

Global Workplace Law & Policy

The meaning of working time in light of autonomy

Sara Huybrechts (Institute for Labour Law – KU Leuven) · Monday, October 9th, 2023



Problem statement

The global workplace quests for both employer-driven and employee-driven flexibility. Such extent of flexibility goes hand in hand with autonomy for workers to decide where, when and how to work to their own discretion. Autonomy, powered by ICT, makes it possible to work anytime anywhere. Time and place independency and autonomy in work performance are undermining the traditional meaning of working time. As workers can be permanently connected, it becomes unclear which activities constitute working time as defined under the Working Time Directive. In addition, it is unclear whether the Working Time Directive even applies to those workers and – by extension – whether or how the obligation to measure working time (CJEU, *CCOO/Deutsche Bank*) is appropriate or relevant to workers with extensive autonomy.

This blogpost is based on a presentation at the [conference](#) to commemorate [Roger Blanpain](#) (late Professor at KU Leuven, Faculty of Law and Criminology) in September 2023. The presentation critically examined the meaning of working time in light of autonomy. The idea is that autonomy is difficult to reconcile with the traditional meaning and regulation of working time. Even though deviations from traditional nine-to-five working time schedules are not a recent phenomenon, it is not clear which degree of autonomy is compatible with the working time regulations. In this presentation (and another [article](#) on the relation between autonomy and working time) autonomy is regarded in light of the [new ways of working](#), of which autonomous work is part. Autonomy is therefore understood as flexibility in respect of hours and place of work (time and place independency) and freedom in the performance of the job. Those characteristics may occur to a greater or lesser extent.

The wide margin of organizational autonomy for the worker together with the new digital reality creates new standards for time fluidity and flexibility. The downside is that workers become more responsible to monitor their own working time and that permanent connectivity can bury workers under a heavy workload. The concept of working time is traditionally used to focus on time spent at work as well as an instrument for striking balance between work and other aspects of life, such as family. With the new time-independent practices, the clear delineation between work and private life becomes more blurred when both spheres systematically interact with each other.

Definition of working time

It is a challenge for the working time regulation to understand working time as a concept that is designed to represent a demarcation in relation to leisure time or rest time. The definition from the [Working Time Directive](#) falls short of identifying which activities constitute working time in case of permanent connectivity. Article 2 of the Working Time Directive defines working time as “*any period during which the worker is working, at the employer’s disposal and carrying out activities or duties in accordance with national laws and/or practice*”. All other time, in principle, is not to be considered working time (such as free time, or leisure time).

The criterion in the definition which states that the worker needs to be at the employer’s disposal confirms the fact that the worker, during working time, needs to be available to the employer. It includes a temporal element stating that the worker is ready to provide the appropriate services immediately when needed. The [Commission](#) has stated that when workers can manage their time without major constraints and pursue their own interests, the period of time in question may not constitute working time.

In order to assess the impact of autonomy on the definition of working time, the cases regarding on-call work and stand-by time can be useful. This case law can be compared to the situation of permanent connectivity which autonomous workers might experience. Similarly, the relevant question in these situations is whether a certain period of time can or cannot be regarded as working time. The Court of Justice of the European Union decided in the [Matzak](#) case that only the time linked to the actual provision of services is working time, except when the constraints imposed by the employer have a very significant impact on the possibility to freely manage personal time or pursue personal and social interests. In the [Matzak](#) case, a volunteer firefighter needed to be available for work during certain periods. During these periods he had to remain contactable and able to arrive at the fire station within eight minutes. The Court decided that the temporal and geographical constraints which were imposed on the worker restricted his opportunities for other activities very significantly, hereby indicating that this period constituted

working time.

The reasoning of the *Matzak* case was applied by the Court in other similar situations regarding availability. This has led to further interpretation of the possible ‘temporal constraints’ to which workers can be subjected. In the *Stadt Offenbach* case, it was specified that the severity of the temporal constraints depends on the response time (namely the brevity of the time period within which work needs to be undertaken) and the average frequency of interventions. In the *Dublin City Council* case, the average duration of interventions was added as a possible temporal constraint. However, in this last case the Court came to a different outcome. The Irish firefighter, who was on stand-by 24/7 (with the exception of leave periods), needed to reach the fire station in five to ten minutes in case of emergency. The terms of his contract stated that even though he was under the obligation to answer 75% of the calls, he was permitted to carry out another professional activity. Based on the consideration that this firefighter did not have to be in a specific place, was not obliged to participate in every intervention and was permitted to carry out another professional activity, the Court decided that his stand-by time did not constitute working time. Hereby the Court implicitly dismissed the duration of the stand-by period as a criterion for temporal constraint.

The discussion regarding on-call work demonstrates that the binary division between working time and leisure time does not meet the demands of the current labour market, even in cases which do not consider the new digital reality. A universal underlying question is whether, and to which extent employers can expect employees to be contactable and available during free time. With the omnipresent virtual office, the very idea of the rest period is at stake.

Scope of the Working Time Directive

For every worker a right to limitation of maximum working hours and daily and weekly rest periods is guaranteed under Article 31.2 of the [Charter](#) of Fundamental Rights of the European Union. Therefore, any limitation to this right needs to meet the criteria of Article 52 of the Charter. The Working Time Directive offers the possibility to derogate from this limitation in Article 17. This provision is highly relevant in light of autonomy as it uses the freedom to determine the duration of working time as a criterion. The interpretation of this Article is, however, not self-evident and several member states use it to – mistakenly – exclude groups of workers from the working time limits.

Article 17 of the Working Time Directive states that it is possible to derogate from working time limits if on account of the activity concerned, the duration of the working time is not measured and/or predetermined or can be determined by the workers themselves. In an [interpretative document](#) the Commission emphasized that the derogation of Article 17 (1) cannot be applied broadly to a whole category of workers and that it only applies when the working time as a whole is not measured and/or predetermined, or can be determined by the worker. The three specific categories presented in the subsections (a) to (c) of the Article (managing executives or other persons with autonomous decision-taking powers, family workers and workers officiating at religious ceremonies in churches and religious communities) are listed in a non-exhaustive way. These categories are illustrations of the main criterion to fall under the derogation: the working time is not measured and/or predetermined or can be determined by the worker on account of the specific characteristics of the activity concerned. Determining whether this derogation applies can thus only derive from how the actual work is performed.

The question then only remains as to what degree of autonomy is required to qualify for the

derogation. Here the [jurisprudence](#) of the Court of Justice stated that the derogations regard situations in which working time as a whole is not predetermined. However, the threshold for the derogation to apply might even appear to be higher according to the [Hälvä](#) case. In this case, the employees in question replaced foster parents when they were absent and then lived with the children and were responsible for their care and all related household tasks. They were able to manage the household as if it was their own, within the limits imposed by the needs of the children. Before the Finnish courts, the relief parents asked for payment of overtime and compensation for working at night and on weekends. The Court of Justice decided that these ‘relief parents’ did not fall within the scope of derogation of Article 17, as freedom in both the quantity and the scheduling of working time is necessary and the employees were not free to decide the number of hours they worked. Remarkably, the employer did not directly issue orders in respect of the amount of working time either, the volume of the work was primarily decided by the needs of the children.

Measuring working time

An additional complication comes to the fore concerning the obligation to measure working time, as traditional measurements and regulations do not correspond to the actual performance of working time. According to the Court of Justice is the famous [CCOO/Deutsche Bank](#) case, for the Working Time Directive to be effective, the number of hours worked each day should be objectively and reliably determined. Therefore, member states must require employers to set up an objective, reliable and accessible system measuring the duration of working time of each employee.

This obligation is only applicable to workers who do not fall under the derogation of Article 17 of the Working Time Directive. A risk for circular reasonings occurs here: there is no obligation to measure working time if the derogation of Article 17 applies and Article 17 applies when the working time is not measured. The correct interpretation of Article 17 explained above is therefore highly relevant for the application of the obligation to measure as well.

The application for workers who do not fall under the autonomous worker derogation, but are nevertheless time-independent to a lesser extent, can be easily fulfilled using digital means, such as software or an application. Whether this is really desirable is another question. Meticulous measurement of working time is opposed to granting autonomy and working time flexibility. Therefore, alternative ways to measure work are worth exploring, such as an [achievement-oriented approach](#) where objectives are the main measurement tool. In this case, attention to the work volume becomes necessary to protect health and safety. To ensure effectiveness of the Working Time Directive, attention to the work volume is necessary to protect health and safety.

Conclusion

The meaning of working time has changed in light of autonomy. Time independency and flexibility requires that working time is regulated with the aim of reconciling work with private life, rather than delineating both spheres. Distinguishing working time therefore becomes more difficult. The opportunity for devotion to personal interests hereby forms an interesting indicator for establishing working time. The working time limits will apply in most cases, given the high threshold. However, for the protection of health and safety, there is an increased need to monitor the work volume and pressure instead of working time.

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