

**Revision of Working Time Directive.
Key-points and comments by ETUC**
22-9-04

Political message

One year ago there were three obligations for the Commission, on the basis of the Working Time Directive:

- to evaluate the use of the individual opt-out with a view to its deletion
- to evaluate the derogation of the reference period from 4 months to 12 on the basis of collective bargaining, with a view to its restriction
- to ensure implementation of the ECJ-judgements about on-call work

Because of the panic in Member States about the implementation of the on-call judgements, the Commission has now come up with "three guns to shoot one bird".

The proposals on the table are all together totally out of proportion, are in clear contradiction to Community obligations and legislation (notably the obligations under the EU-Treaty to harmonize upwards, and to promote dialogue between management and labour), and if adopted would turn the Working Time Directive into a façade without any real content, while overall threatening the coming about of modern working time arrangements on the basis of collective bargaining.

Therefore the proposal on the table has to be rejected / withdrawn.

The only acceptable way forward is:

- a) keeping in place the existing provisions on reference periods
- b) phasing out of the individual opt out
- c) providing for balanced and proportional solutions for on-call work, that are consistent with Community law
- d) provide for genuine measures to reconcile work and family life

Summary of key points

1) reference periods

Current provision: reference period for counting the 'average' maximum working week of 48 hours of 4 months, extension possible by collective bargaining.

Commission proposal:

- reference period stays four months
- *however*, MS's are free to extend to 12 months; only condition is that they 'consult the interested social partners', and should promote social dialogue
- no absolute limit is introduced per week (although a proposal has been on the table to introduce here the same limit as in the individual opt-out, of 65 hours)

Unacceptable because :

deletion of safeguard of collective bargaining is unacceptable and may lead to working time patterns with very long working hours per week on a regular basis (up to 85!), and also to a very irregular and unpredictable working time pattern, which may make it very hard for workers to manage their working and private lives.

2) on-call work

Current situation: ECJ-judgements have defined on-call duty as working time

Commission proposal:

- working time definition itself stays unchanged
- *however*, in addition a definition of on-call working time is introduced, and also a definition of 'inactive part of on-call time' ; only active time is working time in the sense of the Directive, unless Member States or collective agreements regulate otherwise
- *compensatory rest* does not have to be given immediately, but within a reasonable time not exceeding 72 hours

Unacceptable because:

The proposal is in clear contradiction with the fundamental objectives of the Directive and with other existing Community legislation and has disproportionate effects.

3) individual opt-out

Current situation: opting out of 'average 48 hour working week' is possible on basis of individual agreement with employee

Part one: on the possibility for Member States to opt out

Commission proposal:

- MS's can decide not to apply the maximum 48 hours working week only if this is explicitly allowed for by the collective agreement or the agreement by the social partners at the national, regional or 'adequate' level (nb: the consent of the individual worker is also then still needed)
- *however*, this condition does not apply if there is no collective agreement **in force** (*lorsque aucune convention collective n' est pas en vigueur*), and if there is also not a worker representation in the enterprise that *is empowered*

to conclude an agreement between the social partners in this area, in accordance with national law and practice

Unacceptable because:

The proposal, instead of restricting the use of the opt-out, keeps the individual opt-out in place, and may lead to an increase in various forms of opting-out of maximum working time regulations, and will lead to increased pressure on trade unions at the negotiating table to accept individual opt-outs within the framework of a collective agreement, because the employer may threaten not to agree on the collective agreement, or even not to recognize the trade union at all.....!

Part two: on the conditions for the individual opt out

Commission proposal: *(new parts in italic)*

- prior consent by the individual worker
- *agreement shall only be valid for one year*
- *agreement is renewable every year*
- *agreement, when made at time of signature of individual employment contract or during any probation period is null and void*
- no victimisation
- *absolute limit of 65 hours per working week, unless collective agreement provides otherwise*
- employer should keep up records, and present these at their request to the competent authorities, of all workers who carry out such work, *and of the numbers of hours actually worked.*

Acceptable, but

- These proposals could be welcomed as short term measures within the framework of a longer term perspective to phase-out the opt-out, as the European Parliament has asked for. Putting an end to several of the most pressing abuses in the UK has already been the duty of the Commission for years.
- The proposal to on the one hand introduce an absolute limit of 65 hours, but at the same time still provide for derogation by collective bargaining however is an ambiguous one, introducing a notion of acceptability of a 65-hour working week (on a regular basis, because otherwise one would not need an opt-out!), and at the same time providing for a possibility to go even beyond that maximum on the basis of collective bargaining, which is not to be seen as a positive development.

4) work-life balance

Current situation: no provisions in Working Time Directive that take account of link between health and safety and (lack of) work-life balance.

Commission proposal:

- regards all its proposals and especially the ones about the opt-out as allowing for a better compatibility between work and family life
- states that reconciliation of work and family life is an essential element to allow the Union to reach the Lisbon objectives
- but refers the issue to the Member States, stating that *it is for Member States to encourage social partners to conclude agreements to ensure better compatibility between work and family life.*

Unacceptable, because:

Texts as presented do not take the needs of workers and their families seriously.

Explanation

1) on reference periods for counting the 'average' maximum working week of 48 hours:

Problem as identified by the Commission:

- no problem (!)
- evaluation has shown that some employers and Member States want 'more room for flexibility'.

Commission proposal:

- reference period stays four months
- **however**, MS's are free to extend to 12 months; only condition is that they 'consult the interested social partners', and should promote social dialogue

Comments ETUC:

- there is no research presented, nor a business case proven, for extending the reference period to 12 months and deleting the safeguard of collective bargaining as a precondition;
- there is loads of good practice everywhere in Europe about 'annualized hours' on the basis of collective bargaining (EIRO-studies) that could proof this case
- without additional safeguards, a reference period of longer than 4 months can lead to very long working weeks on a regular basis, that are totally unacceptable from a health and safety perspective (and a work-life balance perspective!)
- proposal runs counter to obligation for European Commission under the EU-Treaty to promote collective bargaining

2) on on-call work

Problem as identified by the Commission:

implementation of ECJ-judgements in SIMAP and Jaeger cases, in which the Court

- a) defined 'on call working time' (when the worker has to be available in the workplace) as working time for the counting of the 48 hour maximum working week
- b) decided that compensatory rest has to follow immediately on the extended period of work (day shift, followed by an on-call night shift).

Commission proposals:

- a) working time definition itself stays unchanged
however, in addition a definition of on-call working time is introduced, and also a definition of 'inactive part of on-call time'; only active time is working time in the sense of the Directive, unless Member States or collective agreements regulate otherwise
- b) the obligation to provide for equivalent compensatory rest is 'flexibilized':
equivalent compensatory rest should be given within a reasonable timeframe not exceeding 72 hours (!)

Comments ETUC:

- the proposal would create contradictions between 2 Community instruments: in the Directive on working time of persons performing mobile road transport activities (2002/15/EC), on-call working time (defined as 'time during which the worker cannot dispose freely of his time, and is required to be at his workstation, ready to take up normal work) is defined as working time
- the proposal is in clear contradiction to the fundamental objectives of the Directive: in its decisions the ECJ has explicitly stated that its interpretation of on-call work is the only interpretation which accords with the objective of the Working Time Directive, which is to secure effective protection of the safety and health of employees by allowing them to enjoy minimum periods of rest
- the introduction of a general reversal of the definition (on-call working time is **not** working time, unless regulated otherwise by Member States or social partners) creates a negotiating-disadvantage for trade unions in collective bargaining, and threatens the continuation of existing agreements on the sectoral and enterprise level in a wide range of sectors, other than healthcare
- the proposal is not based on reliable and convincing material from Member States that the ECJ-judgements cannot be implemented without causing major and unsurmountable problems. Even in Germany, a recent study by the German Hospital Institute, welcomed by the German Federal Minister of Health, has shown *"that the introduction of flexible working hours, in conformity with ECJ requirements, for hospital doctors is feasible. It can be achieved by optimizing working time and work process organization in most hospitals – contrary to all the calculations that have been presented – with the available financial and human resources" !!*
- the proposal goes far beyond what can be considered a 'proportional' measure: if an impact assessment in the most relevant Member States (asked for by the EP but still lacking.....) would show the need for adaptations of the legal framework, the scope of such adaptations should be limited to and be in proportionality to the problems as identified, for instance allowing for a specific derogation for specific situations or branches of activity, under certain conditions, preferably on the basis of agreements between the social partners at the European, national or sectoral level
- the flexibilization of 'equivalent compensatory rest' without any further conditions seriously undermines the health and safety of workers, and does not promote the coming about, by way of negotiations, of adequate alternative schemes for dealing with the scheduling of on-call working time and compensatory rest (such as time-saving accounts etc.)

3) on the individual opt-out

Problems as identified by the Commission:

- serious problems with implementation in the UK, including abuses
- increasing recourse of other Member States to the use of the opt-out, to solve potential problems with the implementation of the ECJ-judgements on on-call work.

Part one: on the possibility for Member States to opt out **Commission proposal:**

- MS's can decide 'not to apply article 6' (= 48 hours average per week) only if this is explicitly allowed for by the collective agreement or the agreement by the social partners at the national, regional or 'adequate' level (nb: the consent of the individual worker is also then still needed)
- **however**, this condition does not apply if there is no collective agreement **in force** (*lorsque aucune convention collective n' est pas en vigueur*), and if there is also not a worker representation in the enterprise that *is empowered* conclude an agreement between the social partners in this area, in accordance with national law and practice
- conditions of use of the individual opt out are a little bit tightened, and an absolute limit of working time per week to 65 hours is introduced.

Part two: on the conditions for the individual opt out

Commission proposal: *(new parts in italic)*

- prior consent by the individual worker
- *agreement shall only be valid for one year*
- *agreement is renewable every year*
- *agreement, when made at time of signature of individual employment contract or during any probation period is null and void*
- no victimisation
- *absolute limit of 65 hours per working week, unless collective agreement provides otherwise*
- employer should keep up records, and present these at their request to the competent authorities, of all workers who carry out such work, *and of the numbers of hours actually worked.*

Comments ETUC:

On the relationship between the opt-out and collective bargaining:

- the proposal, on first view, seems to restrict the use of the opt-out. However, on closer examination, it **does not at all lead to a restriction, and may even lead to an increase in various forms of opting-out of maximum working time regulations** !

Although written in a form that suggests restriction, what in fact is created is a very strange and contradictory dynamic: while on the one hand stating that the individual opt-out can 'only' be applied when allowed for by collective agreement, this seemingly restrictive clause is immediately nullified by the provision that the individual opt-out can still be applied when there is not a collective agreement 'en vigueur', and when there does not exist within the

enterprise a worker representation that 'can' conclude an agreement about this issue with the employer.

- So, first of all, the individual opt-out would continue to exist in the area of non-coverage of collective bargaining, just as the situation is at this moment. But in addition, the proposal would introduce the possibility of allowing for opt-outs by collective agreement, in a way which will lead to increased pressure on trade unions at the negotiating table to accept individual opt-outs within the framework of a collective agreement, because otherwise the employer will not agree on the collective agreement, or will not recognize the trade union that wants to negotiate at all!
- the ETUC in general is in favour of providing for flexibility in the **application** of working time regulations by collective bargaining. However, offering the social partners the option to allow for opt outs by collective agreement, is not something the ETUC is waiting for!

Also the social partners in their role as collective bargaining partners will have to respect the fundamental right enshrined in European law, that each and every worker has a right to limitation of his working hours.

- the ETUC is very concerned, that this option would even threaten existing good practice with regard to collective bargaining on flexible working time patterns and annualised working hours, because it could be seen by employers and their organisations as an easy way out of working time limitations.

On the tightened conditions of use for the individual opt-out:

- These proposals could in general be welcomed as short term measures within the framework of a longer term perspective to phase-out the opt-out, as the European Parliament has asked for. Putting an end to several of the most pressing abuses in the UK has already been the duty of the Commission for years.
- However, it is not very realistic to expect real improvements in the level of protection of workers against abuses by for instance separating the moment of consent from the moment of the signature of an employment contract, or an obligation to review regularly the individual consent given by the employee. Also under these conditions, it would be very easy to make renewal of a fixed term contract, or a next step in one's career, dependent on agreeing to the opt-out. Moreover, if the previous very limited conditions were already not implemented and enforced properly in the only Member State that made extensive use of it, why would one expect any better performance with regard to additional conditions?
- The proposal to on the one hand introduce an absolute limit of 65 hours, but at the same time still provide for derogation by collective bargaining however is an ambiguous one, introducing a notion of acceptability of a 65-hour working week (on a regular basis, because otherwise one would not need an opt-out!), and at the same time providing for a possibility to go even beyond that maximum on the basis of collective bargaining, which is not to be seen as a positive development.