual night work (ie waking nights, full active night shifts) but also (for residential services) most night work is in fact a “sleep-in” and involves long periods of inactive time (usually night work is 8 hours). The Continental model (Austria) also follows this pattern and a national agreement has provided (within the WTD) for a 24 hours shift involving “easier duty” in residential facilities for a maximum of 3-times a week.

Minimum daily rest - per day & per week

- In the Continental model (Austria) daily **minimum rest** (11 hours) can be reduced to 9 hours by collective agreement at company level. Weekly rest is 2 full consecutive days. After providing 24-hours care, 2 full continuous days rest have to be granted. In the Central European model (Slovakia) if the continuous daily rest is interrupted by overtime or on-call or stand-by time, then this is held to be outside the shift framework. As a result it does not 'interrupt' the rest period (daily or weekly), but in reality there is clearly an impact on the amount of rest the worker is getting. In the Anglo-Saxon model (UK) sleep-in and stand-by time is usually counted as rest unless disturbed (i.e the worker becomes 'active'). However, there is much confusion and uncertainty about this with current legal challenges pending.

Annual paid leave

- In the Central European model paid **annual leave** varies with the employee's age. It is 25 days for workers under 33 years old and 30 days for workers older than 33 years. A national agreement provides an additional 5 days leave for staff in working directly with clients. In the Anglo-Saxon model, there is a minimum of 28 days per annum for all, with perhaps more holidays earned by long service or seniority. In the Continental model, annual leave increases gradually after 10, 15 and 20 years of work in accordance with a collective agreement for the SCSS sector. The Mediterranean welfare model has two national agreements providing for 25 or 30 days leave.

Part time or full time work

- **Part-time work** is the usual pattern of work in SCSS for PwD sector in the Continental and Anglo Saxon models. It fits in very well with home and life responsibilities of women, who constitute over 80% of the workforce in SCSS for PwD sector. In contrast, the Central European welfare model (Slovakia) uses part time contracts for around 10 % of all staff with most staff on full time contracts. Other forms of contracts such as fixed period contracts, self employed contractors are rarely used, although there has been some increase in 'zero hours' contracts (ie you are paid for the hours you work but there is no obligation on the employer to provide any hours) in recent years in the UK. Spain bans such zero hours contracts in SCSS.

The use of the 'opt-out'

- The WTD provides for optouts under certain specific conditions, for people such as 'autonomous workers' or by individual or collective *voluntary* agreement with an employer. Most senior managers in SCSS for PwD in the Anglo-Saxon model are seen as "autonomous workers" and are therefore able to claim exemption. Also the 48-hours

opt-out is used extensively, but because it is often *required* to be written into contracts, it is therefore not WTD compliant. Because of the UK's fragmented SCSS workforce, social dialogue structures are weak so collective agreements are unusual beyond individual organisations. By contrast, the Central European model (Slovakia) for staff in SCSS for PwD negotiated a reduction of working hours from 40 to 37.5 for public sector employees in SCSS by a collective agreement. The Continental model (Austria) uses sector wide multiple derogations regarding working time, annual leave, reference periods etc in SCSS for PwD. Generally speaking, the number of countries using the WTD opt-out provisions has increased over time.

Health & safety issues

- The WTD was introduced into EU law as a health and safety measure, but in practice it contains remarkably few specific health and safety requirements beyond the issue of regulating working hours. The Central European model requires employers to provide regular training by a certified **health and safety** technician for all employees in certain areas. In the UK, health and safety issues are dealt with outside the WTD and provide for mandatory training for all SCSS staff on key issues (eg Food Hygiene, Moving and Handling etc). Special medical examinations have to be available to the night time workforce in the Continental model. It is mandatory in Mediterranean model to train and report on occupational risk prevention.

II. Trends in work & the WTD's impact on working practices in general & in SCSS for PwD

Working Time: Trends and Prospects

Over the last twenty years, fundamental changes have occurred in the world of work, and they have had a clear impact on the overall length and distribution of working time. The key trends³ and challenges (based on EU Strategic Framework on Health and Safety at Work 2014-2020)⁴ are:

- A **general reduction in total working time**: average weekly working hours in the EU have decreased from 39 hours in 1990 to 37.8 hours in 2006;
- A **polarisation of working time between groups of workers**. Part-time workers, most of them voluntary, increased their share in the workforce from 14 % in 1992 to

³EC - <http://eur-lex.europa.eu/legal-content/SK/TXT/?uri=celex:52010DC0106>

⁴EC - <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A52014DC0332>

18.8 % in 2009; however, 10 % of all employees still work more than 48 hours a week and nearly 7% of all employees work in multiple jobs;

- A **progressive de-standardisation of individual working time**, with increasing variation of working times throughout the year or the working life, along with more flexible practices in companies (flexitime, annualisation of working hours, time banks, time credits, etc.).
- Improvement of the implementation record of Member States, in particular by **enhancing the capacity of micro and small enterprises** to put in place effective and efficient risk prevention measures.
- Improvement of the prevention of work-related diseases by tackling existing, new and emerging risks and **tackling demographic change** (the ageing of the population and reintegration and rehabilitation measures allowing for early return to work after an accident or disease are needed to avoid the permanent exclusion of workers from the labour market).

Greater flexibility for new working patterns

Part-time work and **flexible forms of work** organisation are just two examples of the increasing diversity of working time arrangements. The significant numbers of people teleworking, working in shifts (17 %), evenings/nights (10 % at least three times a month) or Saturdays/Sundays (53 % at least once a month), as well as the non-quantified but increasing phenomenon of ‘taking work home’ compound a general picture of increasingly diversified work patterns across Europe.

Also the growth of **female participation in employment** and the **increasing individualisation of lifestyles** (with the emergence of a greater variety of preferences as regards the distribution of time between work and leisure) have influenced developments. For the future these structural changes will probably accelerate as the global economy completes the transition from an industry-based to a knowledge-based economy.

For a growing number of ‘**knowledge workers**’, work may be assessed not on the number of hours worked, but on the originality and quality of the product delivered. Such workers may enjoy extensive autonomy over the organisation and location of their work, raising questions about the application of normal working time rules.

Increasingly, working time management is becoming an **important element of businesses’ competitive strategies**. New forms of working-time flexibility have been and will continue to be implemented as a result, such as the organisation of rosters and shifts to allow organisational flexibility, and the adoption of flexible work schedules. More recently, in the

current crisis, working-time flexibility has become a key instrument for many businesses to adapt to sharply declining demand. The **ageing of our societies** may also impact on the way workers allocate their time between work and leisure increasing the desire for a better work-life balance with a resulting backlash against the long-hours culture.⁵

Work-life balance for new demographic realities

Major changes are occurring in the world of work, owing to the **increasing participation of women and older people**, the fact that both partners often now work, sometimes at different hours and on different days, and the challenges posed by care of children and the elderly. The rapid and widespread increase in flexitime working illustrates the strength of demand for more balanced solutions, along with greater individualisation of lifestyles for workers of all ages. Making working time rules more flexible could help Member States achieve the EU 2020 target of increasing workforce participation to 75% (from a current 69%), particularly by further increasing the participation of women and older workers.⁶

The impact of the WTD and sectoral problems in SCSS for PwD

Amongst all the general factors identified, the following have a particular resonance in the field of SCSS for PwD.

Opt-out & on-call time

It is relevant to note here that out of the 27 Member States, 16 currently allow use of the opt-out, but 11 of them only permit it in **sectors or activities which make heavy use of on-call time**. It does not seem realistic to ask all these Member States to refrain from using this derogation, without ensuring feasible alternative solutions. It is clear that the future use of the opt-out in on-call services will depend on how public services absorb the changes introduced by this review regarding on-call time and compensatory rest.

On-call time is a key issue for the public sector and particularly the provision of health and **residential care** and emergency services. Social partners in these sectors have been working to negotiate solutions on the basis that a revised Directive requires on-call time at work to be counted as working time. However, because of the position of the Commission and doubts over possible revisions to the Working Time Directive, the easiest solution for

⁵EC - <http://eur-lex.europa.eu/legal-content/SK/TXT/?uri=celex:52010DC0106>

⁶EC - <http://eur-lex.europa.eu/legal-content/SK/TXT/?uri=celex:52010DC0801>

some employers has been to say that the potential costs are excessive and instead of trying to find a solution they avoid the issue entirely by using the opt-out. This does raise an important issue about the health of the workforce and future recruitment and retention.⁷

Paid annual leave

Replies highlighted difficulties with one aspect of the law relating to paid annual leave - the rulings in Schultz-Hoff and Stringer, which held that a worker who is absent from work for reasons (such as illness) outside his control is still entitled to paid annual leave in respect of that period. It should be borne in mind that **proof of incapacity for work and rates of pay** during such absence are matters for national law and are outside the scope of the Directive.⁸

The core problem seems to arise from a **lack of clarity on whether a worker on long-term sick leave** could accumulate paid annual leave entitlements over successive years. Such a prospect creates an unpredictable and potentially substantial cost for employers, and could have the unintended effect of encouraging them to terminate employment of workers on long-term illness before it is clear whether they can return to work after recuperation. Moreover, unlimited accumulation would seem to go beyond what is required to achieve the Directive's aims.

Health and Safety issues

The growing **new trends for atypical working arrangements** could lead to health and safety problems⁹:

- Working at 'unusual times', notably at weekends, is detrimental to safety, health, wellbeing and work-life balance. Despite the trend to a 24/7 society, evenings and weekends are still not seen by society as 'usual' working times, so that working during these times - even occasionally - can be expected to be associated with physical and psychosocial impairments. Compensatory rest cannot fully outweigh these effects.

⁷ EPSU (2010): Final response to the Commission's Communication on Reviewing the Working Time Directive. http://www.epsu.org/sites/default/files/article/files/WTD_communication_response_FINAL.pdf

⁸EC - <http://eur-lex.europa.eu/legal-content/SK/TXT/?uri=celex:52010DC0801>

⁹EC - Deloitte Study (December 2010) to support an Impact Assessment on Further action at European level regarding Directive 2003/88/EC and the evolution of working time organisation, Final Report, <http://ec.europa.eu/social/main.jsp?catId=706&langId=en&intPageId=205>

- Shift work increases the risk of impairments to safety, health, and social participation. Shift workers are susceptible to sleep, digestive and cardiovascular disorders. The more night shifts someone works, the more likely are accidents.
- The risk of accidents is greater where rest breaks are postponed or infrequent. Postponing rest breaks during the working day thus leads to an increased risk to safety, due to the cumulative effect of fatigue - though it is difficult to unbundle the effect of what are normally associated factors of long hours and lack of sleep.
- Flexible working hours may seem superficially attractive, but can be a mixed blessing. A high degree of variability or irregularity of working hours can be detrimental to health and well-being in the same way as shift work.
- Factors in combination: there are effects on health and safety which result from a combination of different characteristics of working hours and their interactions. These effects can be purely cumulative, as is the case with long working hours and shift work, but also interactive, as is the case with flexible and long working hours.

Multiple contracts

- A significant minority of workers in the EU work **under concurrent employment contracts with different employers** or, sometimes, with the same employer. It needs to be made clearer that the working time limit in the Directive applies per worker in such situations. The Commission has previously stated that as far as possible, the Directive must be applied per worker, given its aim of protecting health and safety. However, enforcement can be problematic if the employer is not aware of the worker's other job(s). The move to personalization of services in SCSS for PwD will increase the likelihood of staff having multiple part time jobs.

III. Recommendations to promote a fairer way of working in the SCSS sector

Social Services¹⁰ is one of the biggest job creators in Europe today. The sector employs directly over 10 million staff in Europe. Together with health services, social services

¹⁰EASPD: Job Creation and Decent Working Conditions (2016), <http://www.easpd.eu/en/content/job-creation-and-decent-working-conditions>

represents 7% of the total economic output in the EU-28 (EC, 2016). The social services sector is expected to grow significantly over the next few decades. The same can be said for social service providers for persons with disabilities, in particular in response to the transition to community-based care and support.

However, many issues are currently limiting the sector's job creation potential with many service providers experiencing staff shortages. This is due to (often significant) cuts to public expenditure in social services, despite the increase in demand and the lack of recognition given to the sector. This has led to below average wages, often difficult working conditions, undeclared (or so-called 'voluntary') work, an ageing workforce and stronger gender imbalances in the workforce in most countries in Europe.

EASPD is strongly involved in setting up social dialogue structures at European level for the social services sector. Its economic and social policy, in particular the Stability and Growth Pact and the European Semester, also affects the job creation potential of the sector, in particular as it impacts public expenditure towards social services. **It is the view of EASPD that the European Commission has yet to act sufficiently to ensure that the Social Services sector's job creation potential is fully unlocked.**

Whilst the immediately obvious **impacts** of the WTD are on the labour market, on gender and work-life balance, on quality of care or services, organisations and cost, there is a hidden but potentially much more fundamental and far reaching impact, **which is the impact of the WTD on the rights, hopes and life choices of pwd who depend on staff support.** Herein lies the dilemma of two competing principles, the right of a worker to healthy and safe working practices and the right of a disabled person to live their life as they choose, without unnecessary interference by others. There is ample evidence (see Appendices) of the impact of WTD on the labour market, gender and work-life balance, quality of services, provider organisations and the increase in the cost of service provision when it becomes WTD compliant. What is also obvious, but less reported on and utterly disregarded in the WTD is the impact on the human rights of service users. Looking at the WTD through the prism of its impact on the human rights of the end user and the way in which it is constraining the development of truly person centred services reveals a significant problem. It is arguable that there is a fundamental clash between upholding the rights of a service user to effective inclusion in society (as enshrined in the UNCRPD and the EU's own Charter of Fundamental Rights (CFR) on the one hand and the rights of the worker under the WTD on the other.

There are several proposals which can be implemented *without revising the WTD* which would ease current operational and practical problems. These are as follows:

Possible actions within the current WTD legal framework

- The sector needs greater flexibility through developing more sectoral agreements. Effective social dialogue in the social care and support sector is very patchy at national levels and non-existent at EU level. This creates a significant disadvantage for the whole sector. The sector and the EU should take immediate steps to improve this situation.
- WTD derogations could well be applied to workers involved in small scale ‘live-in’ care services where workers effectively live in the user’s own home for an extended period (see appendices for more details) and actual working hours are often a matter for (daily) negotiation between the user and worker.
- The WTD list of ‘autonomous workers’ who may be exempted from the WTD is not closed and there is no reason why ‘live in support workers’ should not be added to it.
- The WTD already provides for derogations to be made for ‘activities where there is the need for continuity of service (or production).’ This applies to many 24/7 social care and support services and there is no reason why the social care and support sector could not be added to the list.
- The WTD makes explicit provision for derogations where there is a need to ‘encourage another objective, distinct from the implementation of the agreement.’ Using this provision, social care could be exempted via a derogation because the other ‘objective’ would be the achievement of a user’s UNCRPD Human Rights through the provision of a more flexible service. Since the EU has already signed the UN Convention and created the Charter of Fundamental Rights this would be a natural step to take.

However, some desirable changes will require revisions to the WTD. We recognize that this will be a long term and difficult objective to meet, but the principles and general direction of the recommendations listed below should inform future debate and decisions in the interim.

Recommendations for any future revision of the WTD

- Any future negotiations must include all the relevant stakeholders including, crucially, end users of services and providers.

- The Commission should recognize and find ways to address in any revised WTD the problems which the current laws cause service providers when they attempt to create truly person centred services capable of delivering UNCRPD compliant services.
- Any future changes must assess the likely financial impact they will have and ensure that states have time to meet any extra costs which will be incurred. Measures leading to unfunded significant cost increases should be avoided because they will undermine both the credibility and deliverability of any new WTD.
- Greater flexibility should be allowed regarding inactive sleep in/on call time and inactive stand-by time, currently all on-call time (active or inactive) at the workplace counts as working time. This poses especial problems for residential care and staff who live and work on site.
- Particular attention should be paid to the situation of individualised support services using formal and/or informal ‘family carers’ and the impact any reforms may have on their situation and the user’s rights to lead a normal life under the UNCRPD
- Any changes to the WTD must make working in this sector more attractive, enabling employers to offer full time and part time options and family-friendly working time flexibility.
- Any new WTD wording should make it plain that the responsibility for managing the number of hours a worker with multiple contracts works should be shared between the worker and the employer and the means of monitoring the situation should not be so onerous as to be unworkable at employer level.

The European Pillar of Social Rights (EPSR)¹¹ should be used in 2017 as a means to establish an agreement between Parliament, the Commission and the European Council, involving the social partners and civil society at the highest level, and it should contain a clear roadmap for a revision of the WTD & its subsequent implementation.

The Commission should propose mechanisms for adequate involvement of all the relevant stakeholders at all relevant levels in the implementation of the EPSR, including at the forefront the rights of pwd as enshrined in the UNCRPD. It should be clear that this is not just a matter of labour law but also of human rights.¹²

¹¹European Parliament (2016): European Parliament resolution of 19 January 2017 on a European Pillar of Social Rights (2016/2095(INI)). <http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+TA+P8-TA-2017-0010+0+DOC+XML+V0//EN>

¹²European Parliament (2016): European Parliament resolution of 19 January 2017 on a European Pillar of Social Rights (2016/2095(INI)). <http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+TA+P8-TA-2017-0010+0+DOC+XML+V0//EN>

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EASPD is the European Association of Service providers for Persons with Disabilities. We are a European not-for-profit organisation representing over 15,000 social services and disability organisations across Europe. The main objective of EASPD is to promote equal opportunities for people with disabilities through effective and high-quality service systems.

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