Global Workplace Law & Policy

Denmark implements the opt-out of maximum weekly working time in 2024 – why this recent change?

Mette Søsted Hemme (Aarhus University (Denmark)) · Wednesday, January 22nd, 2025

This blogpost looks closer at the Working Time Directive (2003/88) and the possibility under Article 22 to opt-out of the maximum weekly working time of 48 hours. Denmark recently introduced this opt-out in its working time legislation. The Danish legislator did not choose a wide derogation providing more flexibility to employers in general, but rather restricted the possibility to workers with stand-by time. The question is then what key factors have led to the introduction of opt-out in 2024?

Background – regulation of working time

The EU Working Time Directive (then 1993/104) on the organisation of working time was adopted in 1993 with the aim of protecting the health and safety of workers. The directive was adopted under Article 118 a EEC (now Article 153 TFEU) and lays down rights *to inter alia* minimum rest periods and maximum working time, as well as paid annual leave.

One of the directive's central provisions is Article 6, which lays down a limitation on average working time, including overtime, to a maximum of 48 hours per week. The provision aims at protecting employees' health and safety by *limiting* average working time. Since the adoption in 1993, the CJEU has clarified the interpretation of core concepts of the directive in its case law, including the concept of 'working time'. The delimitation is crucial for a correct calculation of working hours and for compliance with the rules on maximum weekly working time (as well as rest periods). It follows from CJEU case law, such as *Simap and Jaeger*,[1]that the worker's activities are either considered 'working time' or 'rest periods', ie. a binary relationship between the two concepts. It follows from *inter alia Dellas* that 'stand-by time' at the workplace qualifies as working time.[2] In the context of 'stand-by time' *outside* the workplace, the CJEU has recently defined working time as periods 'during which the constraints imposed on the worker are such as to affect, objectively and very significantly, the possibility for the latter freely to manage the time during which his or her professional services are not required and to pursue his or her own interests.'[3] The EU law concept of working time has been subject to much commentary.[4]

While the directive sets rather firm standards for working time, the many derogations and exceptions of the directive also reflect the compromise necessary to adopt it. As stated in the recital, 'it appears desirable to provide for flexibility in the application of certain provisions of this Directive, whilst ensuring compliance with the principles of protecting the safety and health of workers'.[5] One such exception is Article 22, according to which Member States are given the option to opt-out of (not to apply) Article 6 on maximum weekly working time. Opt-out is only allowed for under certain conditions, such as consent by the individual worker, and while respecting the general principles of the protection of safety and health of workers.

In Denmark, working time and remuneration for working time has traditionally been regulated in collective agreements in line with the Danish labour market model, where pay and working conditions are determined primarily by way of negotiating collective agreements. The negotiated rules on working time may determine *inter alia* the placement of ordinary work hours, average working time, overtime work, on-call work and the remuneration for performed work. Working time in the collective agreements regards the 'effective working time' (which give rise to outpayment of salaries) and may, thus, differ from the definition of working time laid down in EU law.

With the adoption of the EU Working Time Directive, Denmark originally implemented the directive by collective agreement and (eventually) adopted specific statutory legislation in order to fully comply with the implementation requirements of the directive. This became the Danish Working Time Act.[6] The Act implemented the limitation of the maximum weekly working time in section 4 that states: 'The average working time over a seven-day period cannot exceed 48 hours, including overtime work, calculated over a 4-month period. Periods of paid annual leave and periods of sick leave are not included or are neutral to the calculation of the average working time.' The opt-out possibility of the 48-hour rule was not implemented in the Working Time Act at that time.

Other parts of the Directive are implemented in the Danish Holiday Act and Danish Working Environment Act, respectively.[7] As for the rules on daily and weekly rest periods these are regulated in the Working Environment Act and ministerial orders issued on the basis of this Act.

Introduction of individual opt-out in 2024

The Danish Working Time Act was amended in 2024, primarily as a response to CJEU ruling in *CCOO*. The Act introduced in Danish law a duty for employers to register workers' daily working time. But the amendment of the Act also included an implementation of the *individual opt-out possibility* for some workers under specific preconditions, cf. new section 4 a. The details of the new Danish provision can be summarized as follows.

The new section 4 a (1) states: "The most representative social partners in Denmark may, while respecting general principles for protection of employees' safety and health, in line with subsections 2-4, agree, that within this sector of collective bargaining there may be concluded individual agreements, which entail that the employee works more than 48 hours per week on average."

Whereas the Working Time Directive requires that the *individual worker* has agreed to perform such work, the new Danish legislation sets the further requirement that *social partners* have agreed on using individual opt-out agreements within the relevant sector. It is still a requirement that the individual employee gives consent. In the preparatory works, the chosen model of implementation is framed as a significant protection against abuse, in that only the *most representative* social partners may allow derogations from the 48-hour limit. It depends on a specific assessment, which associations may be regarded as most representative in a given area of employment. This assessment may include facts on number of members of the trade union, which is party to the collective agreement, and how many workers are covered by the trade union's agreements. Company and accession agreements may also qualify, and it is the representativity on the worker side which primarily determines, whether a collective agreement is entered into between a most representative party.[8]

The opt-out model is further limited in subsection (2). Subsection (2) restricts opt-out to employees, who are covered by collective agreement provisions on stand-by work, and who performs work in critical functions within the areas mentioned in Article 17(3), litra a-c, in the Working Time Directive. From this subsection it follows that the scope of opt-out is further reduced and only aims to include workers with stand-by functions in critical functions such as emergency services.

Subsection (3) regulates the employee's right to withdraw his or her consent to opt-out and protects against detrimental treatment by the employer. The employer must, furthermore, keep up-to-date registers over employees, that are covered by the opt-out, and the registers must be made available for the Danish Working Environment Authority (DWEA), and the DWEA must upon request be provided with copies of the individual agreements.[9]

It is worth noting that the Danish legislation does to some extent include an explicit limitation to the working hours allowed, when making use of the opt-out. Subsection (4) states that the average weekly working time must not exceed *60 hours* calculated over a four-month period (reference period may be extended to up to 12 months). However, in subsection (5) the most representative social partners are given a wider option to extend working hours. These social partners may

determine in the collective agreement that the average weekly working time can *exceed 60 hours*, still provided that the individual employee has given consent. Here no explicit limitation on the number of hours is provided.

The motivation for introducing the opt-out in Denmark

It may be highlighted that the individual right to opt-out was intended to be a temporary measure, when the Working Time Directive was adopted in 1993.[10] No revision of the Directive is foreseen at the moment, and 16 Member States now provide for the use of opt-out.[11] Of these Member States, 12 of them have limited the opt-out possibility for jobs that make extensive use of on-call time.[12] Denmark is likely to be the most recent addition to this list.

The scope of the Danish opt-out model reflects the overall aim of the implementation of Article 22 in Danish working time legislation. It is limited to employees who perform *stand-by work in work functions that are critical to society*. It is stated explicitly in the preparatory works that the opt-out introduction must be seen in light of the changes in legislation on stand-by work that have taken place due to CJEU case law.[13] The legislative amendments, which are referred to here, are changes in the ministerial order for rest periods under the Danish Working Environment Act. It was not until 2024 that the ministerial order's provisions on stand-by work were amended to comply fully with EU law on working time. In short, it follows from the amendment that rest periods following e.g. a 24-hour shift cannot be placed in stand-by work periods.[14] Moreover, the social partners agree that it is a precondition for using opt-out that the derogation is not used to increase *effective* working time.[15]

In other words, the choice by the Danish legislator should be seen as a reaction to the on-going clarification of 'working time' in CJEU case law. The broad EU law definition of working time has over the years become challenging to reconcile with existing national (negotiated) rules on stand-by work arrangements. It may be underlined that the *CCOO*-ruling and the – at least for Denmark – new duty to register working time does not change the definition of working time or change the way that a worker's activities should be defined in a registration system. It is, however, likely that the duty to register EU working time sheds light on existing 'challenging areas', ie. in work functions with stand-by work. Especially in the Danish emergency services, EU working time regulation has been seen as a challenge for the proper functioning of these services.[16] It is, therefore, not surprising that the opt-out is implemented at the same time as the new registration duty.

The Danish reaction may be seen as a step to ensure full compliance with EU working time regulation. The underlying aim is to give high priority to the responsible solution of critical functions in society, while at the same time ensuring strong protection against abuse by embedding the opt-out model in sectoral collective agreements. The enforcement does under the Danish approach not rest only with the individual employee, but rather in the hands of large trade unions in the efficient enforcement mechanisms in the industrial relations model.

In conclusion, the Danish implementation of Article 22 uses a combination of collective and individual agreements to manage the possibility of the individual employee giving consent to opt-out. The opt-out model aims to ensure the responsible solution of critical functions in society, while ensuring individual protection of working time limitation through the Danish industrial relations model.

References

[1] Case C-303/98 *Simap* [2000] ECLI:EU:C:2000:528, and case C-151/02 *Jaeger* [2003] ECLI:EU:C:2003:437.

[2] Case C-14/04 *Dellas* [2005] ECLI:EU:C:2005:728.

[3] Case C?580/19 *Stadt Offenbach am Main* [2021] ECLI:EU:C:2021:183, para 38.

[4] Litterature on the concept of working time include *inter alia Jan Popma and Teun Jaspers* in Jaspers, Pennings and Peters (eds.), European Labour Law, 2nd ed., Intersentia, 2024; *Leszek Mitrus*, Defining working time versus rest time: An analysis of the recent CJEU case law on stand-by time, European Labour Law Journal 14/1, 2023, pp. 35-47; *Alan Bogg*, The regulation of working time in Europe, in Bogg, Costello and Davies (eds.), Research Handbook on EU Labour Law, Edward Elgar Publishing Ltd., 2016, pp. 267-299.

[5] Recital number 15 of directive 2003/88.

[6] Act no. 248 of 8 May 2002 (*Lov om gennemførelse af dele af arbejdstidsdirektivet*). Now, Act no. 982 of 12 August 2024.

[7] Act no. 152 of 20 February 2024 (*Lov om ferie*) and Act no. 2062 of 16 November 2021 (*Lov om arbejdsmiljø*).

[8] Legislative proposal L 68, FT 2023-2024, Tillæg A, general comments section 3.1.3.

[9] The Danish Working Time Act, section 4 b (4).

[10] *Jan Popma and Teun Jaspers* in Jaspers, Pennings and Peters (eds.), European Labour Law, 2nd ed., p. 647.

[11] SWD(2023) 40 final of 15 March 2023, Commission Staff Working Document, Detailed report on the implementation by Member States of Directive 2003/88/EC. The SWD mentions 15 Member States, Denmark has been added by the author.

[12] Ibid. The SWD mentions 11 Member States, Denmark has been added by the author.

[13] Legislative proposal L 68, FT 2023-2024, Tillæg A, general comments section 3.1.3.

[14] Amendment to the Ministerial Order, no. 881 of 26 June 2024, section 10, which abolished parts of section 19(2) of the Ministerial Order.

[15] Legislative proposal L 68, FT 2023-2024, Tillæg A, general comments section 3.1.3. citing the agreement by social partners of 30 June 2023.

[16] https://danskeberedskaber.dk/dansk-tolkning-af-lovforslag-fra-eu-smadrer-dansk-beredskabsmodel/, link accessed on 11 January 2025.

This entry was posted on Wednesday, January 22nd, 2025 at 7:00 am and is filed under Uncategorized
You can follow any responses to this entry through the Comments (RSS) feed. You can leave a response, or trackback from your own site.