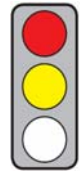


MAIN ISSUES

Objective of the Communication: The Commission wishes to review the Working Time Directive and calls upon the European social partners to deliver their opinion on certain issues.

Parties affected: All public and private employers, all workers.



Pro: The Commission is also considering options for relaxing EU law regarding working time.

Contra: (1) In general, the Commission should leave the regulation of working time to the social partners' and Member States' discretion. This holds especially true when it comes to dealing with on-call time.

(2) Under no circumstances is the right of Member States to allow for longer working times (opt-out) to be abolished.

(3) Exemptions from the rule to calculate the average weekly working time should not be restricted to collective agreements only, but must also be adjustable according to national statutory rules.

CONTENT

Title

Communication COM(2010) 106 of 24 March 2010: **Reviewing the Working Time Directive**

Brief Summary

► General

- The Commission is planning a comprehensive review of the Working Time Directive (2003/88/EC), despite the failure of its last Amendment Proposal [COM(2005) 246, see [CEP Policy Brief](#) in German only].
- Based on a questionnaire, the Commission intends to undertake a full-scale consultation of the social partners (workers and employers associations) at European level, in order to clarify whether the social partners also consider a review of the Working Time Directive to be necessary and, if so, what such a review could look like.
- According to the Commission, there are numerous reasons in favour of a comprehensive review of the existing Directive. The Commission is mainly focussing on:
 - trends in the working world,
 - the rules on the maximum working time,
 - dealing with on-call time,
 - calculating the average weekly working time and
 - determining rest periods.

► Trends in the working world

- According to the Commission, since the issue of the Working Time Directive, in the last 20 years the world of work has undergone fundamental changes, in particular with regards to the overall length and distribution of working time.
- The main changes are:
 - A general reduction in the total weekly working time: the average number of weekly working hours has decreased from 39 hours (in 1990) to 37.8 hours (in 2006).
 - A "polarisation" of working time: the share of part-time workers has increased from 14% (in 1992) to 18.8% (in 2009), while 10% of all workers still work more than 48 hours a week and nearly 7% of all employees work in multiple jobs.
 - A "de-standardisation" of working time: the variation of working times has increased tremendously, in particular through the greater use of flexitime models and time banks as well as longer periods in calculating the average working time.
- The Commission sees the reasons for these developments lying mainly in the shift from manufacturing to services, the rise in productivity due to technological progress, the growth of female participation in employment and the increasing individualisation of lifestyles.
- In view of further technological developments and the transition to a knowledge-based society, the Commission forecasts further structural changes in the way work is organised. In particular, improved information and communication technologies "may reduce the need for physical presence at a centralised work location and promote more mobile and autonomous types of work (tele-working, nomadic working)" (p. 3).
- Moreover, the Commission concludes that in future working-time management will require much more flexibility if companies wish to remain competitive.

► **Rules on maximum working time**

- Currently the maximum working time is set below 48 hours; however, Member States and social partners are free to allow or agree to more than 48 hours a week (so-called “opt out”).
- Self-employed persons are exempted from the maximum working time rule.
- Five Member States apply the opt-out to all economic sectors, while a further ten Member States apply it to individual sectors only. In 2005, only 0.6% of workers in the EU worked both more than 48 hours a week on average at the same time as doing multiple jobs.
- The opt-out rule is controversial and deemed insufficient by many.
 - On the one hand, the abolishment of the opt-out rule is being demanded for health and safety reasons and to make the maximum working time binding for everyone;
 - On the other hand, workers are to be allowed to exceed the maximum working time voluntarily.

► **Dealing with on-call time**

- In default of concrete provisions, the European Court of Justice has ruled that the Working Time Directive should be interpreted such that on-call time periods must be counted fully as working time, even when no work is actually carried out [Case C-303/98 (SIMAP), C-151/02 (Jaeger) and C-14/04 (Dellas)].
- Such jurisdiction poses major problems for health institutions, nursing and emergency services such as fire services and the police. According to the Commission, the maintenance of 24-hour-services can be ensured in different ways:
 - One could continue to count the entire on-call time as working time and would have to employ more staff. However, the Commission stresses that this approach would soon meet its limitations as it would jeopardise the financing of individual enterprises and because in certain sectors there is already a huge lack in professionals.
 - Alternatively, individual rules on on-call time could be adopted counting working time only if the worker is actually performing actively.
 - On-call times could also be generally exempted from the rule on maximum working time and left to the social partner’s discretion.

► **Calculating the average weekly working time**

- When calculating the average weekly working time the statutorily prescribed reference period is normally four months and six months for certain activities. In exceptional cases the reference period may be extended to twelve months by collective agreement.
- Through the restriction of exceptions to collective agreements, small and medium-sized enterprises (SME) in which there is no collective bargaining system, together with companies and sectors from Member States, feel disadvantaged.
- One solution could be if national statutory rules were also to allow a twelve-month extension. However, the Commission argues that “longer reference periods may be seen as encouraging long-hours working over a prolonged period”, with subsequent negative consequences for health and safety at work and for the reconciliation of work and family life (p. 9).

► **Determining rest periods**

- Currently, some or all minimum rest periods may be delayed, provided that all missed minimum rest hours are fully compensated for later. According to the jurisprudence, these compensatory rest periods should be taken as soon as possible. Any missed daily rest period should be taken immediately after an extended shift/working time.
- According to the Commission, these rather flexible provisions are not undisputed:
 - In the interests of health and safety at work, daily or weekly minimum rest periods “should always be taken promptly; or at the very least, delayed to the minimum extent possible” (p. 9).
 - However, more flexibility is being called for in the designing of work and compensatory rest periods, primarily in sectors with 24-hours services.

► **Commission’s questionnaire to social partners (p. 10)**

- How can the working time be organised in a “balanced and innovative” way? What should be the long-term vision for the organisation of working time?
- What impact have changes in the working world had on the application of the Directive?
- What is the overall functioning of the Working Time Directive? What has been your experience regarding working time, on-call time, the calculation of the average weekly working time and rest periods?
- Is the analysis contained in this paper appropriate as regards the organisation and regulation of working time? Are there any issues which should be added?
- Should the Commission launch an initiative to amend the Directive? If so, are the objectives of a review as set out appropriate? What should be the scope of the review?
- Should the the EU, apart from the Directive Amendment, take any further non-legislative action? If so, what form of action should be taken and on which issues?
- On which issues should a debate be initiated between the social partners (Art. 155 TFEU)?

Changes Compared to the Status Quo

Currently not foreseeable.

Statement on Subsidiarity

The Commission does not address the issue of subsidiarity.

Policy Context

The current initiative represents another attempt by the Commission to undertake a review of the Working Time Directive. An Amendment Proposal [COM(2004) 607] already submitted in 2004 met with considerable resistance, which is why the Commission submitted a revised Proposal [COM(2005) 246, see [CEP Policy Brief](#) in German only] in 2005. However, this Proposal failed in the conciliation committee due to insurmountable difficulties between the European Parliament and the Council, in particular regarding the calculation of the average working time and the proposal by the European Parliament to delete the “opt out” when determining maximum working times.

Options for Influencing the Political Process

Leading Directorate General:	DG Employment, Social Affairs and Equal Opportunities
Consultation procedure:	Not applicable.

ASSESSMENT

Economic Impact Assessment

Ordoliberal Assessment

Although **health and safety at work** – the central idea of the Working Time Directive – are important political aims, they **do not justify an EU-wide harmonisation of working times**. Naturally statutory maximum limits are not harmful per se, but they are only justifiable if workers are in a weaker bargaining position than employers, for instance due to a low coverage of collective agreements. **Since the bargaining power of workers varies significantly** between Member States, and even between different business sectors, **the Member States should decide if and which statutory rules on working time should be adopted**.

This is supported by the fact that currently more than half of the Member States use the opt-out option in different ways; this is not the only reason why current statutory rules are very heterogeneous. For instance, in Finland the average maximum weekly working time is 40 hours, whereas in France it is 44 hours. In Portugal, the average weekly working time may even climb up to 50 hours. (Source: EURES) These differences are not really surprising considering the fact that working time offers a possibility to compensate for disadvantages in productivity without at the same time having to give up income and therefore consumption.

Abolishing the opt-out option and introducing a mandatory maximum working time for all Member States, as suggested in the Communication, would discriminate against economically weaker Member States and against less productive workers. Therefore, **the Member States’ right to provide for longer working hours should remain in force**. Should in individual business sectors or Member States the bargaining power between workers and employers be out of balance, Member States can take appropriate measures. **Such binding limits would then be shaped towards the needs of individual business sectors and would thus take much better account of the local circumstances than would an EU-wide harmonisation**.

The same holds true for dealing with on-call time. Whether or not and **to which extent on-call time is considered working time should be negotiated between the social partners or by way of individual contracts**. The fact that this affects mainly positions in public administration, such as the police and the fire brigade, and academics, reduces the risk that workers’ interests are not considered. Besides, workers are normally aware of the fact that certain jobs require more on-call time than others before choosing their profession; a worker will weigh up beforehand the wage against the burden of being on-call. Therefore, it makes sense to exclude on-call services from the Working Time Directive.

The exemption rule for calculating the average weekly working time should definitely be revised. It discriminates **against both enterprises not represented by the social partners – primarily small and medium-sized enterprises – and companies in countries without collective bargaining**, as it restricts their flexibility. The subsequent distortion of competition to the advantage of companies participating in the collective bargaining system should be eliminated as quickly as possible. In future, Member States should have the choice to prolong the reference period through national statutory provisions. The Commission’s argument that longer working hours would have a negative impact on safety and health is not comprehensible, since companies of the collective bargaining system are already entitled to do this.

Impact on Efficiency and Individual Freedom of Choice

A tightening of the Working Time Directive would lead to a situation in which many workers would have to work much more at the same time as earning less than desired. Thus workers would be restricted in their

freedom of choice. It would be better to dispense with the existing rule/exemption relationship regarding maximum working time and the opt-out option and to aim at decentralised solutions instead.

Impact on Growth and Employment

A reduction in average working time would have a negative impact on gross domestic product (GDP). Consequently, a further working time reduction would lower economic growth. A relaxation of the rules would, on the other hand, set positive growth impulses.

Moreover, working time is closely related to macroeconomic indicators such as the unemployment rate. For instance, a reduction in working time for the same pay would lead to increased labour costs, which could, in the worst case, lead to lay-offs. How strong such a correlation is varies from Member State to Member State. So **there is the risk that an EU-wide harmonisation of working time rules might lead to employment hostile upheavals in the job market** in several Member States. This aspect is not addressed even remotely in the present Communication.

Impact on the Quality of Europe as a Business Location

Working time regulations make Europe a less attractive business location for potential investors. An improvement of business location quality is possible if individual and collective agreements prevail over the existing rules on working time.

Legal Assessment

Legislative Competence

The content of the Commission's proposals are covered by Art. 153 (1) TFEU. The hearing of the social partners is the first phase pursuant to Art. 154 TFEU.

Subsidiarity

The provisions on working time regulation that are to be amended are of European origin. Therefore only EU action is legitimate. However, even the existing Directive infringes the principle of subsidiarity: **There is neither a cross-border issue at hand nor are there any impediments imposed upon the single market by different national regulations.**

Proportionality

Unproblematic.

Compatibility with EU Law

Unproblematic.

Compatibility with German Law

Unproblematic.

Alternative Approach

Appropriate would be to support the individually agreed rules and agreements of the national social partners and to restrict state regulation at the level of the Member States.

Possible Future EU Action

It is to be expected that the Commission will publish a legislative proposal, irrespective of the social partners' reactions. The Commissioner in charge of employment and social affairs, László Andor, already announced this during a hearing before the European Parliament. However, whether or not the intended review of the Working Time Directive can actually be implemented is questionable. Negotiations on the first Commission's Proposal on the revision of the Working Time Directive have already failed due to the pros and cons of the review, in particular due to the opt-out rule and the way in which call-on time was dealt with.

Conclusion

A harmonisation of the rules on working time is generally not acceptable and, above all, infringes the principle of subsidiarity. Under no circumstances are Member States and social partners to lose their right to allow for longer working time (opt-out). Whether or not and to which extent on-call time is to count as working time should be negotiated between the social partners or by way of individual contracts. The provision ruling that exemptions in calculating the average weekly working time are reserved for companies participating in the collective bargaining system discriminates against companies not tied to a collective bargaining system, especially SME, and against countries without a collective bargaining system; national exemption rules must be made possible.