The Revision of the Working Time Directive.

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1.1. The Working Time Directive

EU Directive 93/104/EC aimed to ensure a better level of safety and health protection for workers, with the main provisions being:-

1. A minimum rest period of 11 consecutive hours for each 24-hour period (Article 3);

2. A rest break where the working day is longer than six hours (Article 4);

3. A minimum rest period of one day per week (Article 5);

4. Maximum weekly working hours of 48 hours on average, including overtime, over a reference period not exceeding four months (Article 6);

5. Four weeks of paid annual leave (Article 7); and

6. An average of no more then eight hours of work at night in any 24 hour period (Article 8).

The Directive as amended by Directive 2000/34/EC was repealed and consolidated into Directive 2003/88 which entered into force on the 2nd August 2004.

The original Directive provides that two of its provisions had to be reviewed before 23 November 2003. These are:-

1. Article 17 which includes derogations from the four month reference period for the application of Article 6 of the Directive (i.e. the maximum 48 hour working week). For many firms it is

important to organise working time flexibly in order to respond to seasonal or demand fluctuations. The option to derogate from such reference period granted by the Directive, may not result in the establishment of a reference period exceeding six (6) months. However, for objective or technical purposes, Member States have the option to allow, collective agreements or agreements concluded between the two sides of industry to set a reference period that does not exceed twelve (12) months.

2. The option for Member States of not applying Article 6 if the individual worker consents to this (i.e the 'opt out' from the 48 hour maximum working week) (Article 18).

Two very important rulings by the European Court of Justice regarding the definition of working time as to on-call working, were the **Simap** case[341] and the **Jaeger** case[342].

In the **Simap** case, the Court was requested to state whether time spent by Spanish doctors "on call", either at the medical centre or away from it, was to be considered as "working time"[343]. The Directive does not define time spent "on call", whereas rest-time is defined as *"any period which is not working time"*. The Court declared that when doctors are obliged by their employer to be present at the workplace, they are to be regarded as carrying out a duty. The Court adopted the theory that the three features of working time are cumulative. Therefore, time spent on-call in the workplace is regarded as working time. On the other hand, where doctors are to be capable of being contacted when on call, only time linked to the actual provision of medical emergency services is to be regarded as working time[344]. The court considered that such

[341] 3rd October 2000.
[342] 9th October 2003.
[343] Working time is deemed to be "any period during which the worker is working, at the employer's disposal and carrying out his activities or duties, in accordance with national laws and/or practice" (Article 2).
[344] "time spent on call by doctors in primary health care teams must be regarded in its entirety as working time, if they are required to be at the health centre. If they must merely be contactable at all times when on call, only time linked to the actual provision of primary health care services must be regarded as working time".

an interpretation was in line with the objective of the Directive, i.e. to ensure the safety and health of workers.

In the **Jaeger** case, the Court followed the reasoning adopted in the **Simap** judgement. The Court concluded that a doctor required to be available at a place determined by the employer, is subject to greater constraints than a doctor on stand-by and not required to be on the hospital premises. Therefore, on call-working should be considered in its entirety to be working time, even if the doctor in question is permitted to rest and sleep during periods of inactivity, and such periods cannot be taken into account in calculating the 11 hour rest period imposed by the Directive. The Court concluded that the German law which treats as periods of rest periods of on-call duty where an employee is not carrying out any professional activity, and which provides for compensatory arrangements only in respect of periods of actual activity, is contrary to Community law.

Likewise, in cases C-397/01 to C-403/01[345] where emergency medical workers filed proceedings against the German Red Cross, the ECJ confirmed:-

1. The Working Time Directive applies to the activities of emergency workers in attendance in ambulances as part of a rescue service;

2. Any extensions of the 48-hour period of maximum weekly working time requires each worker individually to give his consent, expressly and freely;

3. In calculation of the maximum period of daily and weekly working time, periods of duty time must be taken into account in their totality. Therefore, the average weekly duty time of emergency workers, during which they have to make themselves available to their employer at the place of employment and remain

[345] Bernhard Pfeiffer and Others vs Deutsches Rotes Kreuz, Kreisverband Waldshut e. V, 5th October 2004.

continuously attentive in order to be able to act immediately should the need arise, cannot exceed the 48-hour limit.

4. The directive, so far as the 48-hour maximum period of weekly working time is concerned, has direct effect.

1.2 Communication from the Commission to the Council, The European Parliament, The European Economic and Social Committee and the Committee of the Regions.

On the 5th January 2004 the European Commission issued a Communication concerning the re-examination of the Directive under discussion and the launching of a wide ranging consultation process which would be capable of bringing about an amendment to the Directive. The study consisted of a ten-year review of the Working Time Directive.

The report had three main aims:-

1. To evaluate and review two aspects of the Directive earmarked for review seven years after:-

(a) The option of 'opt-out' from the forty-eight hour weekly limit on average working time; and
(b) Derogations from the four-month reference periods for the calculation of the average weekly working time of forty-eight (48) hours;

2. To analyse:-

(a) The impact of the **Simap** and **Jaeger** judgements in the area of the definition of working time and the status of on-call working;
(b) The possibility of introducing measures to reconcile work and family life;

3. To consult the European Parliament, the Council of Ministers, the European Economic Social Committee, the Committee of Regions and the EU social partners on a possible revision of the

text. The EU level social partner organisations, were also invited to give their opinion on the need to amend the Directive as regards the scope for individual opt-outs and derogations from the reference period in respect of the 48-hour working week.

In the first part, the report:-

(a) Outlined the legal provisions under review;

(b) Assessed the situation prevailing at the time within the Member States;

(c) Considered the definition of working time and rest period;

(d) Analyzed the judgements delivered in the **Simap** and **Jaeger** cases and their impact. The Commission expressed its pre-occupation that the effect of the said judgements would be that some Member States will have recourse to derogations or exceptions, in order to limit their influence. The Commission confirmed that this was the situation in some Member States and would continue in the future. It also envisaged that Member States might be tempted to resort to alternative arrangements offering less protection, example engaging self-employed doctors, to whom the Directive does not apply.

(e) Encouraged greater flexibility between work and family life to ensure the *"growing needs of workers, particularly those with dependent children or elderly relatives, as well as the interests of companies, which need to be able to respond to user and customer demand for extended operating hours or to adapt rapidly to sharp fluctuations in demand"*.

In the second part, the Commission outlined the options available and indicated the criteria to be met for any future proposal in relation to working time:

(a) Ensure a high standard of protection of workers' health and safety with regard to working time;

(b) Give companies and Member States greater flexibility in managing working time;

(c) Allow greater compatibility between work and family life;

(d) Avoid imposing unreasonable constraints on companies, with particular reference to SMEs.

In this part of the report, the Commission also indicated the main issues that had to be addressed.

The Commission invited all interested organizations to send their comments and suggestions, after which the Commission would conduct a detailed assessment of the contributions and subsequently draw the necessary conclusions.

1.3 Proposal for a Directive issued by the European Commission, September 2004

The Commission consulted the two sides of the industry (i.e. the social partners) on the need to revise the existing directive and requested them to negotiate an agreement on amendments to it, as required to do in terms of Article 138. Unfortunately the social partners (i.e. the European employer's Federation and the European Trade Union Confederation) failed to find sufficient common ground to start negotiations and they declined the Commission's invitation to enter negotiations in this field, an asked the Commission to adopt a proposal of a Directive.

In September, 2004 the Commission adopted a proposal for a modification to the existing Directive concerning certain aspects of the organisation of working time. Employment and Social Affairs Commissioner Stavros Dimas, commented on the proposal adopted by the European Commission:- *"This proposal will address shortcomings in the present system, demonstrated in the course of its application. It is a balanced package of measures that protect the health and safety of workers whilst introducing greater flexibility and preserving competitiveness".*

The areas where changes were proposed are the following:-

1. To keep the individual opt-out however tightening the conditions for its application when there is no collective agreement in force or no such agreement can be concluded;

2. To grant Member States the possibility to extend the reference periods to not more than 12 months, subject merely to consultation of the social partners concerned;

3. To correct the definitions of working time, so that the inactive part of on-call time is not considered as working time.

1.3.1 The Opt Out.

Article 22 (in 18 in Directive 93/104) of the current directive gives Member States the option not to apply Article 6 which provides for the maximum 48 hour working week.

The conditions applicable for the application of the opt-out are:-

1. The employer must obtain the worker's consent to work more than 48 hours per week;

2. No worker must suffer any disadvantage if he does not agree to opt-out;

3. The employer must keep up-to-date records of all workers who opt-out;

4. The records must be available to the competent authorities, which can ban or restrict hours worked in excess of the 48 hour limit if necessary for health and safety reasons.

The U.K. has been the only Member State to apply the opt-out on a general basis. Following enlargement, Cyprus and Malta applied it on a general basis. Other countries, such as Luxembourg apply it to certain sectors. Example Luxembourg has applied it to its

restaurant and catering sector; following the **Simap** and **Jaeger** judgements, France, Spain and Germany applied the opt-out to their health sectors.

In its first report, the Commission commented that the possibility to work more than 48 hours per week, *"could put at risk the Directive's aim of protecting workers' safety and health"*. Evidence has shown the systematic abuse of the opt-out clause, for example where employees are persistently asked to sign the opt-out agreements at the same time as the contract of employment, thereby placing pressure to agree to such a clause and undermining the employee's freedom of choice.

Under the new proposal, which the Commission considered to permit better compatibility between work and family life:-

(a) The conditions attached to the worker's individual consent are tightened:-

- It cannot be given during a probation period or at the time when the contract of employment is signed;

- It has to be in writing;

- It is valid for a maximum period of one (1) year (can be renewed);

- No worker can work more than 65 hours a week. This is however not a mandatory maximum and opt-outs will be possible by employer-worker agreements or collective agreements.

- Employers are obliged to keep records that have to be accessible to the competent authorities, if required.

These conditions are aimed at preventing abuses and ensure that the choice of the worker is entirely free and no coercion is exerted by the employer.

(b) The opt-out may be applied if:-

- Expressly allowed under a collective agreement or an agreement between the social partners; and

- The individual consents;

However only individual consent is required where there is no collective agreement in force and where there is no workers' representation within the undertaking or the business that is entitled to conclude a collective agreement or an agreement between the two sides of the industry[346]

1.3.2 On-call time

The proposal introduces a new category, "on call time" which is defined as the *"period during which the worker has the obligation to be available at the workplace to intervene, at the employer's request, to carry out his activity or duties"*. Similarly, the proposal defines *"inactive part of on-call time"* as the *"period during which the worker is on call but is not required by his employer to carry out his activity or duties"*[347].

The Commission proposed that, *"the inactive part of on-call time shall not be regarded as working time, unless national law or, in accordance with national law and/or practices, a collective agreement or an agreement between the two sides of industry decides otherwise.*

The period during which the worker carries out his activity or duties during on-call time shall always be regarded as working time".

This clause has been proposed following the judgements delivered in the **Simap** and **Jaeger** cases. The Commission has declared

[346] This is essentially aimed at small enterprises.

[347] The current position is that any period can be considered to be only working time or a rest period, and the two concepts are mutually exclusive.

that such a proposal aims to ensure an appropriate balance between the protection of workers' health and safety, on the one hand, and the need for flexibility for companies, on the other hand. The inactive part of on-call time was deemed as not requiring the same protection as the active periods. Therefore, the proposal establishes that the inactive part of on-call time is not working time within the meaning of the Directive. In other words, time spent resting at home and the place of employment would be treated in the same way.

Opponents to this proposal have claimed that it violates international labour standards as laid down by the International Labour Organization as far back as 1930. ILO Hours of Work Convention No. 30 provides that *"the term hours of work means the time during which the persons employed are at the disposal of the employer"*.

1.3.3. Implementation of the Reference Periods

According to Article 16 of the Directive (93/104/EC), the reference period for calculating the average working week is established at four months. However, it is possible to extend to six months, and by collective agreement or agreements concluded by the social partners, it may be extended to twelve months. The six month reference period has been removed.

The changes proposed by the Commission are the following:-

(a) Member States could extend the period up to one year, following consultation of concerned social partners and to the encouragement of social dialogue in this matter;

(b) Duration of the reference period can under no circumstance exceed the duration of the employment contract.

This proposal aims at allowing employers to deal with more or less regular fluctuations in demand, and simplify the management of the employee's working time.

1.3.5. Time Limits for Compensatory Rest

Article 3 (daily rest) - workers shall be entitled to a minimum daily rest period of 11 consecutive hours per 24-hour period;

Article 5 (weekly rest periods) – each seven-day period, every worker is entitled to a minimum uninterrupted rest period of 24 hours.

In terms of Article 17, it is possible to derogate from these provisions, for certain groups of workers (e.g. shift workers, cleaning staff), and thereby take the rest period later. In such cases, workers must, in principle be granted an equivalent period of compensatory rest. The Commission's proposal is in the sense that this period of compensatory rest is to be granted within a reasonable time and, in all cases, within a time limit that does not exceed 72 hours. Of interest is that the ECJ in the **Simap** and **Jaeger** judgements interpreted the existing Directive to mean that compensatory leave had to be taken immediately.

1.3.6. Work-life balance

The Commission considered its proposals (especially the ones relating to opt-out) as affording a better compatibility between work and family life. In terms of its proposals, the Commission referred the issue to 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. This has been considered not to take the needs of workers and their families seriously.

1.4 Report by the European Parliament's Employment and Social Affairs Committee for a directive amending Directive 2003/88 concerning certain aspects of the organisation of working time and the European Parliament's Resolution adopted in May 2005.

On the 7th March 2005, the rapporteur of the European Parliament's Employment and Social Affairs Committee (Alejandro Cercas) issued his proposals for the revision of the European Working Time Directive, based on the proposals made by the European Commission on the 22nd September 2004. This was followed by a European Parliament legislative resolution adopted at its May 2005 plenary session.

Essentially, the key areas of amendment are the following:-

1. **On-call time:-** the entire period, including the inactive part, should be regarded as working time unless law or collective agreement stipulate that the inactive on-call periods can be counted in a specific manner for purposes of calculating the average maximum weekly working time. Such a stand clearly indicates the European Parliament's disagreement to legislating against the case law of the Court of Justice, although it attempts to grant a solution in certain circumstances to remedy for staff shortages. The European Parliament clearly gave preference to the conventional method and favours the confining of the said measures to situations and persons who require it.

2. **Opt-out:-** this is to be repealed thirty six (36) months after the revised Directive comes into force[348]. As long as it remains in force, the agreement with the employee cannot exceed a period of six (6) months, which period can be renewed. Furthermore, any agreement made by workers under the Directive and still valid at the date of implementation of the new Directive, shall remain valid for a period not exceeding one year from that date.

3. **Compensatory rest:-** this is to be taken immediately, in accordance with the relevant law, collective agreement or other agreement between the two sides of industry;

[348] The report prepared by Cercas proposes to phase out the individual opt-out entirely by 2010.

4. **Reference Periods:-** Member States shall be allowed to extend such periods to twelve (12) where:-

(a) Workers are covered by collective agreements providing for a 12-month reference period; or

(b) There is no collective agreement, by means of law or regulation on condition as long as the Member State takes the necessary measures to ensure that the employer informs and consults with workers about the introduction of the new working time pattern, and the employer takes the necessary measures to prevent and/or remedy health and safety risks.

5. **Working Time:-** The European Parliament seeks to insert a new Article into the Directive, dealing with the calculation of working time. It states that where workers have more than one work contract, their working time shall be the sum of the periods of time worked under each of the contracts.

6. **Review of Directive:-** This is to take place every five (5) years.

The EP's resolution has been received with contrasting reactions. Thus for example the:-

- European Trade Union Confederation (ETUC) stated:- *"This vote sends out a clear signal to the Council and the European Commission that it is time for an end to the 'opt-out' clause. Today's vote is important for a number of reasons. It demonstrates a commitment on the part of a large number of the political groups represented in Parliament to play a significant role in defending the European social model and fundamental rights against neo-liberal ideas. It is proof that a strong social Europe really exists".*

- Employer Representatives:- they are strongly opposed to the amendments, claiming that they will restrict flexibility. They contend that the resolution is inconsistent and poses threats to the

objectives of enhancing growth and jobs in Europe. They claim that flexibility is essential for the competitiveness of undertakings, in particular SMEs. The removal of the opt-out clause will, according to this sector, undermine the EU's declared aim to become the most competitive economy in the world by 2010.

In Malta, the social partners agree that the abolition of the opt-out from the EU working time Directive's 48-hour limit on average weekly working hours, would harm the national economy. Although they acknowledge that the importance of maintaining a better work-life balance, they fear that the proposed amendment might lead to less business competitiveness and lower standards of living. Therefore, in the local scene the prevalent opinion is that Malta should retain flexibility in working hours.

The Commissioner for Employment, Social Affairs and Equal Opportunities[349], has stated that the Commission cannot accept the European Parliament's amendment on the opt-out clause; *"I am aware that the opt-out is a political question and one of principle. In this context the Commission will continue intensive dialogue with the Parliament"*.

Following the opinion of Parliament, on the 31st May 2005 the Commission forwarded another proposal amending the directive on the organisation of working time. The main features are the following:-

1) **On call-time:-** The Commission took account of the EP's concern for the health and safety of workers who are regularly on call, and included a provision aiming to ensure that inactive periods of on-call time are not taken into account in calculating the rest periods laid down in Article 3 (daily rest period) and 5 (weekly rest period).

2) **Individual Opt-Out clause:-** the EP's proposal for the repeal of the opt out clause within 36 months after the entry into force of

[349] Vladimir Spidla.

the Directive, was declared as being unacceptable. However, the Commission confirmed that *"it is prepared to explore a possible compromise on this question which is dividing the co-legislators"*.

3) Certain proposals contained in the EP's resolution were accepted by the Commission. The main one's are:-

(a) Acceptance of the aggregation of hours in cases involving several employment contracts for the purpose of calculation of working times;

(b) The reference period. Therefore, the Commission deleted its original proposal whereby Member States would be able to extend the reference period for twelve month following consultation with the social partners concerned.

As to compensatory rest, the proposal removed the reference to the 72 hours limit and retained the words *"within a reasonable period"* as contained in the Commission's proposal of September 2004.

The final proposal of the Commission, was studied during the Employment and Social Affairs Council, held in Luxembourg on 2nd June 2005 and chaired by Luxembourg's Minister for Labour and Employment. Talks focused mainly on the main lines of the new proposal and particularly on the sensitive matter of possible opt-outs to the 48 hour limit on the working week. With respect to this issue, two views were evident within the Council; countries who supported the retention of the opt-out, and other countries that consider it no longer to be justified. The conclusion reached was that before a compromise is reached on the opt-out issue, two specific problems had to be solved:-

- Problems in the healthcare sector resulting from the Simap/Jaeger judgements;

- The tradition in certain countries permitting individuals to have more than one work contract at a given time.

Given the desire by all concerned to find a compromise, the Presidency called on 'Coreper' to restart work and keep the Council informed. Therefore, it is evident that the Commission's proposal is not definitive but a basis for future discussions. It is evident that this proposal has a long way to go prior to final adoption, where intense debate and lobbying will surely take place.

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November 2005.