



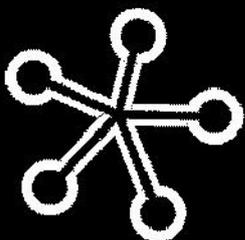
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Governance of EU Labour Law EU's Working time directive and its implementation in the Netherlands

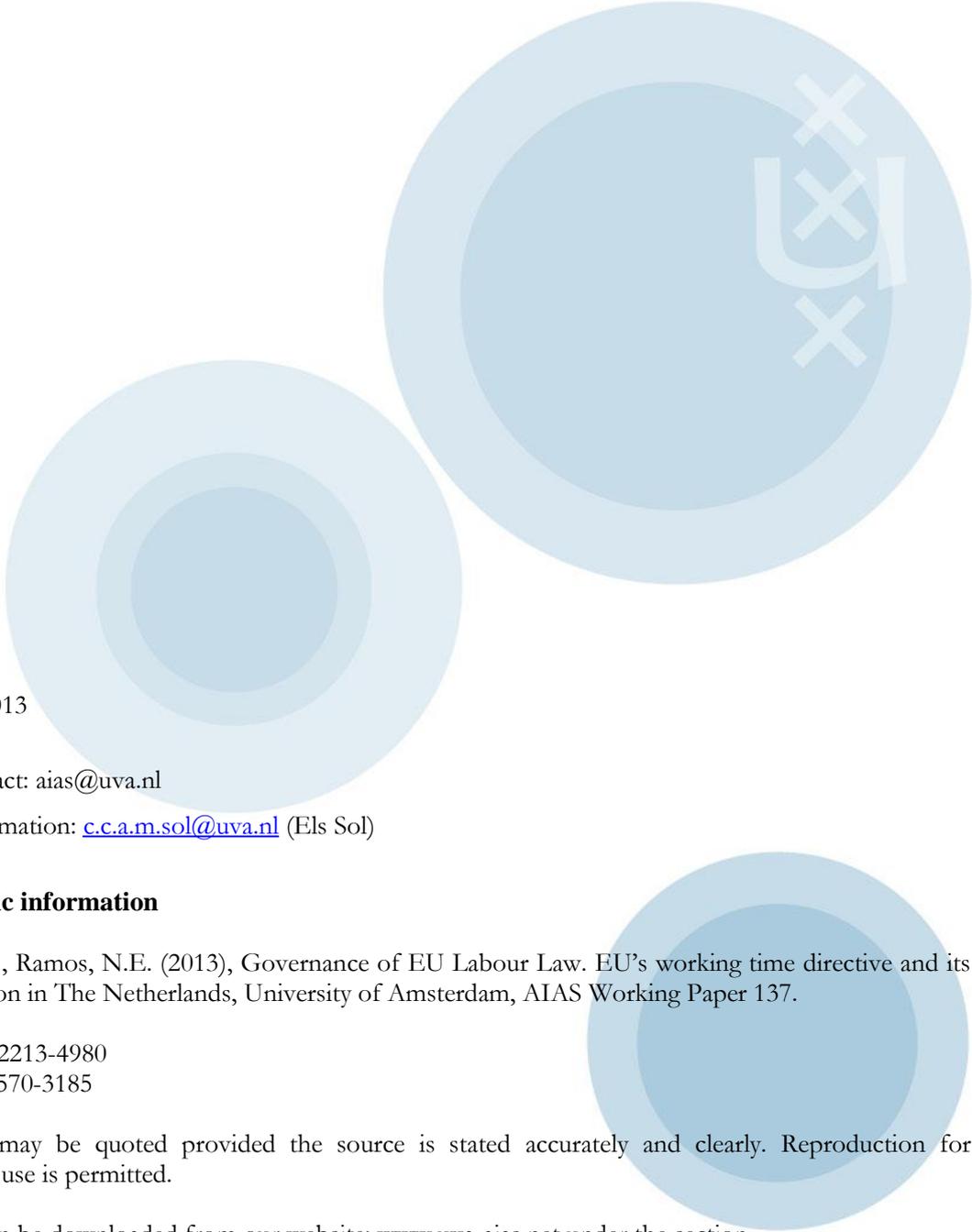
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Working Paper 137

November 2013



November 2013

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Bibliographic information

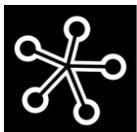
Sol, C.C.A.M., Ramos, N.E. (2013), Governance of EU Labour Law. EU's working time directive and its implementation in The Netherlands, University of Amsterdam, AIAS Working Paper 137.

ISSN online: 2213-4980

ISSN print: 1570-3185

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Governance of EU Labour Law

EU's Working time directive and its implementation in the Netherlands

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WP 137

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Abstract

In the European discussion on working time and working time arrangements the Netherlands stands out as a special case of part-time work. Part-time work can be seen as an individualized solution to smoothen the trade-off between work and family life. It is this solution of part-time work that has been chosen in the Netherlands. Since decades Dutch national statutory initiatives and CLA arrangements have created protective measures for both full-time and part-time workers, including working time. Therefore the implementation of the Working Time Directive (WTD) only led to minor adjustments in the Netherlands and there were no major discussions over challenges. However due to the 'solution' of part-time work the Netherlands lacks institutional arrangements effective in helping to reconcile dual roles of work and life in a sex neutral way. Against the background of the augmentation of time pressures, due to internationalization of markets and ICT, and foreseen shortages in the labour market in the near future this is regarded as a pressing policy problem. Possibly proposals by the European Commission for revising the WTD, such as the reference to the compatibility of work and family life, might be a step in the right direction, considering that a limit on working time is vital to enable working parents (read women and men) to combine jobs and family life.

1. Introduction¹

Debates over challenges that European law poses for national legislation and practices maybe relatively new, the general aspects of working time are a longtime and hotly contested field in the governance and implementation of EU law. This field of regulation of weekly hours of employment is situated at the crossroads of health- and safety regulations and employment protection. It is also of concern for industrial relations insofar as it falls into the domain of autonomy of collective bargaining. The length of working time is a fundamental element of the employment contract and the limitation of daily working time is a longstanding union demand. The European Union has acknowledged this need to regulate and limit working time in several legal instruments such as the Community Charter of the Fundamental Social Rights of Workers of 1989 and the Charter of Fundamental Rights of the EU. In secondary EU legislation, the Directive 2003/88/EC aims to protect workers predominantly against the health and safety risks of long and irregular hours by setting up a framework on the organization of working time.

In European perspective the Netherlands has pioneered with working time regulations. In the last century the Dutch trade union movement successfully claimed an active policy on working time both on the grounds of job creation in situations of high unemployment and on the grounds of health and safety. Since this has resulted in protective Dutch regulations, the implementation of the Working Time Directive (WTD) has had less impact in the Netherlands than it had in some other countries. Much has already been regulated at national level in statutes and collective agreements. The major arrangement is the Dutch Working Time Act of 1996 which underwent major changes, that came into force by 1 April 2007.² The WT Act determines the rules of the (maximum) and working hours (minimum) rest periods and sets a series of other standards. Also the Act gives effect to the Working Time Directive (WTD) (2003/88/EC).³

In addition to the Working Time Act, in the Netherlands, other legal provisions regulate the adjustment of working hours. The Adjustment of Working Time Act 2000 –Wet Aanpassing Arbeidsduur-⁴ gives employees the right to request a decrease or an increase in the number of hours they work. (Kuip and Verhulp 2000) This legislation is weighted in favour of the employee (Jacobs and Schmidt 2001).⁵ As a rule,

¹ The authors would like to thank prof. Klara Boonstra and Suhendra Leon for comments made and prof. Kea Tijdens for providing data from the *Wage Indicator*.

² Law of 23 November 1995, last amended in July 2013, Stb 2013, 236.

³ In addition to ILO Conventions 14 and 106, the European Social Charter and the Youth Council Directive (94/33/EC). Since the Treaty of Lisbon the right to limitation of working hours, daily and weekly rest and paid leave are bound by the Charter of Fundamental Rights of the European Union.

⁴ Stb. 114, 2000

⁵ See case law: Rechtbank Zwolle, Sector Kanton, 12/10/200, KG 200, p. 235; Rechtbank Haarlem, sector Kanton, 12/05/2001, JAR 2001, p. 117; Kantonrechter (Ktr.) Groningen 23/03/2001, JAR 2001, p. 87; Ktr. Haarlem 17/05/2001,

employers are obliged to grant a working time adjustment request unless there is a substantive business reason to refuse, and they should arrange the pattern of working time in line with the employee's wishes unless the employer proposes an alternative pattern that would better suit operational needs. In this case, employees should be 'reasonable and fair' in trying to accommodate the employer's request. Moreover, employers are not generally allowed to demand to know the reasons behind the request. Currently, the government is discussing a legal proposal on 'Modernising leave arrangements and working time' proposing amendments to the Adjustment of Working Time Act and the Work and Care Act.⁶ In the context of the new tripartite social agreement adopted in 2013, the Minister of Social Affairs is planning to organise a summit with the social partners to discuss ideas on how to better reconcile work and care which might lead to amendments of that proposed legislation.⁷

This paper presents working time issues related to debates concerning the EU Working Time Directive (WTD). After an introduction of the Dutch part-time work model and working hours arrangements (par.2), paragraph 3 first explains the Dutch legal approach towards implementing EU law. Paragraph 4 focuses on relevant aspects of the WTD in terms of regulation, implementation and practice. In the paper we use empirical data from the *Labour Force Survey* and the *Wage Indicator* database. Paragraphs 5 and 6 deal with derogations and exceptions respectively in general (par.5) and in specific industries (par.6). Paragraph 7 focuses on case law. Furthermore, paragraph 8 gives an overview of the appreciation of WTD by the relevant actors. Finally in paragraph 9 the paper ends with some concluding remarks.

JAR 2001, p. 117; Ktr. Breda 30/03/2001, JAR 2001, p. 85; Ktr. Maastricht 02/02/2001, JAR 2001, p.49 and Rechtbank Groningen, sector Kanton, 23/03/2001, JAR 2002, p. 140.

⁶ Stb 2013, 236.

⁷ Stichting van de Arbeid, *Perspectief voor een social én ondernemend land: uit de crisis, met goed werk, op weg naar 2020*.

2. Working hours arrangements and general historic context of part-time work

During the 1980s, the growth of part-time employment accelerated simultaneously with the rise in female labour market participation, concentrated heavily in the service sector. The initial rise in part-time employment was mostly the unintended result of the late entry of Dutch women into the labour market following rising education trends and changes in cultural values regarding mothers and paid work outside the home (Yerkes and Visser 2008). The growth in part-time work was stimulated by the economic situation at the time, with fewer employment opportunities, with wage moderation taking place, and policy pressures towards a redistribution of employment. From the employers' point of view, part-time work was a means of increasing flexibility, and offered an individual, rather than a collective solution to working time reduction. One of the main advantages of part-time work for employees was that it supposedly offered the flexibility needed to combine paid work with caring responsibilities. (Visser, 2002; Visser and Hemerijck, 1997; Yerkes and Visser, 2008).

Table 2.1 presents an overview of the part-time working hours arrangements for employees for the Netherlands and for four benchmark countries, each representing different arrangements in Europe: France, United Kingdom, Denmark and Czech Republic using Labour Force Survey data. A majority of men stipulate they work on a fulltime hours per week basis. As the table shows the Netherlands figures for fulltime work are the lowest. Compared to earlier LFS data of 1999 all countries have reduced fulltime working hours.

The part-time-work history of the Netherlands as the country noted for its part-time economy is clearly reflected in the figures (table 2.1). In 2010 The Netherlands share of part-time hours (24.2 for men and 76.82%) both for men and women stand out as remarkably high against 2.2 and 9.1 % in Czech Republic (lowest) and 14.1% in Denmark for men and 42.5% in the United Kingdom for women (second highest score). And the percentages still rise. All percentages of employees with part-time hours contracts rose from 1999 to 2009.

Table 2.1 *Part-time working hours' arrangements of employees as a share of total employment in the Netherlands and its four benchmark countries in %, 1999-2009*

part-time hours per week	Males		Females	
	1999	2009	1999	2009
Czech Republic	2.4	2.1	9.9	9.1
Denmark	10.4	14.1	34.7	38.6
France	5.5	6.4	31.4	29.8
Netherlands	18.0	24.2	68.9	76.2
United Kingdom	8.8	11.0	44.0	42.4

Source: Labour Force Survey data.

A typology

We can typify the Netherlands against its benchmark countries' working time participation model using a typology developed by Anxo and Boulin as a maternal part-time work model (Anxo and Boulin, 2006):

- *'Maternal part-time work' model.* Characteristic is that women after they have children, continue to participate in the labour market in a part-time appointment. Part-time seen as the norm for mothers, even if the children are older. The Netherlands is the example of the 'maternal part-time work' model and to a smaller extent the United Kingdom. Both the Netherlands and the United Kingdom have a large percentage of women working part-time, resp. 75% and 41 % (OECD 2009).
- *Universal Breadwinner model.* Characteristic for this model is that women's employment throughout the life cycle is high and women generally work in large part-time jobs or work full time. In most families both partners work. Denmark, Czech Republic and France practice this model.

3. National legal approach to implementing EU Law

In general terms, the Netherlands can be defined as a parliamentary representative democracy and a constitutional monarchy. The legislative process in the Netherlands is based on a bicameral system with a Second Chamber (House of Representatives) that discusses and adopts the bills and a First Chamber (Senate) that assesses bills by reference to its own criteria after they have passed through the Second Chamber. When describing the legislative process in the Netherlands, it is important to mention the existence of some bi- and tripartite advisory boards. In fact, trade unions and employers are represented in the Social-Economic Council (Sociaal Economische Raad, SER), the Stichting van de Arbeid (STAR), and the Council for Work and Income (RWI).

When dealing with EU related matters, the Second Chamber does not usually adopt resolutions on EU proposals, nor does it give mandates to the government to take a certain position in the Council of the European Union. Instead, there is a consultation and reporting procedure, according to which ministers incorporate Parliament's views by discussing their position with MPs before every Council meeting. The government outlines its position on important EU proposals in explanatory memorandums (so-called BNC fiches) that are sent to the Standing Committee of European Affairs of the Parliament. These include an assessment of the proposal's financial and other implications for the Dutch interests and regulations. In principle, the role of the Committee on European Affairs is limited mainly to 'horizontal' EU issues, like the adoption of new treaties or the Lisbon process, and each specific committee (in the case of the organization of working time, the Committee of Social Affairs and Employment) deals with the EU proposals in its own area.

4. Relevant aspects of the working time directive regulations, implementation and practice

This section discusses the major topics of discussion concerning issues related to the Working Time Directive (WTD) and its implementation, notably annualised hours, flexible hours, the opt-out of WTD, on-call work and shift work. Also the section shows figures related to these topics for the Netherlands benchmarked against four other countries.

Working time in the Netherlands is mainly regulated in the Working Time Act (*Arbeidstijdenwet*) and in the Working Time Decree (*Arbeidstijdenbesluit*)⁸. The Working Hours Act stipulates how many hours per day and week an employee may work and also regulates breaks and minimum rest periods. These legal texts apply for employed over the age of eighteen but there are special regulations applicable for children under 16 and young workers aged 16 and 17. In addition, special rules concerning working time apply for women who are pregnant or who have recently given birth. In principle the Working Hours Act applies for everyone who works for an employer, so for all employees, including interns and temporary employees. However, workers who earn at least three times the minimum salary are excluded from the scope of the legislation (unless they are engaged in dangerous work, night work or shift work, or when they work on non-managerial positions in the mining sector). This exclusion has been criticized by some researchers (Schaapman, 2011). In a number of cases the Working Hours Act also applies for the self-employed (i.e., in the transport sectors). Finally, there are also specific regulations on working time for several sectors, i.e., healthcare and mining.

The definition of working time and rest-time

In the Netherlands until a legislative change introduced by Law of 22 November 2012 there was no clear definition of working time and resting time.⁹ This legislative lacunae was criticised by the a decision of the Administrative Law Division of the Council of State in 2009.¹⁰ This Administrative institution decided on appeal that whereas the definitions of working time and rest period included in article 2 of the Working Time Directive is not implemented in the domestic law and, as long as the proper description and explanation of these definitions are decisive in a given case for answering the question whether there has been a violation of law, it is against the principle of the legal certainty to apply the doctrine of interpretation in conformity with

⁸ Decree of 4 December 1995, last amended in August 2012, Stb 2012, 397.

⁹ Stb 2012, 604.

¹⁰ JB 2009/99 RvS, 04-03-2009.

EU law. This led to the conclusion that the Ministry of Social Affairs had no power in that case to impose a fine to a company for non-compliance with the working time and resting time imposed by that Directive. After this decision, new definitions of working time and rest period were included in Article 1:7 K and L.¹¹ Working time is now defined in the national law as “the time that the employee performs work under the authority of the employer” and rest period “means any period which is not working time”. This new definition of working time does not seem to fully correspond with the wording of the WTD, which is more elaborated and 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 laws and/or practice.” Therefore, this lack of full compliance could lead to further litigation in the case of on-call workers –see section below- or, eventually, to a submission of a preliminary question to the Court of Justice of the EU (CJEU) in order to clarify if the terms ‘the authority of the employer’ is equivalent to the EU law terminology ‘the employer’s disposal’.

The length of the working week

The length of the working week is at the heart of the working time controversy between governments, employer associations and the trade union movement in the EU (Klaveren, Ramos and Tjidsens 2008). The debate has been intense during the discussion of the European Commission’s proposals for revising the WTD. These proposals aimed at counteracting the effect of CJEU’s decisions on the cases SIMAP¹² en Jaeger¹³, which held that on-call duty performed by doctors when they are required to be physically present at their working place must be regarded as working time.

Table 4.1 presents an overview of average usual working hours per week, for the Netherlands broken down by industry for 2010.

¹¹ An amendment of Article 1:7 Atw was introduced by Stb 2013, 236.

¹² Case C-303/98 SIMAP *v* Conselleria de Sanidad y Consumo de la Generalidad Valenciana. [2000] ECR I-7963.

¹³ Case C-151/02 Landeshauptstadt Kiel *v* Norbert Jaeger. Judgment of 9 October 2003.

Table 4.1 Average usual working hours, breakdown by industry, 2010

	<i>Netherlands</i>
Agriculture	39.5
Manufacturing	41.1
Utilities	41.3
Construction	42.1
Wholesale/retail	37.4
Hotels, rest., cat.	36.3
Transp, commun.	40.6
Finance	39.2
Other comm.serv.	39.2
Public admin.	39.1
Education	38.0
Health care	34.2
Other	36.2
Total	38.7
Total N	27759

Source: WageIndicator data 2010.

Compared to the years before (period sept.2004-March 2007) the average number of hours for the Netherlands rose from 36.4% to 38.7%. The construction industry has the longest working week with 42.1 hours.

Regarding rest periods, the legislation in the Netherlands establishes that after a working day, an employee must have 11 consecutive hours of resting time. This rest period may be shortened to 8 hours once in a 7-day period if the nature of the work or the business circumstances so require. In a regular week of 5-day work, an employee is entitled to enjoy 36 consecutive hours of resting time after the end of the working week. A longer working week is also possible, provided the employee has at least 72 consecutive hours of resting time within a period of 14 days. This period may be split into two periods of at least 32 hours each. Moreover, the legislation in the Netherlands stipulates that an employee who works more than 5 ½ hours per day is entitled to at least a 30 minutes break each day. This may be split into two 15-minute breaks. Furthermore, if an employee works for more than 10 hours, he must have at least a 45 minutes break. This may be split into several breaks, each of which must be at least 15 minutes. These breaks can be modified by collective agreement, also to the detriment of the employee.

The individual opt-out

The WTD allows, providing that the conditions set up in Article 22 are fulfilled, for a worker to sign an agreement with the employer to work more than 48 hours per week. In this case the WTD explicitly forbids any kind of victimization of the worker who is not willing to give his agreement to perform such work. In addition, the Directive contains recording and information obligations of the employer concerning all workers who carry out such work. The Netherlands applies the individual opt-out to the maximum standard duration of

the working week for jobs which make extensive use of on-call time, such as in health services and emergency services. However, the introduction of the opt-out has been controversial; trade unions complain that it amounts to a regression from the levels of protection and co-determination which applied previously, while employers disagree. Municipal authorities and public service unions reached an agreement in May 2010 on allowing the use of the opt-out during the period 2009-2011 for emergency services, subject to approval by union members. The agreement would allow working time of up to 50 hours per week, and maximum daily working time would not exceed 11 hours (see also court cases below).

Annualised hours

The issue of annualisation of working hours relates to the reference periods for the calculation of maximum weekly and daily working time and for minimum rest periods. Nevertheless, derogations to the maximum length of night work and of the reference periods set up in the WTD are admitted in many cases.

Table 4.2 presents personal characteristics of employees with annualised hours, their CLA coverage and the percentage of employees with annualised hours. The table reveals that the Netherlands has a major CLA coverage.

Table 4.2 Personal characteristics of employees with annualised hours, breakdown by CLA and percentage of employees with annualized hours, 2010

	<i>% female</i>	<i>Average age</i>	<i>% covered by coll. agreement</i>	<i>Firm size work place</i>	<i>% with annualized hours</i>
Netherlands	70.2%	41.2	95.8%	4.81	0.8%

Source: WageIndicator data 2010, employees with an employment contract

Overtime payment

As table 4.3 reveals the Netherlands scores poorly on the payment of overtime as regular hours plus overtime compensation and high on additional overtime hours paid as normal hours.

Table 4.3 Distribution over overtime payment arrangements and average contractual working hours by arrangement, 2010

<i>Distribution over arrangements</i>	<i>Netherlands</i>
<i>1 Overtime paid as normal hours plus overtime premium</i>	8.6%
<i>2 Overtime paid as normal hours</i>	16.9%
<i>3 Time-off in lieu for overtime hours</i>	31.4%
<i>4 Partly paid, partly compensated with time-off in lieu</i>	14.3%
<i>5 Not compensated</i>	28.7%
<i>Total</i>	100%
<i>Average contractual working hours</i>	
<i>1 Overtime paid as normal hours plus overtime premium</i>	36.8
<i>2 Overtime paid as normal hours</i>	30.2
<i>3 Time-off in lieu for overtime hours</i>	34.6
<i>4 Partly paid, partly compensated with time-off in lieu</i>	34.5
<i>5 Not compensated</i>	37.8

Source: WageIndicator data 2010, employees with an employment contract.

In the Netherlands time off in lieu for overtime hours is most common, reflecting the high value attached to leisure time.

On-call work

The case law of the European Court of Justice have established that on-call working time, when the employee must be available at the workplace, should be regarded as working time. Due to the dissatisfaction of some Member States, including the Netherlands, with the need to implement the Jaeger doctrine, the European Commission amended proposal for revising the WTD suggested the introduction of a new category of on-call time, the ‘inactive’ part of on-call time (COM 2005 246 final).

In the Netherlands, even if an employee is not at the work place, he may be called on to go to work if unforeseen circumstances arise. This is referred to as ‘on-call duty’ in the Working Time Act. ‘Standby duty’ is

also regulated in that Act and the difference between the two is that being called to work is a normal part of the job for someone with standby duty, i.e., healthcare sector. (Ministry of Social Affairs and Employment, 2010). In the legislation in the Netherlands in the event of on-call duty and standby duty, the hours during which an employee can be called are not considered working hours. However, if an employee is called and must go to work, this time does count as working hours. A call counts for at least a half hour of working time, even if the employee only actually works for fifteen minutes. If an employee is called once again within a half hour after he has finished his work following a call, the interim time also counts as working time.¹⁴

In addition to on-call duty and standby duty, the Working Time Decree regulates another form of on-call work, the so-called 'on-site standby duty.' This form refers to the cases when the employee must be present at the work place (similarly to the situation in the Jaeger and SIMAP EU cases). In the Netherlands, special rules apply for on-site standby duty. During on-site standby duty, an employee must remain at the work place, so that he can start working as quickly as possible after being called. This is only permitted if the type of work requires the presence and the work cannot reasonably be organized in a different way (i.e. in healthcare or in the fire brigade). Moreover, working on-site standby shifts must be agreed in a collective arrangement. The specific regulation of this type of labour performance only applies if the employee does not regularly work an on-site standby shift. Otherwise the standard working time regulations apply.¹⁵

An on-site standby shift may not last more than 24 hours, including hours of waiting or sleeping and an employee may work an on-site standby shift a maximum of 52 times in 26 weeks. In conformity with EU case law, all hours during an on-site standby shift, which requires mandatory presence at the workplace, count as working time. In principle, an employee working on-site standby shifts may work at most on average 48 hours per week in a 26-week period. However, since 2005, the employee and employer may also make use of the individual opt-out to the maximum duration of the working week and agree on an arrangement to work up

¹⁴ The Dutch WT Act establishes that an employee who works on on-call duty may not work more than 13 hours per 24 hours, including the hours arising from calls. An employee may be on on-call-duty for a maximum of 14 days during a 4-week period and must have at least 2 consecutive days in every 4-week period in which he is not working and also not on on-call duty. Furthermore, an employee may not be on on-call duty immediately before or immediately after a night shift nor in the 11 hours preceding a night shift or during the 14 hours after a night shift. If an employee is on on-call duty between midnight and 6 am 16 times or more within a 16-week period, he may not work more than 40 hours per week on average during that 16-week period. However, the legislation foresees an extension to 45 hours per week under the following conditions: The employee has 8 consecutive hours of rest immediately after the last night call during which he is not working or on on-call duty or, if that is not possible, 8 consecutive hours of rest on that same day (before midnight in any case).

¹⁵ The ruling is as follows. There must be a period of at least 11 hours of rest before and after every on-site standby shift. This rest time may be shortened to 10 hours once per week and to 8 hours once per week if necessary due to the nature of the work or the business circumstances and providing that it is collectively agreed. The shorter rest times may not be planned to follow each other. A shortened rest time between two shifts must be compensated for in the following rest period. Moreover, after a shortened rest period, the very next rest period must in that case be extended by the number of hours by which the previous one was shortened. In addition, in every consecutive period of 7 times 24 hours, the rest time must amount to a minimum of 90 hours and it must at least contain one uninterrupted rest period of at least 24 hours, as well as four uninterrupted rest periods of at least 11 hours, one uninterrupted rest period of at least 10 hours, and one uninterrupted rest period of at least 8 hours, whereby uninterrupted rest periods may follow one on the other.

to 60 hours per week. This exception follows the opt-out option provided by Article 22 of the WTD and it was included in the national legislation to limit the impact of the Jaeger ruling. If an employee agrees to the opt-out, he must state his agreement in writing and his/her consent is valid only for a period of 26 weeks and is subsequently tacitly renewed for the same period, unless he or she explicitly states that he does not want to continue the agreement.

Shift work

According to national Dutch law, an employee works a night shift if he must work for more than 1 hour between the hours of midnight and 6 am. This regulation improves the protection provided by the WTD which considers as a night worker any worker, who, during night time, works at least three hours of his daily working time. The Legislation in the Netherlands stipulates that a night shift may not involve more than 10 hours of work whereas the WTD sets up that limit at 8 hours but exceptions are allowed. If a night shift ends after 2 am, this must be followed by a minimum of 14 hours of non-work time. This may be shortened to 8 hours a maximum of once per week if the type of work or the business circumstances justifies this. If a night shift ends before 2 am, it must be followed by 11 consecutive hours of resting time. An employee may work a 12-hour night shift a maximum of 5 times per two weeks and 22 times per year. After a 12-hour night shift, he must have at least 12 hours of resting time. After a series of 3 or more night shifts, an employee must have at least 46 hours of resting time.

The legislation in the Netherlands regulates also the maximum number of night shifts that an employee may work during a reference period of 16 weeks.¹⁶ Collective agreements might increase the number of night shifts from 117 to 140 night shifts per year if there is justification based on the type of work or due to special business circumstances. Furthermore, if the employee only works on the ‘edges of the night,’ for example if the working day starts at 4 am, then the collective arrangement may establish that the employee may work a maximum of 38 hours every 2 weeks between the hours of midnight and 6 am. Since the new Working Time Act came into effect on 1 April 2007, the transitional scheme for permanent night work applies in the Netherlands indefinitely.¹⁷

Concerning the obligation established in Article 11 WTD of taking all the necessary measures to ensure that an employer who regularly uses night workers brings the information and to the attention of the

¹⁶ In principle, an employee may work a maximum of 36 night shifts in a 16-week period. Moreover, an employee may not work more than 7 consecutive shifts if one of these shifts is a night shift. This maximum may be extended by collective agreement to 8 shifts if the type of work or business circumstances justifies it. If the employee only works a night shift occasionally (less than 16 times in 16 weeks), the regular rules for day shifts apply, namely: on average 48 hours of work per week during a reference period of 16 weeks. Finally, if an employee regularly works night shifts (16 times or more during a 16-week period), he may not work more than an average of 40 hours per week within those 16 weeks.

¹⁷ According to that scheme, if an employee already worked mainly at night before 1 January 1996, he may continue this work pattern after 1 April 2007 providing that every period of 4 consecutive weeks he is not working more than 20 night shifts. (Ministry of Social Affairs and Employment, 2010)

competent authorities, the legislation in the Netherlands seems to comply with that requirement. However, concerning the obligation of Article 12 WTD on ensuring the health and safety protection, prevention services and facilities which are appropriate to the specific nature of night work or shift work, the European Commission has pointed out that the reference of the Dutch government to the general legislation on health and safety of workers might not suffice to fulfil that duty. (European Commission, 2010). A large proportion (51%) of the Dutch employees regularly work in the evenings and is rising. According to the Wage Indicator the percentage of employees who regularly work at night increased from 43% between 2004-2007 to 51% in 2010. Compared to the period before (sept.2004-March 2007), both the percentage of employees that regularly works on Saturdays or Sundays rose sharply from 30% to 43.6% and 18% to 28.9% respectively.

5. The use of derogations and exceptions

The most frequently used derogation of the WTD is Article 17.3 WTD, which allows Member States to derogate from the Directive's requirements regarding daily and weekly rests, rest breaks, length of night work, and length of reference periods in a detailed range of specific situations or activities. (European Commission, 2010)

In principle the legislation in the Netherlands regarding breaks, daily and rest periods complies with the minimum rest periods set up by Articles 3 to 5 of the WTD. Also the derogations allowed by the national regulation comply with the EU legal framework as far as they are included in the derogations provided by Articles 17 to 18 WTD. These derogations are applicable when, on account of the specific characteristics of the activity concerned, the duration of the working time is not measured and/or predetermined or can be determined by the workers themselves, and in particular in the case of managing executives, family workers and workers of religious communities. Provided that alternative equivalent periods of compensatory rest or appropriate protection are afforded to workers by means of regulation or collective agreement, derogations to the general resting periods set up by the WTD are also admitted for activities which imply distant/offshore work, security and surveillance activities, for activities needing continuity of service or production (i.e., healthcare, residential institutions and prisons, docks and airports, press, radio, television, postal services, fire and civil protection services, gas, water, and electricity production, transmission and distribution, research, agriculture, transport of passengers, etc.); when there is a foreseeable surge of activity, (i.e. agriculture, tourism, and postal services), and in several activities in railway transport and in cases of accidents or risk of accident. Finally, derogations to the minimum daily and weekly rest periods are admitted in the case of shift work activities when the worker is changing shifts and in the case of activities involving periods of work split up over the day, particularly those of cleaning staff.

In the case of the Netherlands, the Working Hours Decree contains exceptions and additions to the Working Time Act. There are general exceptions that apply for certain employees and certain situations and exceptions that apply for certain sectors, such as healthcare or mining. These sectors therefore are subject to the general regulations from the Working Hours Act and the Working Hours Decree and the separate sector regulations. Moreover, several provisions of the Dutch Working Time Act and the special and sectoral regulations on working time can be modified or adapted by collective agreements (CAOs or company level

between the employer and the works council).¹⁸ This possibility is foreseen by Article 18 WTD which allows derogations from the breaks, minimum daily and weekly resting time and reference periods set up by the Directive as long as those derogations are made by means of collective agreements concluded between the two sides of industry at national or regional level or, in conformity with the rules laid down by them, by means of collective agreement or agreements concluded between the two sides of industry at a lower level. These derogations are allowed on the condition that equivalent compensating rest periods are granted to the workers concerned or, in exceptional cases where it is not possible for objective reasons to grant such a periods, the workers concerned are granted appropriate protection.

¹⁸ Unless otherwise stated in the law, the application of exceptions in on site standby duty, on-call during breaks, break waived, longer night shift during the week and reference period extended to 52 weeks, is only possible by collective agreement (Ministry of Social Affairs and Employment, 2010).

6. Specific industries

According to the excluded sectors Directive 2000/34/EC from 1st August 2004, the Working Time Directive applies to all sectors of activity, unless other Community instruments contain more specific requirements on the organisation of working time for certain occupations or occupational activities. The previously excluded workers who are now covered by the Directive include doctors in training, offshore workers, workers on seagoing fishing vessels, non-mobile workers in civil aviation, workers in inland waterway or lake transport, most rail workers, and some workers in local road transport. Special provisions of the Working Time Directive apply to some of these groups.

As it has been already mentioned, the WTD also foresees derogations and exceptions to the applicability of the general rules on the organisation of working time. The derogations may be adopted by means of collective agreements or agreements between the two sides of industry in the case of certain activities, such as security and surveillance activities intended to protect property and persons; activities involving the need for continuity of service (hospital care, agriculture and media); where there is a foreseeable surge of activity, (agriculture, tourism, postal services, and railway transport).

In the Netherlands, there are several specific sector regulations based on the Working Time Decree. In principle, unless otherwise stated, application of the specific regulations is only possible by collective arrangement. The sectors where special regulations on working time are found are the following (Ministry of Social Affairs and Employment, 2010): audio-visual productions, dredging activities, Cinemas; Performing arts, boarding schools for children of barges and occupational travellers; winter maintenance work; exhibition construction and ship repair; mining industry; bakeries and patisseries; defence; young employees, hospitality industry, volunteer police and non-nautical inland navigation personnel.

Other sectors with special regulations regarding working time are:

- *Fire brigade*: the derogation applies to the municipal fire brigade and company fire brigades, and both volunteer and professional fire brigades. In this case, the specific regulations concern exclusively the regulations for on-call duty and on-site standby duty. Normal activities, such as extinguishing fires, are subject to the regulations of the Working Time Act. For the volunteer fire brigade the maximum working time for on-call duty is 14 hours in every period of 24 consecutive hours and 48 hours of work (main occupation plus fire brigade work) on average per week, measured over 16 weeks (also in the case of on-call duty partly at night). The normal restrictions on on-call duty apply for the volunteer fire brigade, except if the individual is head or deputy head of the fire brigade. Amongst other more specific arrangements, on-site standby duty a worker must not have more than 1 on-site standby shift per 7 consecutive days. For the professional firemen a system of maximum 62 presence shifts in any

period of 26 consecutive weeks applies. In this case the regular rules over resting periods for on-call work are applicable, unless the number of workers needed to ensure the unimpeded progress of the service is below the required minimum. In that case, the minimum rest period of 11 hours between shifts is not compulsory. There has been some case law ruling that the current practice at the town halls of using rosters of 54 hours per week for the fire brigadiers is against the regime established by the Working Hours Decree –in line with the WTD- of a maximum 48 hours per week working time. In this case, the court has allowed the employer to offer the firemen to sign an individual "opt out" agreement, on the basis of which the maximum working time can be up to 60 hours per week on average -of course, including payment of overtime compensation-. This agreement was seen as a transitional solution until a uniform national agreement for the working time of the fire brigade is reached.¹⁹

- *Health sector:* A number of specific regulations apply for work in the health care sector, for nurses and workers in care (i.e. physical therapists, laboratory assistants, and workers in home care and maternity care), doctors, midwives and for ambulance employees. These regulations replace the corresponding regulations in the *Working Time Act*. In this sector the use of standby duty and on-site standby duty occurs regularly. If an employee first works a normal, scheduled shift and a period of exclusively standby time follows that, both periods together constitute a standby shift. The regular regulations for on-site standby duty apply for on-site standby duty for nursing and care.

'Doctors in training' is a special group within the health care sector that deserved attention. Doctors in training were expressly excluded from the scope of Working Time Directive 93/104/EC (Article 1.3). However, this was changed by the amending Directive 2000/34/EC. Therefore, doctors in training are now covered by the Working Time Directive in the same way as other workers, except in the Netherlands (and Hungary and the UK) which have chosen to use extended transitional arrangements, in accordance with Article 17.5 WTD. Accordingly, in the Netherlands, working time of doctors in training may amount up to 52 hours per week, averaged over not more than 6 months, until 1 August 2011. This extension was subject to the national social partners concerned reaching agreement on a joint plan for achieving a 48-hour average weekly working time in hospitals by 1 August 2011.

There are also specific rules on working time for midwives, (including midwives working in extramural healthcare and midwives in training).

¹⁹ Rechtbank Haarlem, 13-04-2007, 133140/KG ZA 07-115.

7. Case law

In 2012 the Working Time Act has been reformed to include a new definition of the concepts of 'working time' and 'rest period' sufficiently clear. This legal amendment is the result of a number of cases where there was a discussion on the lack of proper definition of working time in Dutch law and when an interpretation in conformity of the national law and the Working Time Directive was denied because it could jeopardize the principle of legal security.²⁰ For example, it was unclear whether travel time during working hours was counting as working time. Also, in some professions, such as the firemen or in the care sector, the employees often spend the night at work, under on-call duty. According to EU law this falls under working time, even if the workers sleep during this duty. By amending the Working Hours Act the definition of 'working time' has been clarified. The law states now that working time is that the employee performs work 'under the authority of the employer'. However, the different terminology used by the Dutch law might still lead to some confusion. Whether travel time is considered working time depends on whether the employee travel 'under the authority of the employer'. In other words, whether the employee is during that trip 'at the disposal of the employer'. Other important elements to determine if travel time is working time are also whether the agreement reached between employer and employee includes this issue, or whether under the collective agreement applicable those hours or wages should be paid.²¹ This issue is often dealt with in collective agreements or company arrangements.

In general the subject of working time has not led to litigation very often. Relevant cases that are available tend to relate to conflicts between CLA actors, as the individual worker does not go to court for problems over working time in fear of conflict with the employer and to make things worse. Only in case of dismissal one might consider to do so.

The most relevant national case law dealing with the implementation in the Netherlands of the WTD relates to the definition of on-call time. The Working Hours Act 1996 formerly defined inactive on-call time at the workplace as rest time. However, the Court of Justice's decisions about on-call working time were applied by national courts in a number of cases brought by fire-fighters and ambulance workers about the treatment of on-call time as working time. Consequently, the Working Time Decree 605/2005 amended national law to define inactive on-call time at the workplace as working time, with effect from 1 June 2006. According to national law, collective agreements which pre-date the Decree are now void, to the extent that they define inactive on-call time other than as working time. This case law has considerable implications for sectors using

²⁰ JB 2009/99 RvS, 04-03-2009; Rechtbank Utrecht, uitspraak 19-01-2010, SBR 08/966 and Rechtbank Breda, uitspraak 28-04-2008, AWB- 07_3585, inter alia.

²¹ Advice by the Raad van State, N0.W12.11.0120/III, The Hague, 9.06.2011.

extensive on-call time as health, residential care, nursing homes, support services for people with disabilities, midwifery, ambulance and fire services, and defence forces. As a temporary measure, the Netherlands has introduced a temporary and limited opt-out, under which workers in services using extensive on-call time may agree to work up to 60 hours per week including on-call time, averaged over 6 months (see section 4).

What is more, in the case of on-call time, the Working Time Decree 2005 provided for a minimum 11 hour daily rest before and after each period of on-call duty at the workplace. However, a shorter rest could be applied for 'objective reasons', or a collective agreement could provide for the worker to take extra remuneration instead of the 11-hour immediate rest. The Court of Appeal Arnhem held in January 2007²² that these rules failed to respect the minimum daily rest required under the WTD following the Jaeger case. Consequently, the Working Time Decree was amended and now it sets up an obligatory rest period of at least 11 consecutive hours immediately after an on-call duty at the workplace. In exceptional cases where this is objectively impossible, this may once a week be reduced to 10 hours and once a week to 8 hours, on condition that the next rest is extended by a corresponding number of hours. Such a reduction must be agreed under a collective agreement, or between the employer and the works council. In any event, each week must contain a minimum of 90 hours' rest consisting of 6 daily rest periods of at least 11 hours, and one weekly rest period of at least 24 hours.

Also following the Jaeger arrest, both the court in Rotterdam in 2006²³ and The Hague²⁴ on February 27, 2007 put a fire-fighter in the right who wanted full pay for 48 hours instead of 54 hours. Both courts found that the workweek of fire-fighters may take up to 48 hours and no more. The Fire Department, as a good employer should be offering the fire-fighter a schedule of 48 hours for a full salary.

Finally, there is also relevant domestic case law about how the employers should comply with the obligation to register working hours applicable in some sectors and on enforceable entitlements on leave during illness (art 7 WTD). The ruling on Schultz-Hoff/Deutsche Rentenversicherung Bund, and Stringer and others versus Her Majesty's Revenue and Customs²⁵, has resulted in administrative-law and civil-law jurisdiction at national level. Regarding civil law, article 7:635 subsection 4 of the Dutch Civil Code provides that sick employees can only accrue holiday rights over the last six months of their sick leave and that partially disabled employees can only accrue holiday entitlement over hours worked. This is contrary to article 7 of the directive. Since citizens cannot make a direct appeal to this directive,²⁶ the legislator must amend the aforementioned act. On 24 May 2011, the Upper House agreed to a legislative bill to abolish²⁷ the distinction in the way sick and

²² LJN: AZ6434, Arnhem Court of Appeal, 2006/1110.

²³ Sector kanton Rechtbank Rotterdam , 743949 LJN: AZ2887.

²⁴ Court case Hague Administrative Sector, 27 February 2007, LJN: AZ9327.

²⁵ Court of Justice 20 January 2011, Dutch Law Reports 2009.252

²⁶ Court of Amsterdam 10 November 2009, National Case-Law Number BK4648

²⁷ Proceedings of the *Upper House* 2010-2011, no. 28, item 7

healthy employees accrue paid leave²⁸. The new act has taken effect on 1 January 2012. Regarding administrative law, on 18 July 2011 the Central Appeals Tribunal ruled²⁹ in proceedings involving civil servants³⁰ that legal status regulations³¹ restricting the accrual of paid leave entitlement during sick leave, without a guaranteed minimum of four weeks, are contrary to EU law.

A last case worth mentioning is one in response to questions of German and British judges about the interpretation of the Working Time Directive of the European Court of Justice on January 20, 2009 ruling on the interpretation of Article 7 of the Directive. It ensures an employee's annual leave with pay for four weeks, not by an allowance can be replaced, except in case of termination of employment. The ruling of the Court of Justice EC is that it is contrary to Article 7 of the Directive as a sick employee is not able to make use of his right to annual leave with pay and therefore not receive financial compensation. In a dispute between an employer and employee on the amount of accrued leave during disability in Utrecht³², the magistrate acknowledged that the judgments of the European Court of Justice has no direct effect in the relationship between an employer and an employee. However, the magistrate did see room for a directive conforming interpretation. The Cantonal Court does not explain a directive to a compliant implementation of Article 7:635 paragraph 4, Civil Code (in short: "accrual of holidays during the last six months of disability") as against the law (*contra legem*), since Article 7:638 paragraph 1 Civil Code stipulates that the employer is required to allow the employee each year the holiday to be taken under Article 7:634 Civil Code which he is entitled to as a minimum (i.e. the four weeks holiday required under the Working Time Directive are guaranteed). In a ruling of November 10, 2009, the Amsterdam Court held that conformity with interpretation leads to an application of the law "*contra legem*" and therefore is not possible.³³

²⁸ It can be agreed in writing to depart from this provision for the accrual of paid leave above the minimum set out in article 7 of the directive.

²⁹ Highest Civil Service Tribunal

³⁰ Central Appeals Tribunal 18/07/11, National Case-Law Number BR0268

³¹ in this case, the General Legal Status (Police) Decree

³² District court Utrecht October 14, 2009, www.rechtspraak.nl, LjN: BK0017.

³³ *District Court Amsterdam 10 November 2009*, www.rechtspraak.nl, *ljn*: BK464

8. General political awareness and appreciation of the directive

Recently, the European Commission has presented an evaluation report on the implementation by the Member States of Directive 2003/88/EC. On the occasion of the elaboration of that report the social partners were consulted on their opinion on the implementation at national level of the EU rules on working time. In the Netherlands trade unions were dissatisfied with the consultation process during the national transposition of the Directive. They deem that the Directive has been transposed into national law in a way which reduced the level of protection previously available. Trade unions consider the recent changes to working time legislation make it less favourable than the previous law as regards overtime, night work, and co-determination.

Employers on the contrary praise legislative changes introduced in the Working Time Act in 2007³⁴ for simplifying working time obligations, but considered the protection for night workers still as set too high.

The evaluation of the implementation of the Directive by the Dutch government was in general positive. However the government indicated that the Directive has had a negative impact on the use of on-call working time in some sectors. The problems arose from major difficulties with transposition of the European Court of Justice's interpretation in the SIMAP and Jaeger cases regarding on-call time and immediate compensatory rest, particularly in specified sectors (health, care, defense forces, and services for persons with disabilities, emergency services, and fire-fighters). Transport was also mentioned as a sector where working time rules were considered to present particular difficulties of application in the Netherlands, especially on the inland waterway transport sector in the Netherlands, (though this might be solved in the short-term as the social partners are currently discussing a possible agreement for this sector.) The government also stated that revision of the Directive regarding the treatment of on-call time, the timing of compensatory rest and the extension of reference periods to 12 months by legislation remain a major and urgent priority. Moreover, the government pointed out the convenience of streamlining the content of the WTD with more specific directives in the transport sector. (European Commission, 2010b)

By some scholars the implementation in the Netherlands of the WTD has been considered as 'non/inflexible' in comparison with other EU Member States, especially because in the Netherlands collective agreements play an important role in implementing the Working Time Directive. (Boonstra and Schaapman, 2004)

³⁴ Stb 2006, 632.

9. Conclusions

Despite some problems, the implementation of the WTD in the Netherlands has not had a major impact nor has it been controversial. However, some discrepancies between the EU law and domestic definitions of the crucial concept of working time do persist which can lead to further litigation in this area in the case of on-call work. In general terms, the implementation of the WTD has left the main problem relating to working time in the Netherlands, its 'successful' part-time model untouched. Till the nineties the Netherlands considered this to be the 'ideal' model both for a combination of work and care and for employment growth ('The Dutch Miracle', see Visser and Hemerijck). However part-time work in the Netherland is gendered; the unequal division in household and caring tasks remains and the constraint of motherhood is not lessened. The long-term effects of part-time work are far from ideal (O'Reilly and Fagan, 1998; Wattis, Yerkes, Lloyd, Hernandez, Dawson, and Standing, 2006; Yerkes, 2009) resulting in diminished career prospects, lower income and in many cases, reduced rights to social security benefits such as pensions (Lewis, 2002). From an employer's point of view, part-time availability means less labour available in a labour market situation of labour shortages to come.

The combination of paid work and other responsibilities increasingly provides time bottlenecks. More and more Dutch workers experience significant time constraints and lack of time. This is related to the fact that more people have multiple responsibilities and thus divide their time on paid work, housework, care, volunteering and other activities. In addition, there is a continual acceleration rate in both economy and society due to developments in ICT and international markets. Companies need flexible deployment of personnel to survive in an international market and to respond to new customer needs. The combination of these factors leads to a need for flexibility, but a significant change in a way that addresses this new reality is missing. Within the organizations the growth of part-time work made it possible that a distinction could be made between operating time and working time, so relatively few innovative arrangements such as a flexible start and end times or opportunities to plan the work over the week are introduced in the Netherlands (SER, 2011). As a result a majority of workers between 20 and 65 years of age do feel having time constraints/ pressure a couple of times a week or month (Cloin, M. 2010). Up till now this problem of dealing with time constraints is being solved through more part-time work. However this leads to a part-time work paradox: part-time constraints as a coping strategy keeps the traditional time format - one of the main causes of time constraints - intact. As such part-time work is a lazy catch-all to avoid modernizing work organization. The cost for society is considerable: time pressure, anxiety among civilians, under-utilization of human resources, traffic jams and under-utilization of buildings and equipment outside the rush hours (SEOR 2010). Unfortunately the WTD until now does not provide solutions to this problem.

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