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# What to do with the Working Time Directive?

## Revision or abolition

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- Following several judgements by the ECJ, the existing Working Time Directive has become obsolete.
- The EU Commission's previous attempts at revision have all failed, a future reform also seems unrealistic.
- EU rules on the remuneration of on-call duty are in breach of the principle of subsidiarity.
- The Working Time Directive should therefore be abolished.

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# 1 Introduction

Whilst the economic situation in many Member States - with the extreme exception of Greece - is once again moving in a positive direction, the unemployment figures are still high in lot of places. Some of the blame for this lies not least with the frequently rigid labour markets of some Member States. Using the general term of structural reforms, the European Commission therefore recommends, this time in the form of employment and economic policy guidelines, that Member States undertake regular labour market reforms.[1] The guidelines, however, contain only very vague suggestions for improvement of policy in the Member States. This reflects the distinctly limited competence of the EU in this area since regulating the labour markets is a core task of economic policy in the Member States. There are nevertheless numerous labour law provisions at European level, particularly those aimed at protecting the health of employees.

This legislation includes what is known as the Working Time Directive.[2] It came into force in 1993 and had to be implemented by the Member States by 1996.[3] It was revised for the first time in 2000.[4] The aim of the revision was to extend the scope to include the transport sector and trainee doctors.[5] In the meantime, the European Court of Justice (ECJ) has also concerned itself with the Directive and consolidated parts of it. The European Commission has been attempting to revise the Directive since 2004 in order to adapt it to this new case law - always without success.

The Commission again began a comprehensive examination of the Working Time Directive and held a public consultation in this regard. The aim of the consultation was to gauge public opinion and expectations and to analyse what changes to the Working Time Directive might be necessary.[6]

This cep**Input** will examine whether and how the EU Commission should revise the Working Time Directive.

# 2 Main provisions of the current Working Time Directive

The Working Time Directive stipulates minimum requirements for protecting the health and safety of employees. Of particular importance are the provisions on the weekly maximum working time, the daily and weekly minimum periods of rest and break times.[7] The provisions of particular relevance, namely those on maximum working time and minimum rest periods, are briefly described below.

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1 EU Commission, Proposal COM(2015) 98 of 2 March 2015 for a Council Decision on guidelines for the employment policies of the Member States; EU Commission, Recommendation COM(2015) 99 of 2 March 2015 for a Council Recommendation on broad guidelines for the economic policies of the Member States and of the Union.

2 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.

3 Art. 18 (1) (a) Directive 93/104/EC.

4 Directive 2000/34/EC of the European Parliament and of the Council of 22 June 2000 amending Council Directive 93/104/EC concerning certain aspects of the organisation of working time to cover sectors and activities excluded from that Directive.

5 Applicable in the transport sector from 1 August 2003 and to trainee doctors from 1 August 2004, Art. 2 (1) Directive 2000/34/EC.

6 Public consultation on the review the Working Time Directive from 1 December 2014 to 18 March 2015, available for download at http://ec.europa.eu/social/main.jsp?catId=333&consultId=14&visib=0&furtherConsult=yes&langId=en.

7 Art. 1 (1) Directive 2003/88/EC

## 2.1 Maximum weekly working time

In principle, the maximum average weekly working time of an employee - including overtime - is not permitted to exceed 48 hours.[8] The Member States may, however, permit the maximum average weekly working time to be exceeded under certain conditions (so-called "opt-out").[9] The condition for claiming the opt-out is that every employee has to consent to overtime and will not be subjected to any detriment if he does not agree to perform overtime.[10] In order to calculate the maximum weekly working time, Member States may provide for a reference period of up to four months.[11] With regard to certain activities and sectors - particularly those in which continuity of service is required such as healthcare facilities, care and emergency services - the reference period may be extended up to a maximum of six months by way of legal and administrative provisions, collective agreements or agreements between the social partners.[12] The Member States may also permit an extension of the reference period up to a maximum of twelve months, in all sectors, by collective agreements or agreements between the social partners.[13]

## 2.2 Minimum rest periods

Every employee must be allowed a minimum daily rest period of 11 consecutive hours and a minimum weekly rest period of 35 consecutive hours. In addition, a rest-break must be granted for daily working time over six hours. Details will be determined by way of collective agreements or agreements between the social partners.[14] Derogations are possible - under certain conditions - by way of collective agreements or agreements between the social partners.[15]

## 2.3 Interpretation of the Working Time Directive by the ECJ

The ECJ has expressed its opinion in particular in relation to on-call duty and the opt-out as well as regarding reference periods and rest periods. The case law relating to on-call services, as expressed in the cases of SIMAP, Jaeger and Dellas, carries particular weight because the Directive contains no provisions in this regard.

**SIMAP** (2000): In the case of SIMAP[16], the ECJ found, in particular, that the entire period of on-call duty in the workplace must be classified as working time irrespective of whether the employee was actually deployed by the employer. This arises from the fact that the employee must be present and available at the workplace in order to perform his/her work. Whether work was actually performed is irrelevant in this regard. The ECJ distinguishes this from being on stand-by where the employee must be permanently accessible but does not need to be present at the workplace. Since, in this case, the employee is freer to manage his/her own time and interests, only that time in which work was actually carried out for the employer should be included as working time.[17]

**Jaeger** (2003): The case of Jaeger[18] confirmed the SIMAP Judgement: The classification of on-call duty as working time arises from the obligation to be present at the workplace. The ability to rest or sleep during that time is irrelevant. In addition, the employee is subject to greater restrictions

[8] Art. 6 Directive 2003/88/EC.
[9] Art. 22 Directive 2003/88/EC.
[10] Art. 22 (1) (a) and (b) Directive 2003/88/EC.
[11] Art. 16 (1) (b) Directive 2003/88/EC
[12] Art. 17 (3) and Art. 19 (1) Directive 2003/88/EC.
[13] Art. 18 and Art. 19 (2) Directive 2003/88/EC.
[14] Art. 3 and 4 Directive 2003/88/EC
[15] Art. 17 and 18 Directive 2003/88/EC
[16] Judgement SIMAP, C-303/98, ECLI:EU:C:2000:528.
[17] Judgement SIMAP, ECLI:EU:C:2000:528, para. 48 et seq.
[18] Judgement Jaeger, C-151/02, ECLI:EU:C:2003:437.

than if he were merely on stand-by because he is apart from his family and social environment and has less freedom to manage his "inactive" time.[19]

**Dellas** (2005): In the case of Dellas, the ECJ found in relation to on-call duty that systems of equivalence which stipulate a ratio[20] between the periods of attendance and the actual working time credited, are unlawful because the Directive does not provide for any intermediate category between working time and rest periods, and the intensity of the work performed is not one of the characteristic elements of working time. The fact that on-call duty includes periods of inactivity is immaterial for the calculation of working time.[21]

# 3 Attempts to revise the Working Time Directive since 2004

## 3.1 Legislative approach

In 2004, the European Commission proposed an amending Directive.[22] One important aim was to insert definitions of on-call duty and inactive periods during on-call duty and to distinguish inactive periods from working time.[23] The European Parliament gave its opinion in a first reading and proposed amendments to the Directive which the European Commission took into account in an amended proposal.[24] The discussions between the European Parliament and the Council failed in 2009, however, after protracted negotiations in the conciliation procedure.

## 3.2 Approach based on dialogue between the social partners

Following the failure of the legislative process, the European Commission initiated a dialogue between the two sides of industry in the hope of finding common ground which could be laid down in agreements and declared binding at the joint request of the social partners.[25]

The European Commission introduced the first phase consultation of the social partners[26] with a Communication reviewing the Working Time Directive in which it questioned the social partners about the need for a revision and its extent. [27,28] The second phase consultation of the social partners[29] took place by way of another Communication from the European Commission in which it summarised the opinions of the two sides of industry and presented various options for revising the Working Time Directive.[30,31] In May 2011, the EU social partners informed the European

[19] Judgement Jaeger, ECLI:EU:C:2003:437, para. 49, 60, 65.
[20] In this case, a 3 to 1 ratio for the first nine hours and a 2 to 1 ratio for subsequent hours.
[21] Judgement Dellas, C-14/04, ECLI:EU:C:2005:728, para. 33, 43, 45, 47, 50.
[22] European Commission, Proposal COM(2004) 607 of 22 September 2004 for a Directive of the European Parliament and of the Council amending Directive 2003/88/EC concerning certain aspects of the organisation of working time.
[23] Cf. Proposal COM(2004) 607 of 22 September 2004, p. 4 et seq.
[24] Amended Proposal of the European Commission COM(2005) 246 of 31 May 2005.
[25] Art. 155 TFEU
[26] Art. 154 (2) TFEU.
[27] European Commission, Communication COM(2010) 106 of 24 March 2010, Reviewing the Working Time Directive (first-phase consultation of the social partners at European Union level under Article 154 of the TFEU).
[28] A summary and assessment is provided by: Sohn and Kullas, in: Working Time Directive, cepAnalyse, Centrum für Europäische Politik, Freiburg of 15 May 2010, available online at: http://www.cep.eu/Analysen_KOM/KOM_2010_106_Arbeitszeitrichtlinie/cepPolicyBrief_KOM_2010_106_Working_Time_Directive.pdf (last accessed on 5 March 2015).
[29] Art. 154 (3) TFEU.
[30] European Commission, Communication COM(2010) 801 of 21 December 2010, Reviewing the Working Time Directive (second-phase consultation of the social partners at European Union level under Article 154 of the TFEU).
[31] A summary and assessment is provided by: Sohn, in: Working Time Directive 2nd Phase Consultation of the Social Partners, cepAnalyse, Centrum für Europäische Politik, Freiburg of 14 March 2011, available online at:

Commission that they wanted to negotiate the revision of the Working Time Directive themselves. The negotiations officially began in November 2011 but were declared to have failed in February 2013 due to irreconcilable differences.

# 4 Assessment

The ECJ closed the loophole relating to on-call duty by making it mandatory for on-call duty in the workplace to be classified as working time in all cases. Exemptions under works agreements or collective agreements or at national level are not possible. The ECJ considers it to be immaterial whether the employee is able to rest without interruption for much of his on-call duty or whether he is mainly working. This result of this ruling is inappropriate because on-call duty needs to be classified separately and differently in order to take account of the true situation. Thus hospital doctors who are on call are required to work much more often than members of a plant fire brigade. The appropriate solution would be to have collective or works agreements stipulating which on-call duties are to be classified as working time and to what extent. Such agreements should be concluded at a decentralised level to take account of regional differences.

For these reasons, the Commission rightly wanted to add flexible provisions relating to on-call duty to the Directive. The basic question which arises to begin with, however, is whether it should in fact be the Member States rather than the EU who should lay down statutory rules for on-call duty.

## 4.1 Breach of the Principle of Subsidiarity

Whilst the EU does have the competence to adopt minimum requirements for working conditions and the health and safety of employees,[32] it can only use this competence if, in line with the principle of subsidiarity, regulation at EU level is preferable to action by the Member States.[33] This would be the case "if and in so far as the objectives of the proposed action cannot be sufficiently achieved by the Member States, either at central level or at regional and local level, but can rather, by reason of the scale or effects of the proposed action, be better achieved at Union level".[34] A cross-border element to the situation being regulated is therefore generally required. This requirement is not met in relation to regulating on-call duty due to the purely national nature of the labour markets. In particular, individual action by Member States has no negative external impact on the labour markets of the other Member States.[35] Thus uniform EU legislation relating to on-call duty is in breach of the principle of subsidiarity.

## 4.2 Impracticability of Reform of the Working Time Directive

The failure of previous attempts at reform and of the dialogue between the EU social partners shows that another attempt at revising the Working Time Directive would also face major political challenges[36] because the basic conditions have not changed. Whether a compromise can be found which takes full account of the case law of the ECJ - which at least impinges upon the primacy of

http://www.cep.eu/Analysen_KOM/KOM_2010_801_Arbeitszeitrichtlinie_2._Phase/cepPolicyBrief_KOM_2010_801_Working_Time_Directive_2nd-phase.pdf (last accessed on 5 March 2015).

[32] Art. 153 (1) (b) and (c) TFEU.

[33] Art. 5 (3) TEU.

[34] Art. 5 (3) TEU.

[35] Cf. Czuratis and Sohn, in: "Reviving the Principle of Subsidiarity", cepInput No. 04/2015, Centrum für Europäische Politik, Freiburg, last accessed on 11 March 2015 at (http://www.cep.eu/Studien/cepInput_Subsidiaritaet/cepInput_Reviving_the_Principle_of_Subsidiarity.pdf).

[36] Thus the United Kingdom did not approve the proposal for a Directive in 1994 and brought an action in the ECJ while the transposition period was still running. As a result the ban on working on Sundays was lifted.

politics - is more than doubtful. And even if a compromise were to be found, it would at best be based - as the past has shown - on the lowest common denominator of the diverging interests of the Member States.

## 4.3 Recommendation: Abolish the Working Time Directive

These considerations can lead to only one conclusion - though it is one which seems politically very difficult to implement: the European Working Time Directive must be abolished. There are three reasons why it is appropriate to do away with the Working Time Directive without substitution.

(1) The uncontroversial points have already been implemented in the Member States and would basically remain in place in most of them even if the Working Time Directive were abolished.
(2) The principle of subsidiarity would be upheld because the matters governed by the Directive can be handled better at national level - whether by legislation or between the national social partners; both of which are better able to accommodate national differences.
(3) The primacy of politics would be maintained and the ECJ's role as "lawmaker by the back door" restricted. Although the courts are responsible for closing regulatory loopholes, judicial solutions should also correspond with the objective requirements which in this case, as we have shown, they do not.

Abolition without substitution is therefore the logical answer to the question of how the Working Time Directive should be reformed. As the result of the first phase consultation of the social partners in 2010 showed, however, the "large majority of EU social partners" called[37] for minimum standards to be retained at EU level. Although, this statement was made by the social partners before their dialogue broke down. Whether, in view of current tensions at European level, the social partners would still be opposed to individual solutions at national level is certainly questionable. This option should therefore at least be discussed.

[37] Cf. European Commission, Communication COM(2010) 801, p. 9.

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