European Organisation of Military Associations and Trade Unions

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http://euromil.org/

Memorandum on the

Working Time in the Armed Forces

(Status February 2023)

A. About EUROMIL

The European Organisation of Military Associations and Trade Unions (EUROMIL) is an umbrella organisation composed of 34 military associations and trade unions from 21 countries. It is the main Europe-wide forum for cooperation among professional military associations on issues of common concern. EUROMIL strives to secure and advance the human rights, fundamental freedoms and socio-professional interests of military personnel of all ranks in Europe and promotes the concept of "Citizen in Uniform". As such, a soldier is entitled to the same rights and obligations as any other citizen. EUROMIL particularly calls for recognition of the right of servicemen and -women to form and join trade unions and independent associations and for their inclusion in a regular social dialogue by the authorities.

B. Background information

Working time of military personnel is an important issue for EUROMIL and its member associations. Closely linked to health and safety at work, adequate working hours, including provisions for rest time, are necessary to ensure that military personnel can safely execute their tasks in oftentimes demanding and high-risk environments and deliver good results. Military personnel are assuring security for others and should therefore be able to operate in the best working conditions possible.

C. International standards and legislation

International Labour Organisation (ILO)

On the international level, there are several ILO labour standards on working time, setting out frameworks for regulated hours of work, daily and weekly rest periods, and annual holidays. The ILO acknowledges that well-regulated working hours, including rest periods, "ensure high productivity while safeguarding workers' physical and mental health".[1]

[1] For more information on the relationship between ILO labour standards and national legislation, please take a look here: https://www.ilo.org/global/standards/introduction-to-international-labour-standards/international-labour-standards-use/lang--en/index.htm.

European Union (EU)

The Charter of Fundamental Rights of the European Union stipulates in Art. 31 §2: "Every worker has the right to limitation of maximum working hours, to daily and weekly rest periods and to an annual period of paid leave."[2]

The European Pillar of Social Rights sets out in Principle 9: "Parents and people with caring responsibilities have the right to suitable leave, flexible working arrangements and access to care services. Women and men shall have equal access to special leaves of absence in order to fulfil their caring responsibilities and be encouraged to use them in a balanced way." Furthermore, Principle 10 states that: "Workers have the right to a high level of protection of their health and safety at work."[3]

The 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 (in short: Working Time Directive – WTD) sets out general principles with regard to working time. The scope of the WTD (Article 1) is the same as set out in Article 2 of the EU Safety and Health Directive [89/391/EEC]: "the Directive shall not be applicable where characteristics peculiar to certain specific public service activities, such as the armed forces or the police, or to certain specific activities in the civil protection services inevitably conflict with it." As a consequence, some Member States chose to generally exclude members of the armed forces from the scope of application.[4]

The European Commission followed up on the implementation of the WTD and published two important documents on 26 April 2017.

- An interpretative communication which aims at giving guidance and clarity for the implementation of the Working Time Directive. The interpretative communication mainly reviews the case-law established by the European Court of Justice on the issue in over 50 judgements since 1993. Most importantly for military personnel, the Commission establishes that the WTD is applicable to the armed forces. The exclusion of workers – including military personnel – must be interpreted restrictively and take into account the nature of the tasks performed rather than the sector of employment.
- An implementation report which assesses the current state of play in the different Member States. The report highlights the fact that in some Member States categories of workers are excluded from the scope of the WTD implementation – in the public sector these are most commonly the armed

[2] For more information on when the Charter applies, please take a look here: https://ec.europa.eu/info/aid-development-cooperation-fundamental-rights/your-rights-eu/eu-charter-fundamental-rights/when-does-charter-apply_en.
[3] For more information on the European Pillar of Social Rights, please take a look here: https://ec.europa.eu/social/main.jsp?catId=1226.
[4] The WTD is a Directive, which means that the content needs to be implemented in national law through the legislative process within Member States. For more information on EU law and its application, please take a look here: https://ec.europa.eu/info/law/law-making-process/applying-eu-law_en.

forces – and clearly states that such arrangements are not consistent with the requirements of the WTD.

In recent years, the Court of Justice ruled on several cases related to the WTD, finetuning different aspects from standby-time (C518/15) to the correct measurement (C55/18) of hours worked.

D. EUROMIL recommendations

No en bloc exemption of military personnel when implementing the WTD on national level

As stipulated in the Interpretative Communication (see above) EUROMIL strongly recommends that there should be no *en bloc* exemptions from the WTD in public service and the security forces in particular. This means that any diversion from the provisions of the Directive in these fields shall be possible only to the extent that specific activities of the armed forces unconditionally justify it, and that adequate compensatory safeguards are simultaneously put into effect to guarantee the highest level of workplace safety achievable in the specific situation.

Clear, comprehensive, coherent and binding working time regulations

Binding legal instruments have to be issued to regulate the regular working hours for soldiers, including appropriate compensation for overtime, for example through remuneration or time credits.

In most European armies, working time is managed by the commanding officers' discretion and through verbal orders. While EUROMIL acknowledges that in relevant military branches a majority of commanders administer working hours in a very caring manner, there are major problems arising from a lack of personnel in most of the armies of the European Union. For many commanders, the legal term "working time" or "overtime" is non-existent, as it is expected from soldiers to "serve" and fulfil their duty during 24 hours and 7 days.

The aforementioned judgment C55/18[5] gives an indication of how the Court of Justice interprets the correct measurement of hours worked. It is argued that Member States need to ensure that national legislation implementing the European WTD requires employers to record the working time of each individual worker, every day, in a suitable (automated) system. Such a system will be to the benefit of all (the employees, the employers as well as national authorities and courts) to keep track as to whether the maximum weekly working time and the minimum daily and weekly times of rest prescribed for in the WTD were respected. The judgment makes it clear that it is up to the Member States to define the

[5] More information about the judgement C55/18 can be found here: http://euromil.org/court-of-justice-of-the-european-union-ruled-on-implementation-of-working-time-directive/.

arrangements for implementing a system of working time registration, keeping in mind the specific requirements of the different sectors.

EUROMIL thus calls for the creation and implementation of clear, comprehensive, coherent and binding working time regulations, specific and adapted to the armed forces, that respect working hours, on-call time, weekly working time, rest periods and overtime, in order to preserve the health and safety of the armed forces members. These regulations should be negotiated in a fair and transparent manner, through social dialogue with the representatives of staff associations or military unions, resulting in a collective binding agreement between the employers and employees.

Limitation of average weekly working hours for soldiers as ensured by Directive 2003/88/EC

In the armed forces, protection against long and irregular working hours is a crucial aspect for health and safety prevention.

Active military personnel have the right to working conditions which respect their health, safety and dignity. This right is safeguarded under Article 31 of the Fundamental Rights Charter which ensures that every worker has the right to a limitation of the maximum of working hours, to daily and weekly rest periods and to an annual period of paid leave.

The strain put on soldiers, with the increasing participation in international missions and an ever more challenging working environment due to lacking recruitment and high budgetary pressures, results in a lengthening of working time, in particular for on-call duties. This unnecessarily enhances the exposure to health and safety risks of the soldier, for example in cases of security or guardroom duties, but additionally puts third parties at risk which are closely linked to the armed forces working environment.

On-call time is working time

EUROMIL recommends that all working time defined as any period during which the soldier is working at the employer's disposal and carrying out his activity or duties - be it on-call or for emergency preparedness - should be counted as working time. The judgement C518/15[6] of the European Court of Justice (ECJ) should be regarded as a powerful argument to count stand-by / on-call time as working time. The court ruled that "*stand-by time which a worker spends at home with the duty to respond to calls from his employer within 8 minutes, very significantly restricting the opportunities for other activities, must be regarded as*

[6] In this case, the stand-by time of a worker who is obliged to respond to calls from the employer within a short time was discussed. The Court decided that this stand-by time must be regarded as working time. More information about the judgement C518/15 can be found here. http://euromil.org/a-step-in-the-right-direction-for-the-implementation-of-the-working-time-directive/

'working time'." Although the circumstances of this case were quite specific (a firefighter who needed to be able to reach the fire department within 8 minutes if on-call) one can nevertheless conclude that on-call duty, if seriously restricting the employee's opportunities for other activities, must be regarded as "working time".

Working time during specific military activities

In October 2019, a Slovenian court referred a question to the Court of Justice of the European Union, questioning whether the WTD applies to workers in the defence sector and military personnel who perform guard duty in peacetime. The Slovenian court also asked whether time spent physically present at the barracks, or another place designated by the employer but not performing actual work could be seen as working time.

On 15 July 2021, the European Court of Justice published its judgement of Case B.K. v Slovenia (C-742/19). The Court reaffirmed that, although the WTD allows in theory for the exclusion of military personnel from its scope, members of the armed forces are not automatically excluded from its provisions. The Court opined that it is only in certain specific circumstances, with regard to the nature of the work being carried out, the expertise of the individual and the limited nature of this expertise, can the exception be applied. Therefore, the Court set forth in clear terms which specific security activities of military personnel are excluded from the scope of the Directive.

More specifically, a security activity performed by a member of military personnel is excluded from the scope of that directive:

1. where that activity takes place in the course of initial or operational training or an actual military operation; or

2. where it is an activity which is so particular that it is not suitable for a staff rotation system which would ensure compliance with the requirements of that directive; or

3. where it appears, in the light of all the relevant circumstances, that that activity is carried out in the context of exceptional events, the gravity and scale of which require the adoption of measures indispensable for the protection of the life, health and safety of the community at large, measures whose proper implementation would be jeopardised if all the rules laid down in that directive had to be observed; or

4. where the application of that directive to such an activity, by requiring the authorities concerned to set up a rotation system or a system for planning working time, would inevitably be detrimental to the proper performance of actual military operations.

Furthermore, the Court confirmed that the WTD does not preclude different remuneration being payable for stand-by periods during which military personnel does not actually perform work as opposed to stand-by periods during which he performs actual work (§96-97), as the question of remuneration for working time, be it stand-by or guard time or actual working time, remains an exclusive issue of national laws. The Court reiterated that all stand-by periods (irrespective of how they are organised) during which the constraints imposed upon the worker are such as to affect, objectively and significantly, the possibility for the worker freely to manage the time during which his professional services are not required and to pursue his own interests are considered to be working time. Conversely, where such constraints do not reach such a level of intensity and allow him to manage his own time and pursue his own interests without major constraints, only the time linked to the provision of work actually carried out during that period constitutes working time (§93).

EUROMIL holds that during international military operations and missions with their specific security conditions and for specific military activities, such as military exercises or manoeuvres and special training runs, exceptions to working time regulations can apply. However, daily working time periods should be clearly defined and controlled so that, for example, the total working hours are taken into account for the calculations of the reference period, be it weekly, monthly or yearly.

EUROMIL believes in the inherent principle of the Directive to improve the safety and health of workers to the largest possible extent, while subordinating said rights to the greater good, but only in such circumstances as is absolutely necessary. Moreover, EUROMIL contests that any exemption or derogation from the scope of the Directive should not arise from failure to provide adequate resources that give rise to shortages of appropriately trained and qualified personnel. Moreover, EUROMIL assert that the safety, welfare and health of personnel must be uppermost in the minds of authorities when planning activities and derogations and not exemptions are more appropriate in the first instance.

Finally, it is of paramount importance to EUROMIL that the rules on the implementation of the Working Time Directive are the result of a collective agreement following a social dialogue with the social partners in whatever form is provided for in national legislation.

Reconciliation of professional and family life

EUROMIL notes that the reconciliation between professional, private and family life is essential when trying to improve the attractiveness of the military profession and counter the recruitment problems in the armed forces all over Europe. It, therefore, summons to streamline work-life balance measures with working time regulations in order to achieve a better balance between army and family life. This

would contribute to the attractiveness of the armed forces as an employer in general and make it more appealing to men and women to join the forces.

Additionally, parental, paternity and maternity leave regulations have to be formulated and implemented, while childcare facilities within army facilities should be developed further to the benefit of the families.

Annual Leave

Article 7 of Directive 88/2003 provides: "Member States shall take the measures necessary to ensure that every worker is entitled to paid annual leave of at least four weeks in accordance with the conditions for entitlement to, and granting of, such leave laid down by national legislation and/or practice."

Additionally, Article 17 of the aforementioned Directive provides that, while Member States may derogate from certain provisions of the Directive, however no derogation is allowed with regard to Article 7.

In consideration of the foregoing principles, the ECJ in the case of *Schultz-Hoff and Others*[7] made the following observation:

"[a]s a rule, national legislation which lays down conditions for the exercise of the right to paid annual leave expressly conferred by the directive, including even the loss of that right at the end of a reference period or of a carryover period, provided, however, that the worker who has lost his right to paid annual leave has actually had the opportunity to exercise the right conferred on him by the Directive."

EUROMIL believes that all members of armed forces have an absolute entitlement to their annual leave. Additionally, members are entitled to pay/allowances during the period of annual leave that reflect their working time, and that where members are unable due to avail of all of their leave, they should be entitled to carry the full allocation over until such time as they can avail of their leave entitlement.

Right to disconnect

In recent years, the world of work has been transformed by technology, enabling many workers, including the ones in the armed forces, to continue working during unprecedented times. For this reason, the right to disconnect gained relevance: it refers to legislation that allows employees to disconnect and not receive or respond to work-related emails, calls or messages outside of normal working hours.[8] Said right establishes boundaries between one's work and life, protecting them from any negative consequences of disconnecting from their job. Although

[7] C-520/06 Schultz-Hoff and Others [2009]
[8] A definition of the right to disconnect can be found at: https://www.eurofound.europa.eu/observatories/eurwork/industrial-relations-dictionary/right-to-disconnect.

there is currently no legal framework in the EU regulating the right to disconnect, many European countries have already enacted their own laws on the right to disconnect nationally. However, these laws differ in practice from country to country.

In 2021, the European Parliament passed a resolution calling on the Commission to publish a directive "enabling those who work digitally to disconnect outside their working hours". It should also "establish minimum requirements for remote work and clarify working conditions, hours and rest periods", as the right to disconnect is vital for protecting workers' physical and mental health and well-being, and to protect them from psychological risks.

Here too, EUROMIL believes that military personnel, in this changed world of work, should have the same, if not similar, measures taking into account their specific assignments, after consultation with the social partners through the appropriate social dialogue channels.

Greater pressures on personnel arising from retention difficulties cannot be addressed by the infringement of the personal time of members. EUROMIL believes that an onus exists on Governments to introduce policies that are agreed with the representative bodies/unions representing armed forces personnel that provide for clear delineation between working time and personal time.

It is the considered opinion of EUROMIL that the lack of entitlement to disconnect and delineate between working time and family time has a negative impact on retention and recruitment, which ultimately impacts on the ability of the states to ensure adequate levels of defence.

Final Considerations

EUROMIL considers that the most appropriate manner of implementation of the Directive is through direct negotiation and consultation with the representative bodies/associations of members of armed forces in each state.

EUROMIL is firmly of the belief that any implementation of the Directive must be done in a manner that ensures armed forces personnel to be capable of understanding their rights and entitlements, and that this must be clearly communicated to personnel[9].

[9] Article 18 of Directive (2003/88) provides for derogation by way of collective agreement. Premised upon recent findings of the ESCR, notably EUROMIL v. Ireland Complaint No. 112/2014, EUROMIL believes that representative bodies/associations & unions should be permitted to conclude agreements on the important matter of the Working TIME Directive.

EUROMIL believes that exemptions from the scope of the Directive should be limited to extreme or absolutely necessary circumstances. Derogations should be used in the first instance while resources are secured to permit full usage of the safety protections inherent in the Directive.

EUROMIL asserts that all armed forces personnel are entitled to 4 weeks annual leave with full pay allowances. Where full leave allotments cannot be granted in the appropriate year, full carryover of unused leave should be provided for.

Where working hours outside of normal regular restored hours are undertaken by personnel, these should be appropriately compensated for, and appropriate policing of agreements should be undertaken to ensure the continued health and safety of personnel.