

OPEN ACCESS

ISSN 2280-4056

*E-Journal of  
International and Comparative*

# LABOUR STUDIES

Volume 6, No. 2 May-June 2017



**ADAPT**  
www.adapt.it  
**UNIVERSITY PRESS**

**ADAPT** *International School of Higher Education in Labour and Industrial Relations*

*Scientific Directors*

Lauren Appelbaum (USA), Greg Bamber (Australia), Stuart M. Basefsky, (United States), Daria V. Chernyaeva (Russia), Richard Croucher (United Kingdom), Maurizio del Conte (Italy), Tomas Davulis (Lithuania), Tayo Fashoyin (Nigeria), József Hajdu (Hungary), Ann Hodges (USA), Richard Hyman (United Kingdom), Maarten Keune (The Netherlands), Chris Leggett (Australia), Guglielmo Meardi, (United Kingdom), Shinya Ouchi (Japan), Massimo Pilati (Italy), Valeria Pulignano (Belgium), Michael Quinlan (Australia), Juan Raso Delgue (Uruguay), Raúl G. Saco Barrios (Peru), Alfredo Sánchez Castaneda (Mexico), Malcolm Sargeant (United Kingdom), Jean-Michel Servais (Belgium), Silvia Spattini (Italy), Michele Tiraboschi (Italy), Anil Verma (Canada), Stephen A. Woodbury (USA)

*Joint Managing Editors*

Malcolm Sargeant (Middlesex University, United Kingdom)  
Michele Tiraboschi (University of Modena and Reggio Emilia, Italy)

*Editorial Board*

Lilli Casano (Italy), Emanuele Ferragina (United Kingdom), Antonio Firinu (Italy), Valentina Franca (Slovenia), Erica Howard (United Kingdom), Karl Koch (United Kingdom), Attila Kun (Hungary), Felicity Lamm (New Zealand), Cristina Lincaru (Romania), Nikita Lyutov (Russia), Merle Muda (Estonia), Boaz Munga (Kenya), Peter Norlander (USA), John Opute (UK), Eleonora Peliza (Argentina), Daiva Petrylaite (Lithuania), Aidan Regan (Ireland), Marian Rizov (United Kingdom), Salma Slama (Tunisia), Francesca Sperotti (Italy), Barbara Winkler (Austria), Machilu Zimba (South Africa)

*Language Editor*

Pietro Manzella (ADAPT Senior Research Fellow)

*Book Review Editor*

Peter Norlander (UCLA, Anderson School of Management)

*E-Journal of  
International and Comparative*

# LABOUR STUDIES

Volume 6, No. 2 May - June 2017

**@ 2017 ADAPT University Press**

---

Online Publication of the ADAPT Series  
Registration No. 1609, 11 November 2001, Court of Modena  
*www.adaptbulletin.eu*

The articles and the documents published in the *E-Journal of International and Comparative LABOUR STUDIES* are not copyrighted. The only requirement to make use of them is to cite their source, which should contain the following wording: **@2017 ADAPT University Press**.

# The Source of Labour Law on Working Time: A Comparative Perspective

Diogo Silva <sup>1</sup>

---

**Abstract Purpose.** The study presented here is a comparative analysis examining the links between different sources of labour law, placing a special emphasis on the regulation of working time.

**Design/methodology/approach.** The analysis considers some key indicators such as working time duration, rest periods, overtime. Working time regulations in some European countries have been analysed, and subsequently compared with those in place in the United States and Japan.

**Findings.** Although different regulations are in place, some common aspects have been identified, as well as some disparities concerning the relevance of legal sources regulating working time.

**Research limitations/implications.** The research is part of a debate adding a comparative perspective.

**Originality/value.** The paper provides further material for an ongoing discussion about how working time is conceived in different countries.

**Paper type.** Issues paper

**Keywords:** *Labour law, working time, overtime, rest periods.*

---

<sup>1</sup> ADAPT Junior Research Fellow and student at Law School of University of Lisbon (Portugal)  
Email address: [diogomigueldsilva@gmail.com](mailto:diogomigueldsilva@gmail.com).

## 1. Framing the Issue

Working time is a quintessential matter of labour law, being related to the working activity of the worker who is the holder of the employment contract<sup>2</sup>.

The relevance of this topic can be understood if one thinks that the first ILO Convention<sup>3</sup> has concerned working time and placed some restraints on daily and weekly hours of work in industry.

Working time regulation is also important in the European legal context: the European Directive 2003/88/EC (also known as the European Working Time Directive)<sup>4</sup>, provides some standard rules, limits the total amount of work to be performed, and attempts to harmonise the EU systems on working time<sup>5</sup>.

This leads us to yet another indication on the importance of the theme: the limitation of working hours is intrinsically connected to health and safety<sup>6</sup>. The ultimate goal of the legal instruments referred to above has been the protection of these two aspects. Even though the impact of

---

<sup>2</sup> M. B. HERNÁNDEZ, 2015, “Problemas legislativos en materia de ordenación del tiempo de trabajo: una comparativa con el modelo italiano”, in: *El derecho del trabajo y la seguridad social en la encrucijada: retos para la disciplina laboral*, A. M. C. GIRÁLDEZ [et al.] (Spain: Ediciones Laborum), p. 232.

<sup>3</sup> ILO Convention n° 1 of 1919, Hours of Work (Industry). The importance of this Convention is stressed in T. USHAKOVA, 2016, “Algunos aspectos de la ordenación del tiempo de trabajo en el derecho de la Unión Europea”, *Révue européenne du droit social*, n° 4, p. 112.

<sup>4</sup> Directive 2003/88/EC of the European Parliament and of the Council of November 4<sup>th</sup> 2003, regarding certain aspects of the organisation of working time. See also the EU Interpretative Communication on Directive 2003/88/CE, of April 26<sup>th</sup>, 2017 (integrative part of the European Pillar of Social Rights), that aims to provide greater clarity on the Directive provisions in accordance with the successive decisions of the Court of Justice of the European Union, despite not having a binding effect, as the competence to interpret EU Law lies with the Court (article 19 of the Treaty on European Union).

<sup>5</sup> The harmonisation of working time in European countries has always been controversial and somehow impossible. There have been some unsuccessful attempts to reform the Directive, but the opt-out clause is still a lively debated issue. See F. L. FERNANDES, 2012, “Um breve olhar sobre a Directiva n° 2003/88/CE, relativa à organização do tempo de trabalho”, *Prontuário de Direito do Trabalho*, n° 93, pp. 116-117.

<sup>6</sup> See T. USHAKOVA, 2016, “Algunos aspectos de la ordenación del tiempo de trabajo en el derecho de la Unión Europea”, *Révue européenne du droit social*, n° 4, p. 97. This is clear considering workers’ rights as regards working time laid down in the new French *Code du Travail*: the right to disconnect (*droit à la déconnexion*), as formulated by articles L. 2242-8 and L. 3121-64, I, which came into force on 1 January 2017 and is mandatory for enterprises with more than fifty workers. See J. RAY, “Grande accélération et droit à la déconnexion”, *Droit Social*, n° 11, pp. 919-920.



working time on health and safety will not be covered in this article, one might note that it plays an important role.

Another point that has to be stressed concerns employers' interests within the employment contract. In reality, the regulatory framework allows for derogations to adapt to employers' reasonable needs<sup>7</sup>.

Based on the previous considerations, this article intends to reflect on the state of the art of working time regulation<sup>8</sup> and the interaction between the different sources of labour law<sup>9</sup>. However, and considering the broad nature of the topic, our comparison will be limited to specific key indicators<sup>10</sup>. In this sense, the analysis concerns sources of labour law (state legislation, collective agreements at sectorial level, negotiations at company level, and individual negotiations) regarding: 1) working time duration, especially working hours limits; 2) working time organization<sup>11</sup>; 3) rest periods, with a special focus on breaks, daily and weekly rests; 4) overtime regulation<sup>12</sup>.

This selection of key indicators has been made to provide an overall picture of working time regulations in the legal systems under study. In this sense, each section will comprise an analysis of working time provisions, looking at the sources regulating their terms<sup>13</sup>.

Geographically, the investigation will take into consideration some European countries to assess whether points of contact exist within EU legal systems. The countries under investigation are: 1) France; 2) Germany; 3) Italy; 4) Portugal; 5) The United Kingdom. These countries have been selected according to the framework outlined in a study conducted by Eurofound, according to which four different

---

<sup>7</sup> J. C. MESSENGER, 2011, "Working time trends and developments in Europe", *Cambridge Journal of Economics* 35, n° 2, p. 313.

<sup>8</sup> For a broader study on employment regulation theory, see C. INVERSI et al., 2017, "An analytical framework for employment regulation: investigating the regulatory space", *Employee Relations*, n° 3, pp. 291-307, where reference is also made to working time regulation.

<sup>9</sup> D. SCHIECK, 2017, "Comparing Labour Laws in the EU Internal Market: a Social Actor Perspective", *International Journal of Comparative Labour Law and Industrial Relations* 33, n° 1, pp. 193-194, points out that the convergence of national rules due to EU and ILO legal instruments leads to a challenge within the comparative labour law discipline. However, the same author stresses that the relevance of comparative studies is maintained through interactions between labour law sources (legislation, collective bargaining, etc.).

<sup>10</sup> This study will only cover full-time employment provisions.

<sup>11</sup> Working hours arrangements during the day and the week.

<sup>12</sup> In relation to this particular key indicator, we will focus on both the provisions regarding limitations to overtime and the determination of overtime itself.

<sup>13</sup> Night working, shift working or flexitime regimes are thus excluded.

configurations exist regulating working time within the European limits: a) a purely mandated system (nearly any statutory level, highly decentralized collective bargaining, most individual levels); b) an adjusted mandated system (state plays a dominant role but collective bargaining can provide favourable measures on a sectoral, company or individual level); c) a negotiated system (collective bargaining agreements at sectoral level, complemented by company-level bargaining) and; d) a unilateral system. In order to draw an overall picture of the working time regulatory framework in Europe, this research will take account of two countries for each configuration, excluding the ‘purely mandated’ system<sup>14</sup>.

In addition to those of the European countries mentioned above, the provisions of the United States and Japan will also be scrutinized. This will give us the opportunity to provide an evaluation of working time regulations without the influence of EU regulations, to understand how common law deals with working time (The US case) and to become familiar with the workings of a hybrid system (Japan’s case)<sup>15</sup>.

## 2. Comparative Report

### 2.1. Working Time Duration

State legislation plays a dominant role in setting rules for working time duration. Even though there are similarities across Europe at this level, Portuguese and French legislation seems to exclude from their legal provisions overtime when calculating working time. Thus, in Portugal, the limit of working time can be found in article 203, n. 1 of the Portuguese Labour Code<sup>16</sup> (8 daily hours and 40 weekly hours) while in France it is article L. 3121-27 of the *Code du Travail* that governs the traditional 35-hour<sup>17</sup> working week (which was not affected by the 2016 reform of the *Code du Travail*)<sup>18</sup>.

---

<sup>14</sup> See EUROFOUND, 2016, *Working time developments in the 21st century: Work duration and its regulation in the EU*, Luxembourg: Publications Office of the European Union, pp. 13-14, that refers to these systems. We excluded the purely mandated system as this system relies on law, not allowing for an understanding of the interplay between different sources of labour law.

<sup>15</sup> D. M. VICENTE, 2008, *Direito Comparado: Volume I*. 2th edition. Coimbra: Almedina, p. 543.

<sup>16</sup> That transposed the Working Time Directive 2003/88/EC. See article 2, point n) of Law n° 7/2009, of February 12<sup>th</sup>, that approved the Labour Code reform.

<sup>17</sup> The assessment of this rule can be done over a period of reference of a week, as set by article L. 3121-41. On the rule of the 35-hour week in France, see M. ESTEVÃO and F.



Although different from the European parameters, the Japanese system seems to follow the European pattern in that working time standards are established by law. It should be mentioned that the Japanese Constitution establishes that the worker is entitled to a minimum wage, a working schedule and rest periods, all aspects that have to be regulated by law (article 27, n 2 of the Japanese Constitution). Therefore, the Japanese Constitution leaves the task of regulating the terms of working time to the law, more precisely to Labour Standards Law (Law n° 49, of April 7<sup>th</sup> 1947, as modified by Law n° 107, of June 9<sup>th</sup> 1995). Accordingly, article 32 of Labour Standards Law establishes a 40 hour weekly and a 8 hour daily limit<sup>19</sup>.

However, collective bargaining can still play a role in regulating working time, as it mostly focuses on increasing the reference period and/or increasing or reducing the limits set by law on working time duration.

In the Portuguese case, collective bargaining can only reduce the limits of working time set by the Labour Code, as long as it does not result in a wage reduction (see article 203, n° 4 of the Labour Code)<sup>20</sup>, mainly because the rule establishing the hierarchy between the sources of labour law states that statutory regulation can only be derogated *in mejus* by

---

SÁ, 2008, “The 35-hour workweek in France: straightjacket or welfare improvement?”, *Economic Policy* 23, n° 55, pp. 417-463.

<sup>18</sup> This makes the French legal system an interesting one to analyse, especially when determining whether the new rules are in line with the French trends on working time or constitute a major change from the traditional way of regulating working time. Overall, the *Code* comprises three different set of provisions: 1) the public order provisions; 2) norms related to collective bargaining; 3) default rules, which apply only in case when no enterprise or branch-level agreements are in place. This means that the *Code* itself limits the leeway of collective or individual agreements in this area. Only within the limits allowed by the law can collective bargaining provide regulations for key indicators, such as limits to working time. See F. FAVENNEC-HERY, 2016, “La négociation collective dans le droit de la durée du travail”, *Droit Social*, n° 11, p. 893.

<sup>19</sup> K. OGURA, 2006, “Contemporary Working time in Japan: Legal System and Reality”, *Japan Labor Review*, n° 3, p. 9.

<sup>20</sup> M. LOPES CARDOSO, 2009, “A duração e organização do tempo de trabalho – evolução de 2003 para 2009”, *Revista de Ciências Empresariais e Jurídicas*, n° 15, pp. 294-295. For a report on Portuguese collective bargaining on working time in a broader sense (*i.e.*, with other key indicators), see CENTRO DE RELAÇÕES LABORAIS, 2017, *Relatório Anual sobre a evolução da negociação coletiva em 2016*, available at: <https://www.crlaborais.pt/documents/10182/13326/CRL+-+Relat%C3%B3rio+sobre+a+evolu%C3%A7%C3%A3o+da+Negocia%C3%A7%C3%A3o+Coletiva+2016/c3ff4cd2-1973-4732-9054-a56550cc6c38>.

collective agreements when it comes to the maximum duration of daily and weekly work (article 3, n° 3, point g) of the Labour Code)<sup>21</sup>.

Conversely, the German legal system allows for collective bargaining (either at sectorial or company level) to extend the limits envisaged in Section 3 of the Working Hours Act (*Bundesgesetzblatt*)<sup>22</sup>: up to 10 hours daily and up to 60 hours weekly, bearing in mind that the average of 8 hours per day is preserved over a period of six months or 24 weeks. To increase this period, the employer needs the consent of the works council. The possibility to increase working hours also exists in the Japanese system, as collective agreements can rise to 10 hours the maximum duration of daily working time in certain cases (see article 32 of Labour Standards Law).

In the UK and in the Italian system collective bargaining can increase working time limits. In the first system, Regulation 23 of the Working Time Regulation Act<sup>23</sup> provides the opportunity for a collective or a workforce agreement to extend the reference period up to 52 weeks, even though a major trend exists to reduce working hours<sup>24</sup>. As for the Italian system, it gives the possibility to increase the statutory reference period from 4 months to 6 or 12 months (see article 4 of the *Decreto Legislativo* 66/2003)<sup>25</sup>.

---

<sup>21</sup> This rule nullifies individual agreements and the amendments made to legal standards for working time duration (whether increasing or decreasing them), as article 3, n° 5 of the Labour Code establishes that where the law allows for changes to standards through collective bargaining, the individual agreement does not apply.

<sup>22</sup> On working time, the main legal tool is the Working Hours Act (*Bundesgesetzblatt*), enacted on 10 June 1994. As will be demonstrated throughout this article, the German system provides collective bargaining with much latitude, making it the main regulatory source for working time, except for rest breaks. See G. SYBEN, 2016, "Regulation and reality of working time in Germany: the example of branches represented by IG Bauen-Agrar-Umwelt", *European Institute for Construction Labour Research News* n.° 3, pp. 6-11, available at: <http://www.clr-news.org/CLR-News/CLR%20News%202016.pdf>.

<sup>23</sup> This is the main legal instrument on working time in the UK. See C. FAGAN, 2009, "Working time in the UK: Developments and Debates", in: *Working Time: in search of new research territories beyond flexibility debates, proceedings of an international conferences*, Japanese Institute for Labour Policy and Training [ed.], p. 43.

<sup>24</sup> See C. FAGAN, 2009, "Working time in the UK: Developments and Debates", in: *Working Time: in search of new research territories beyond flexibility debates, proceedings of an international conferences*, Japanese Institute for Labour Policy and Training, p. 45.

<sup>25</sup> That transposed the Working Time Directive 2003/88/EC and implemented the provision of article 36, n° 2 of the Italian Constitution and no. 2107 of the Civil Code, establishing that the limitations of the working week shall be provided by law. See A. TURSI and P. A. VARESI, 2016, *Istituzioni di diritto del lavoro*. 7th edition. Wolters Kluwer, Milan, p. 381.

For an overview of the Italian working time regulatory framework, decentralized collective bargaining shall be taken into account, which is governed by article 8 of Decree Law n° 138/2011, later on converted into Law n° 148/2011 (*contrattazione collettiva di prossimità*). This form of decentralized collective bargaining allows for derogations to the rules on working time set by law and sectoral collective agreements, as long as they comply with the Constitution, and the EU and international rules applicable in Italy, such as those on working time duration<sup>26</sup>.

However, the UK has a peculiarity concerning the relevance attributed to individual agreements on working time duration, both as regards the reference period rule and the limitation of daily and weekly hours of work. As such, the maximum limits can be amended by individual agreements or workforce agreements, just as long as the 48-hour average is maintained over a 17-week reference period<sup>27</sup>. The latter can be derogated by individual agreements between employers and workers, because in the Working Time Regulation Act an opt out clause is provided (article 22 of the Working Time Directive) allowing workers to perform work beyond the 48-hour average limit imposed by Directive 2003/88/CE<sup>28</sup>. In order to legally apply the opt-out clause, there must be a written agreement between employers and workers, from which the latter can withdraw at any time by sending the employer a written notice at least seven days prior to its entry into force (though the time by which the notice period shall be forwarded to the employer can be increased in a number of cases).

Against this backdrop, the US legal system represents an exception. Reflecting the “at will” nature of the employment relationship and its regulation<sup>29</sup>, regulations on working time are few and far between. A standard 40-hour week is provided only for commerce jobs and is determined by law (Section §207 of the Fair Labor Standards Act of

---

<sup>26</sup> Limitations refer to both the possibility to increase and decrease working time. The decision of the Italian Supreme Court of 14/06/2014, n° 16089 ruled that this instrument cannot be used for converting a full-time employment relationship to a part-time one, as employees’ consent is needed for this. See also A. FENOGLIO, 2012, *L’orario di lavoro tra legge e autonomia private*. Naples: Edizioni Scientifiche Italiane, p. 72.

<sup>27</sup> In some activities (offshore work) this period of reference can be extended to 26 weeks.

<sup>28</sup> EUROFOUND, 2015, *Opting out of the European Working Time Directive*. Luxembourg: Publications Office of the European Union, 2015.

<sup>29</sup> A. S. BLOOM and C. M. DELLATORE, 2017, “United States”, in: *Employment Law Review*, E. C. Collins [ed.], 8th Edition, p. 715.

1938)<sup>30</sup>. The parties can individually amend the rule, as long as one-half times the rate of the agreed hourly pay compensation is paid.

The conclusion that can be drawn from the analysis of this key indicator is that working time duration is mainly governed by law, though collective bargaining also has a say. There are, however, exceptions, like the UK, that prioritises the role of individual agreements in the determination of working time parameters, and the USA, that has no regulations in general terms.

Another point that should be emphasized is the similarity between the European systems and the Japanese system on working time duration. This can be attributed to the fact that Japan ratified the two ILO Conventions on Working Time (Convention n° 1 and 30)<sup>31</sup>, adapting article 32 of Labour Standards Law to article 4 of the ILO Convention no. 30 and, both establishing that daily working time can be extended up to 10 hours by collective agreements. Conversely, the US government did not ratify neither of the ILO Conventions, an aspect that evidently influenced the sources of labour law on working time<sup>32</sup>.

## 2.2. Working Time Organization

As for working time organization, both Japan and USA have no provisions on or limitations to the duration and organization of working time. In the US case, this is inherent to the “at will” nature of employment relationship, while in Japan’s case it is an essential feature of the employer’s power.

In Europe, the scenario changes, as different sources of labour law deal with working time organization, though collective bargaining holds a major role in relation to its regulation.

Two points should be stressed: the systems that are based on collective bargaining are not mandatory. In other words, absent the collective

---

<sup>30</sup> FLSA does not contain many regulations on working time for the majority of workers. Working time regulation is provided by state and local laws, but their analysis falls outside the scope of study. As the constitutional system dictates, federal law has priority as regards the law-making process. However, state and local laws have the autonomy to create rules and complement this regulation, see A. S. BLOOM and C. M. DELLATORE, 2017, “United States”, in: *Employment Law Review*, E. C. Collins [ed.], 8th Edition, p. 720-721.

<sup>31</sup> ILO Convention n° 30 of 1930, Hours of Work (Commerce and Offices).

<sup>32</sup> M. WEISS, 2011, “Re-inventing Labour Law”, in: *The idea of labour law*, G. Davidov and B. Langille [eds.], Oxford: Oxford University Press, pp. 52-53, states that some countries show resistance to ratify some ILO conventions.

agreements, the power to determine the organization of working time will be attributed to the employer. For instance, both the Italian and French systems rely on collective bargaining to set working time organization<sup>33</sup>. The difference between the two systems lies in the fact that the first one demands the agreement to be concluded at an enterprise level<sup>34</sup>. The German system delegates the organization of working time to collective bargaining at a sectorial level, which shall set standard weekly working hours. But the German legal system has a special characteristic, for it attributes power to works councils within the company to co-determine the organization of working time, as laid down by Section 7, paragraph 1, n 2 of Works Council Constitution Act (or *Betriebsverfassungsgesetz*). German law also contains a special provision concerning the organization of working time prohibiting Sunday working (Section 9 of the Working Hours Act) save for special circumstances and provided that workers are paid properly.

Portugal regulations go in the opposite direction. Working time organization is regulated by article 212 of the Labour Code, that states that the employer has to decide, taking into consideration the limits imposed by the law, the operating period of the enterprise, health and safety, work-life balance (in accordance with article 59, paragraph 1, point d) of the Portuguese Constitution)<sup>35</sup> and workers' participation in courses, technical or professional training. When drafting or amending the working schedule, the employer shall consult the workers' committee or, alternatively, trade unions, workers' commissions or trade union delegates (article 212, n° 3 and 217, n° 2 of the Labour Code).

### 2.3. Rest Periods

This section will consider the provisions regarding three main aspects: breaks, daily rest periods and weekly rest periods in light of the different sources of labour law. From a comparative perspective, it can be stated that in non-European countries, it is the law that determines the

---

<sup>33</sup> See articles L. 3121-41 to L. 3121-47 of the *Code du Travail*. See also P. LOKIEC, 2016, "La modulation du temps de travail", *Droit Social*, n° 11, p. 962.

<sup>34</sup> It is also necessary to take into account the role of *Contrattazione collettiva di prossimità*, already mentioned. See A. FENOGLIO, 2012, *L'orario di lavoro tra legge e autonomia private*. Napoli: Edizioni Scientifiche Italiane, p. 72.

<sup>35</sup> See G. CANOTILHO and VITAL MOREIRA, 2014, *Constituição da República Portuguesa - Anotada - Volume I - Artigos 1º a 107º*. Coimbra: Coimbra Editora, p. 774. The authors also highlight that the Portuguese Constitution does not provide the worker's right to decide on "daily working shifts, weekly rests, annual paid leave".

minimum rest periods, even though failing to regulate the three aspects mentioned above. In Japan, for instance, rest periods between two work periods are not mandatory.

As for rest breaks, a common framework is set by law in all the systems examined, with collective bargaining that has the power to increase or diminish rest periods within certain limits.

The German system is the most rigid one in that only the law regulates that. The worker is entitled to a 30-minute rest break if working time is between six and nine hours, or to a 45-minute rest break – or to a number of 15-minute breaks – if workers work more than nine hours (Section 4 of the Working Hours Act).

By contrast, the Italian system delegates to collective bargaining the regulation of breaks in case of workers working more than six hours, as long as a minimum break of ten minutes is provided (see article 8 *Decreto Legislativo* 66/2003).

In other systems, the law lays down the standard duration of the break period, allowing collective bargaining to increase, reduce or even suppress it. Such is the case of France, Portugal and the UK, though collective bargaining operates on different levels when it comes to breaks. France gives this role to collective agreements at the company or at the sectoral level (see article L. 3121-17 of the Code du Travail). The UK's Working Time Regulation Act states that the worker is entitled to a minimum twenty-minute break if the work period exceeds six hours. But in conformity with Regulation 12 of the Working Time Regulation Act, rest breaks can also be determined, reduced or removed by collective agreements or workforce agreements. Absent a collective agreement, it is up to the employer to regulate rest breaks<sup>36</sup>. In Portugal, there is no distinction on the level of collective bargaining that should deal with this aspect. Article 213 of the Portuguese Labour Code establishes that the rest breaks cannot be less than one hour and more than two hours, when it comes to workers who perform their activity lasting more than five consecutive hours, or six consecutive hours if the working period is

---

<sup>36</sup> In this respect, see the decision of the Employment Appeal Tribunal of 16 November 2016, appeal n° UKEAT/0130/16/DA, that defined the criteria for the conceptualization of a refusal to the twenty-minute break in two steps: 1) the worker has to demand the exercise of the right; 2) the employer has to *de facto* refuse this positive request. The Court also expressed that “*If, however, the employer has taken active steps to ensure working arrangements that enable the worker to take the requisite rest break, it will have met the obligation upon it: workers cannot be forced to take the rest breaks but they are to be positively enabled to do so*”.



longer than ten hours<sup>37</sup>. In this respect, collective bargaining can play a major role, as article 213, n° 2 of the Labour Code establishes the possibility to increase (through additional rest breaks)<sup>38</sup>, reduce or even remove rest periods. Differently from other countries, in these two latter cases the employer must send a request to the labour administrative authority that performs inspection activities (*Autoridade para as Condições do Trabalho*, or ACT), containing the worker's approval and following the communication from the worker's commission and trade unions, justifying such request (for job-related reasons or for reasons related to workers themselves)<sup>39</sup>.

In relation to the regulation of rest breaks outside Europe, article 34 of Labour Standards Law establishes that the worker is entitled to at least 45 minutes for working periods lasting six hours, or to a one-hour break for work performed longer than eight hours<sup>40</sup>.

In the USA, workers in the commerce sector are covered by specific provisions. Title 29, Part §785.18 of the Code of Federal Regulations establishes that the worker can rest from five to twenty minutes and this time is seen as being part of working time. Part §785.19 provides that a worker has to be relieved from his/her duties to eat meals and enjoy what is called a “*Bona fide meal period*” of thirty minutes or more.

Daily rests are regulated by different provisions outside Europe. In the USA, the daily break is only applicable if the worker performs 24 hour or more hours of work, being entitled to a “*sleep time exclusion*” of up to eight hours, which can be established by employers and workers. Japan does not have any rules concerning daily breaks.

In Europe, it is the law that sets a minimum standard for this break, and collective bargaining can also have a say.

---

<sup>37</sup> A. NUNES DE CARVALHO, 2012, “Tempo de trabalho”, *Revista de Direito e Estudos Sociais*, n° 1-2, p. 48, argues that this possibility only applies to working time accounts established by collective bargaining.

<sup>38</sup> As for the increase of rest breaks, company practices should also be considered. Recently, Évora's Court of Appeal of 20/04/2017, judge Baptista Coelho presiding, case n° 8617/15.2T8STB.E1, considered that an extra 15 minute break provided to employers for a number of years shall be regarded as working time, being company practices a source of labour law, in accordance with article 1 of the Labour Code. The decision is available at:

<http://www.dgsi.pt/jtre.nsf/134973db04f39bf2802579bf005f080b/9ff812f71e326be1802581100033175e?OpenDocument>.

<sup>39</sup> Which is considered accepted if the administrative authority does not make a decision within 30 days from the request (article 213, n° 4 of the Labour Code).

<sup>40</sup> The rule establishes that all workers rest at the same time, but collective agreements at company level can provided exceptions to it.

Such is the case of Germany and France. In the first, the worker is required to have a rest period of 11 hours between two periods of work (Section 5 of the Working Time Regulation Act), but this can be reduced by two hours by collective bargaining if the work activity requires it and compensation of time is provided (Section 7, n° 1). As for France, the break has the same duration as the one provided in Germany, though exceptions can be made through agreements concluded at enterprise and sectorial level (L. 3131-2), and through the Ministerial consent in exceptional peaks of production (article L. 3131-3 and the *Décret* n° 2016-1551).

Portuguese collective bargaining only allows for *in mejus* amendments (article 3<sup>rd</sup> of the Labour Code). In the UK, the law sets the minimum standard for this type of break (Regulation 10 of the Working Time Regulation Act), while in Germany priority is given to individual agreements if no collective agreements are in place (Section 7, n° 3 of the Working Hours Act).

Finally, in relation to weekly breaks, two major systems are in place which share the preponderance of law in determining the standard for this break. What differentiates the systems is the involvement of other sources of labour law. In one system, the law sets the main standard for the weekly rest, allowing for the unilateral determination of its average duration. This system comprises Japan and the UK. The discretionary power to determine weekly rests seems more pronounced in the Japanese legal framework, as the employer can determine the break as long as the worker is given four rest days during a four-week period, as stated by article 35 of Labour Standards Law. According to Regulation 11, the employer in the UK can only determine this weekly rest period over a period of 14-days, either by allowing two uninterrupted rest periods of 24 hours each 14-days period or one uninterrupted period of 48 hours in the same time frame.

The other system in place allows for derogations in collective bargaining. This is the case of France, Italy and Portugal, even though differences exist as regards the particulars of collective agreements. For example, in Italy the rule can only be derogated by collective agreements at national level or by means of agreements at territorial level or enterprise level concluded with the most representative trade unions in comparable terms, in accordance with article 17 of *Decreto Legislativo 66/2003*. France emphasises the role of collective bargaining at enterprise level, with derogations that can only take place if some functional or geographical

criteria exist (articles L. 3132-4 to L. 3132-31)<sup>41</sup>. Portugal is the only system allowing for collective bargaining to establish *in mejus* amendments and does not make any distinction between collective bargaining levels (article 232 of the Labour Code).

#### 2.4. Overtime

In Europe, some systems simply establish maximum numbers of working hours per day/week (scheduled work and overtime), while others lay down limitations to overtime.

The first group includes Germany and France. Germany gives relevance to collective bargaining, which must establish a limit of ten hours a day and sixty hours per week (as long as the average of the 48-hour week is maintained over a period of six months, see Section 7 of the Working Hours Act).

Under German law, there is no obligation to work overtime, although some exceptions exist, e.g. employers' urgent need. Collective bargaining can deviate from this rule at a sectorial level and through negotiations at the company level, and so can the employer in the employment contract (or individual agreements), thus giving the latter the power to request overtime.

It should also be stressed that the German legal system attributes power to the works councils within the company to co-determine overtime, in accordance with section 7, paragraph 1, n.º 3 of the Works Council Constitution Act<sup>42</sup>. Overall, this regulatory system gives some consultation rights and decision making powers to workers' organizations within German companies.

Likewise, the French *Code du Travail* sets the following limits: 10 daily hours of work<sup>43</sup> and 44 weekly hours<sup>44</sup>. It also establishes the possibility to

---

<sup>41</sup> F. FAVENNEC-HERY, 2016, "La négociation collective dans le droit de la durée du travail", *Droit Social*, n° 11, p. 895.

<sup>42</sup> Among the few studies on the effect of works councils on overtime determination in the German system, see R. GRALLA et al., 2017, "The effects of works councils on overtime hours", *Scottish Journal of Political Economy*, n° 2, pp. 143-168, that has described such effects as "negative", as these structures do not prevent the conclusion of overtime arrangements. However, the study indicates that they are vital for avoiding excessive long hours of work per week and allow the uniform application of overtime rules across at the employer's premises.

<sup>43</sup> Which can be amended in the exceptional cases set down in article L. 3121-18 of the *Code du Travail*.

<sup>44</sup> See article L. 3121-20 of the *Code du Travail*.

increase the maximum daily working time up to 12 daily hours of work by concluding enterprise or sectoral agreements in the event of production peaks or organisational reasons.

The weekly limit of 44 hours is calculated against a reference period of 12 consecutive weeks up to 46 hours (article L. 3121-23 of the *Code du Travail*)<sup>45</sup>. If collective bargaining (both at sectorial and enterprise level) does not regulate this aspect, the employer can request to amend the limit of forty-four hours and increase it to forty-six hours (article L. 3121-24 of the *Code*). Hence, overtime is set according to the 35-hour week rule and the limitations mentioned above.

The second system is based on limitations to overtime (Italy's case). Article 5 of *Decreto Legislativo* 66/2003 establishes that the main source of overtime regulations in the Italian system is collective bargaining (whether *in mejus* or *in pejus*), as individual agreements between employers and workers can allow the latter to perform more hours than those agreed upon. Consequently overtime can be performed up to a maximum of 250 hours per year (see article 5, n.º 3, point c) of the *Decreto*)<sup>46</sup>.

As for Portugal, par. n.º 1 of article 228 of the Labour Code limits overtime hours according to different factors: i) the size of the company (see article 100 of the Labour Code and point a) and b) of the 228 of the Labour Code); ii) the type of contract (limitations are in place for part-time workers, see point c)); iii) the day on which overtime should be performed (weekly rests, including complementary rest breaks).

Collective bargaining in Portugal also plays a role in increasing the limits of overtime in the first two cases (point a) and b)), to a maximum of 200 hours per year (article 228, n.º 2 of the Labour Code<sup>47</sup>). The same

<sup>45</sup> F. FAVENNEC-HERY, 2016, "La négociation collective dans le droit de la durée du travail", *Droit Social*, n.º 11, p. 893. In the new wording of the article, this instrument is now called "*dépassement*" (to surpass) referring to the maximum duration of working time, daily and weekly, which repeals the expression "*dérogation*" (derogation). Consequently, the system of derogation concerning the maximum duration of working time has been replaced by a system of authorization that goes beyond the maximum duration of working time.

<sup>46</sup> R. PESSI, 2016, *Lezioni di Diritto del Lavoro*. 7th edition. Torino: G. Giappichelli, p. 317-318.

<sup>47</sup> In 2015, only 33% of the collective agreements had clauses regarding overtime. CENTRO DE RELAÇÕES LABORAIS, 2016, *Análise dos Instrumentos de Regulamentação Coletiva do Trabalho: Trabalho suplementar, Descanso compensatório, Adaptabilidade, Banco de horas e Horário concentrado*, p. 26, available at: [https://www.crlaborais.pt/documents/10182/13323/CRL-ESTUDOS+-+Impacto+da+Lei+n+23-2012+TS-DC-A-BH-HC++\(Vr+04-03-2016\)/45be58d9-8e40-4274-8fb6-c584ba1ac788](https://www.crlaborais.pt/documents/10182/13323/CRL-ESTUDOS+-+Impacto+da+Lei+n+23-2012+TS-DC-A-BH-HC++(Vr+04-03-2016)/45be58d9-8e40-4274-8fb6-c584ba1ac788).

discretion is provided in relation to part time workers (point c)), which can see their hours increased to 200 hours per year through collective bargaining, or up to 130 hours per year by individual agreements (article 228, n° 3 of the Labour Code).

Only the UK seems to deviate from this European pattern, due to the absence of any specific provisions on overtime. This has two major implications: on the one hand, it means that only the limit of 48 hours applies, which as seen concerns both scheduled working time and overtime. On the other hand, even within these parameters, the possibility to request overtime has to be laid down in individual agreements between employers and workers<sup>48</sup>.

As for Japan and the USA, they share common aspects in overtime regulation. They both provide that, within certain quantitative limits, overtime shall be determined jointly by employers and a collective body representing workers.

In the Japanese case, overtime work may be determined by agreements between employers and trade unions (or a worker representing the majority of workers)<sup>49</sup>. By law (see article 36 of Labour Standards Law<sup>50</sup>) there is no limit to overtime for regular workers (except for underground workers, other occupations that entail health measures and women providing care to children or elder people). However, the Ministry of Health, Labour and Welfare has set a non-binding limit on the maximum hours of overtime, which employers and trade unions need to take into account in negotiations. At the time of writing, this limit comprises: a) 15 hours for one week; b) 27 hours for two weeks; c) 43 hours for four weeks; d) 45 hours for one month; e) 81 hours for two months; f) 120 hours for three months; g) 360 hours for one year<sup>51</sup>.

In the USA, FLSA establishes that overtime can be set by agreements between employers and a representative of workers certified by the

---

<sup>48</sup> As demonstrated by the ruling of the Court of Appeal *Driver vs. Air India Ltd*, [2011] EWCA Civ 830, of 19/07/2011, available at: <http://www.employmentcasesupdate.co.uk/site.aspx?i=ed8793>.

<sup>49</sup> T. A. HANAMI and F. KOMIYA, 2011, *Labour Law in Japan*, Netherlands: Kluwer Law International, p. 104.

<sup>50</sup> See the decision of the Japanese Supreme Court of 16/07/2009, judge Wakui Norio, case n.° 2007 (A) 1951, available at: [http://www.courts.go.jp/app/hanrei\\_en/detail?id=1014](http://www.courts.go.jp/app/hanrei_en/detail?id=1014).

<sup>51</sup> These limitations, put in place in December 1998, are a response to the *Karoshi* problem, that is not limited to Japan. The problem is a serious one in the country, also because of a lack of limitations to overtime. See K. OGURA, 2006, "Contemporary Working time in Japan: Legal System and Reality", *Japan Labor Review*, n° 3, p. 5.

National Labour Relations Board, with the limit of 1040 hours over a period of twenty-six consecutive weeks or 2240 hours over fifty-two consecutive weeks (see point (b) of the Section §207 of the FLSA). However, in the American system the main discussion on this topic is related to monetary compensation for these hours<sup>52</sup>. Not all workers are covered by this rule, as there are three main criteria to the entitlement of overtime pay: 1) salary<sup>53</sup>; 2) job duties<sup>54</sup>; 3) workweek<sup>55</sup>. It must be mentioned that the first criterion is currently under revision. On May 23<sup>rd</sup> 2016, the US Department of Labour Wage and Hour Division approved a new rule regarding the overtime limit that would extend this provision to those workers who earn up to \$47,476 a year, that should have entered into force starting from 1 December 2016<sup>56</sup>. Yet, on 22 November 2016, a preliminary injunction vetoed the effects of this amendment, mainly due to the Department's lack of authority to do so<sup>57</sup>. This means that the extension of these eligibility criteria on overtime payment remains on hold for the time being.

### 3. Conclusions

Even though this article has focused primarily on the internal regulations of the key indicators mentioned above, international instruments have a major role on the countries analysed. As such, the role of the ILO Conventions n° 1 and 30 should not be taken lightly, as the Japanese system demonstrated some contact points with the European systems on working time regulation.

The same can be said of the European Working Time Directive and for the legal systems in place in the European Union. Indeed, it is possible to see a harmonizing effect on standards and provisions regarding working time limitations, for the purposes of promoting decent work and workers'

---

<sup>52</sup> Which can constitute a clause preventing the abuse of overtime, not through limitations to its use, but through increasing its costs.

<sup>53</sup> It only covers workers who make less than \$455 a week or \$23,660 a year.

<sup>54</sup> It excludes executives, administrative or IT professionals or sales workers.

<sup>55</sup> If the worker works more than 40 weekly hours of work, he will be entitled to 150% compensation for each hour performed over that limit.

<sup>56</sup> Final Rule "Defining and Delimiting the Exemptions for Executive, Administrative, Professional, Outside Sales and Computer Employees", 81 Fed. Reg. 32391 of May 23, 2016, available at: <https://www.gpo.gov/fdsys/pkg/FR-2016-05-23/pdf/2016-11754.pdf>.

<sup>57</sup> See the decision of the Eastern District of Texas, judge Mazzant, Civil Action n.° 4:16-CV-00731, available at: [www.txed.uscourts.gov/d/26042](http://www.txed.uscourts.gov/d/26042).



health and safety. The only system that seems to diverge from the European regulatory paradigm is the UK, which gives much latitude to individual agreements and has put in place the opting-out clause laid down the Working Time Directive. The disparities may increase with the conclusion of the Brexit process, that will perhaps water down the regulation of working time, maybe aligning itself with other common-law countries (e.g. the USA, where working time is mainly regulated by other instruments than statutory law).

State regulations play different roles on governing working time, ranging from setting the entire framework to simply establishing the minimum standard and the background for collective bargaining/individual agreements to operate. Collective bargaining also seems to play a major role in EU countries, though major differences can be seen. In Germany, for instance, the power of collective sources is a direct consequence of the co-determination principle concerning the key indicators. Conversely, in the UK, collective agreements have to be implemented through individual agreements.

Even within countries where collective bargaining has much room for manoeuvre, there are differences in terms of how collective bargaining can operate. Some systems demand a certain type of agreement (this is the case of France, where the new *Code du Travail* reasserted the role of agreements at company level), while others do not make any distinction in terms of collective bargaining level (e.g. the Portuguese system).

Undoubtedly, a trend exists to regulate working time through collective bargaining, as more flexibility can be provided at the time of meeting employers' and workers' needs.

Individual agreements play a residual role, and in some case they do not even have validity. The UK case is particularly telling in this connection, following the application of the opt-out clause of the European Working Time Directive 2003/88/EC.

# ADAPT International Network



**ADAPT** is a non-profit organisation founded in 2000 by Prof. Marco Biagi with the aim of promoting studies and research in the field of labour law and industrial relations from an international and comparative perspective. Our purpose is to encourage and implement a new approach to academic research, by establishing ongoing relationships with other universities and advanced studies institutes, and promoting academic and scientific exchange programmes with enterprises, institutions, foundations and associations. In collaboration with the Centre for International and Comparative Studies on Law, Economics, Environment and Work, (DEAL) the Marco Biagi Department of Economics, University of Modena and Reggio Emilia, ADAPT set up the International School of Higher Education in Labour and Industrial Relations, a centre of excellence which is accredited at an international level for research, study and postgraduate programmes in the area of industrial and labour relations. Further information at [www.adapt.it](http://www.adapt.it).

For more information about the E-journal and to submit a paper, please send a mail to [LS@adapt.it](mailto:LS@adapt.it).

