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## **PUBLIC CONSULTATION ON THE REVIEW OF THE WORKING TIME DIRECTIVE**

### **BACKGROUND**

The organisation and regulation of working time in the public and private sector has considerable social, economic and political impact. At EU level, Directive 2003/88/EC (the Working Time Directive)<sup>1</sup> aims at providing minimum standards common to all Member States for protecting workers from health and safety risks associated with excessive or inappropriate working hours, and with inadequate time for rest and recovery from work. Article 31(2) of the Charter of Fundamental Rights of the European Union similarly provides that: 'Every worker has the right to limitation of maximum working hours, to daily and weekly rest periods, and to an annual period of paid leave.'

Over the last twenty years, fundamental changes have occurred in the world of work and the economy, which have had a clear impact on many aspects of the organisation of working time. In the light of these developments, it is necessary to reflect on the kind of working time legislation the EU needs in order to cope with the current and future challenges of the first part of 21st century – social, economic, technological and demographic.

The Commission has therefore launched a comprehensive review of the Working Time Directive. The objective is to analyse what changes to the current legal framework would possibly be needed to arrive at working time rules which best meet the needs of workers, businesses, public services and consumers across the EU.

#### ***The scope and significance of EU working time regulation***

The Directive was adopted by the European Parliament and the Council under Article 137(2) of the European Community Treaty (now Article 153 TFEU), which provides for Community measures to improve the working environment by protecting workers' health and safety.

The Directive applies to all sectors of activity, both public private, including healthcare and emergency services.

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<sup>1</sup>Directive 2003/88/EC of the European Parliament and of the Council of 4 November 2003 concerning certain aspects of the organisation of working time, OJ L 299, 18.11.2003, p. 9.

The Directive does not apply to self-employed workers. The applicability of the directive to volunteers may vary from a Member State to another since it is dependent of whether they qualify as 'workers' according to the autonomous definition of this concept which is specific to EU law<sup>2</sup> and in the light of their particular working arrangement under the applicable national law and practice and factual circumstances.

The current Working Time Directive codifies two previous directives, the most important of which was adopted in 1993, on the basis of a proposal made by the Commission<sup>3 4</sup>.

The Directive establishes common minimum requirements for all Member States which include:

- daily and weekly rest breaks for workers (normally, 11 consecutive hours' daily rest and 24 – 35 hours' uninterrupted weekly rest)
- a rest break during working time (where the working day is longer than six hours)
- limits to weekly working time for workers (48 hours a week on average, including overtime)
- paid annual leave for workers (at least 4 weeks per year)
- extra protection for night workers<sup>5</sup>:
  - *normal hours of work must not exceed 8 hours (average) per 24-hour period,*
  - *work must not exceed 8 hours in any 24-hour period, if it involves special hazards or heavy physical or mental strain,*
  - *right of all night workers to a free health assessment before assignment, and at regular intervals afterwards,*
  - *right to a transfer 'whenever possible' to day work, if suffering from health problems connected to the night work,*
  - *measures to require employers who regularly use night work, to notify the responsible authorities if the latter so request.*

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<sup>2</sup> See ECJ case C-428/09, ECR I-09961, *Union syndicale Solidaires Isère v Premier ministre and Others*

<sup>3</sup> Proposal for a directive concerning certain aspects of the organization of working time – COM (90) 317, of 20 September 1990.

<sup>4</sup> Doctors in training were excluded from the scope of the 1993 Directive, but were brought back into its scope under an amending Directive 2000/34/EC. Member States were therefore obliged to ensure that the Directive's rules applied to doctors in training with effect from 1 August 2004. The only exception to this deadline was the Directive's 48-hour limit to average weekly working time: since long hours working was an established feature of medical training in many Member States at that stage, the 2000 Directive allowed extended transitional arrangements for gradually applying working time limits to doctors in training, over the period August 2004 – 31 July 2009. A further facility to allow slightly extended working hours (maximum 52 hours per week) until 31 July 2011 was used by three Member States (UK, NL, HU). Since 1 August 2011, the 48-hour limit to average weekly working time applies to doctors in training in all Member States.

<sup>5</sup> The definition of 'night worker' depends on working in ordinary course during 'night time' as defined by the Member State: various derogations also apply. See SEC (2010) 1611, chapter on 'night work'.

The Directive does not contain any rule relating to remuneration (except the right to 4 weeks of paid annual leave).

The Directive is fairly detailed in its provisions, in line with its stated goal of protecting the health and safety of workers. However, it provides for some degree of flexibility, in order to accommodate differences between national working time rules or the requirements of specific activities or professions:

- Member States may adapt EU rules to their national circumstances (for instance, maximum weekly working time has been set below 48 hours in many countries);
- There is substantial scope for flexible working arrangements through collective bargaining (for instance, the annualisation of working time);
- There are many derogations and exceptions from the general provisions (for instance, on the timing of compensatory rest, or the individual opt-out from the 48-hour rule).

The Court of Justice has held in a number of rulings that the Directive's requirements concerning maximum working time, paid annual leave, and minimum rest periods 'constitute rules of EU social law of particular importance, from which every worker must benefit'.<sup>6</sup>

A number of rulings of the Court of Justice are of particular importance for the organisation of working time in public health/care services:

- (i) Regarding the treatment of '*on-call time*': the Court held in *SIMAP* (3 October 2000), *Jaeger* (9 September 2003) and *Dellas* (1 December 2005) that all 'on-call' time where the worker is obliged to remain at a place designated by the employer, must be included when calculating working time limits under the Directive and may not be counted towards minimum rest periods. For workers, this means that their on-call time must be fully counted for the purposes of their entitlements to rest periods and maximum weekly working time. For employers, this means that in the organisation and planning of working time within the Directive's limits, they have to count their employees' on-call time fully as working time.
- (ii) Regarding the treatment of '*standby time*': the Court also held in *SIMAP* that 'stand-by time', where a worker is on duty to provide services if called, but is not obliged to remain present at the workplace, and may (for example) remain at home or at another place of his or her choosing, does not have to be counted integrally as working time under the Directive: in such cases, only time spent in responding to a call received is to be counted as working time.

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<sup>6</sup> See Case C-19/04, *Dellas* [2005] ECR-I-10253, paras 40-41 and 49, and the case law cited at that passage; similarly regarding paid annual leave, Case C-124/05, *FNV*, para 28.

(iii) Regarding the timing of '*compensatory rest*'. Under the Directive, minimum daily and weekly rests may be delayed in whole or part, but only on condition that the missed rest hours are made up in full afterwards. The Directive does not, however, specify within what time frame that should be done. The CJEU held in its *Jaeger* judgment that this 'equivalent compensatory rest' has to follow on immediately after the extended shift concerned. For workers, this means that they are entitled to rest time immediately after serving the prolonged working hours, so that they can recover from the work performed and get fit for future work. For employers, it means that they have to grant their employees who performed extended working hours the equivalent compensatory rest immediately afterwards, which has consequences for the organisation and the planning of their workforce.

A number of Member States, in the period following the SIMAP and Jaeger judgments, introduced legislation providing for the use of the 'opt-out' derogation<sup>7</sup> in activities requiring 24-hour availability where 'on-call' time was a particular feature - often in the specific case of public health and/or care services. Any derogation should respect and be implemented in conformity with the Charter of Fundamental Rights<sup>8</sup>.

Member States transpose the Directive very differently. In certain Member States working time rules across the economy are normally fixed by collective agreements, which vary according to the sector of activity. In others, legislation fixes basic rules but collective agreements are also very important in many sectors. In some MS, specific working time rules are fixed by sectoral legislation – notably for the public health sector. This is particularly true for the public sector, where specific sectoral or sub-sectoral legislation can be very extensive and complex.

### ***The 2004-2009 proposal for legislative change***

During the period 2004-2009, there were extensive discussions in Council and Parliament on a Commission legislative proposal which would have made a number of changes to the Working Time Directive.

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<sup>7</sup> The 'opt-out' is a derogation contained at Article 22.1 of the Working Time Directive whereby a Member State may choose to permit an employer to ask an individual worker for their agreement to voluntarily work hours exceeding the limit set by the Directive (of 48 hours per week on average.) For full information, see SEC 2010 1611, chapter 5.

<sup>8</sup> Article 52 of the Charter provides that any limitation on the exercise of the rights and freedoms recognised by this Charter must respect the essence of those rights and freedoms and that limitations may be made only if they are necessary and genuinely meet objectives of general interest recognised by the Union or the need to protect the rights and freedoms of others.

The proposal tabled by the Commission was based on a review and consultations which focussed on four particular issues left unresolved by the existing legislation or by jurisprudence. Two of the main issues (the 'opt-out' derogation and the reference period for calculating working time limits) were ones on which the Directive itself required a review within the decade after its adoption. The other two issues (the treatment of 'on-call' time and the timing of compensatory rest) were ones where the Commission had received numerous requests to clarify the application of the Directive following the Court of Justice's interpretation in the *SIMAP* and *Jaeger* cases.

In particular, the original proposal sought:

- (i) to either abolish the individual opt-out from the 48-hour rule progressively, or subject it to extra protective conditions and a stringent review clause;
- (ii) to treat on-call time differently from normal working time, by distinguishing between active and inactive periods at the workplace;
- (iii) to allow for more flexibility in the timing of compensatory rest (to be provided within a 'reasonable period');
- (iv) to allow the reference period for the averaging of weekly working time to be extended to a maximum of 12 months by law (and not only by collective agreement as in the current Directive).

The discussions on this proposal between the two institutions failed at conciliation stage in 2009.

### ***The current review of the Directive***

The President of the European Commission announced in 2009 that the Commission would make a new proposal to amend the Working Time Directive, following a two-stage consultation of the social partners under Article 154 TFEU and a comprehensive impact assessment.

The Commission launched [a first stage consultation paper of the European social partners in March 2010](#)<sup>9</sup> which provided a clear overview of the main terms which are relevant to the review and their legal implications (e.g. on-call time, stand-by time, compensatory rest, autonomous workers, application per-contract or per-worker, opt-out). This paper asked whether the social partners considered that there was a need for change, and if so, what should be its scope.

[The Communication launching the second stage consultation of the European Social Partners in December 2010](#)<sup>10</sup> summarised the replies received from European social partners, and concluded

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<sup>9</sup> COM (2010) 106, 24.03.2010

<sup>10</sup> COM (2010) 801 and SEC (2010) 1610, 21.12.2010

that there was indeed a need for change. It set out a number of different themes on which some or all social partners wanted to see change, and put forward possible options on each of those themes.

In parallel with the consultation process, the Commission also began work on assessing the impact of the current rules, and of possible changes. The Commission published, and made available to the European social partners as part of the second stage consultation, a number of evaluation studies and reports focusing both on legal and socio-economic aspects:

- *a detailed report by the Commission services on the legal implementation of the current Directive*<sup>11</sup>, published in 2010 and which sets out the Directive's requirements, as interpreted by the Court of Justice's judgments until late 2010, for each of the Directive's key themes and provides a detailed account of the transposition of the Directive in the Member States,
- *a study by external consultants on the social and economic impact of existing working time rules (which included specific chapters on the impact in practice on public health and care services in Member States of the SIMAP-Jaeger rulings, and of the use of the 'opt-out')*,<sup>12</sup>
- *several other studies published on different aspects of working time organisation in the EU, by the Commission, Eurofound and other organisations* .

In reply to the second consultation, the main cross-sectoral social partners (BusinessEurope, ETUC, CEEP and UEAPME) indicated in May 2011, their interest in negotiating between themselves a review of the Directive, with the aim of reaching an agreement which could be implemented by a Council directive under Article 155 TFEU. Their negotiations were formally launched by a joint letter to Commissioner László Andor on 14 November 2011. The Commission therefore suspended its impact assessment work, out of respect for the autonomy of the social partners' negotiations.

However, after a series of meetings from December 2011 onwards, the social partners announced the blockage of their talks in December 2012. After exploratory contacts and meeting the main negotiators, Commissioner László Andor concluded in February 2013 that the negotiations were definitively ended.

It therefore falls to the Commission to pursue its review of the Working Time Directive. The Commission wishes to complete its preparatory work with a thorough impact assessment of a range of possible options for the review. This public consultation aims at contributing to the current review and impact assessment.

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<sup>11</sup> COM (2010) 802 and SEC (2010) 1611, 21.12.2010

<sup>12</sup> Study to support an impact assessment on further action at European level regarding Directive 2003/88/EC and the evolution of working time organisation, Deloitte, 2010