



CPME/AD/Brd/270304/040/EN/fr

At its Board meeting, Brussels, March 27th, 2004, the CPME adopted the following policy : Revision of the European Working Time Directive (CPME 2004/040 Final EN/fr)

Revision of the European Working Time Directive

See also documents CPME 2003/176 and CPME INFO 05-2004

Background

On 5 January 2004, the European Commission gave out its Communication on the re-examination of certain aspects of the organisation of working time. Originally, this report should have studied only two aspects of the European Working Time Directive (EWTD): the length of the reference period and the possibility for the so-called individual opt-out. However, the recent judgements of the European Court of Justice made it necessary for the Commission to also take up the definition of working time in the report.

The Communication launched a wide-ranging consultation process capable of resulting in a possible amendment of the Directive. The Communication was aimed at the European bodies and social partners, but also to all interested organisations. The deadline of the consultation is 31 March 2004.

Content of the Communication

In its Communication (CPME Info 05-2004), the Commission introduces the main questions and describes the current situation in Member States. The Communication discusses positive and negative sides of the specific EWTD articles and ECJ judgements, but does not give any proposal for possible solutions. Instead, the Commission asks the replying parties for answers to the following questions:

- 1) The length of the reference period
- 2) Definition of working time - the Court of Justice's interpretation of the concept of *working time* in the SIMAP and JAEGER cases
- 3) Individual opt-out - conditions of application of article 18.1 b) i)
- 4) Measures aiming at improving the reconciliation between work and family life
- 5) Whether an interrelated approach to these issues would allow for a balanced solution capable of meeting the criteria set above.

Opinion of the European Parliament

The European Parliament assigned the Spanish MEP Alejandro Cercas to draft its report on the Communication. The Cercas report was originally quite critical towards the Commission and the United Kingdom. However, in the EP Plenary vote on 11 February, some of the provisions were deleted or modified so that the final EP opinion is somewhat softer.

The European Parliament:

- Calls on the Council to ask the Commission to consider an amended directive as soon as possible;
- Highlights the specific importance of addressing the problems relating to availability and financing in the health sector arising from the Court of Justice's interpretation of the concept of working time in the SIMAP and Jaeger cases;
- Calls on the Commission to advance the formal process of social partner discussion ... as a means of facilitating agreement and a possible resolution of the issues raised by the Court's judgments regarding the definition and calculation of 'on-call stand-by' hours at the workplace and the period within which the compensatory rest period must be granted;
- Looks to the Commission to refrain from taking any initiatives serving to 'renationalise' the European Working Time Directive;
- Calls for the revision, with a view to the phasing-out, as soon as possible, of the individual opt-out provided for in Article 18(1)(b)(i);
- Calls on the Member States to await a revised version of the directive and not to make excessive use of the derogation provided for in Article 18(1)(b)(i) and not to misuse it to cater for the apparent problems caused by the Court of Justice's interpretation of working time for on-call stand-by hours at the workplace in the health-care and other sectors;
- Suggests that the Member States exchange information about already existing models and schedules that deal with stand-by service without conflicting with the normal rules of the directive;
- Urges the Member States, together with the social partners in the relevant sectors, seriously to look for alternative solutions within the scope of the directive, which provides for other flexibility options that do not completely do away with any limitation on working hours and continue to provide for adequate protection;
- Calls on the Commission and the Member States to promote an exchange of information about good practice within already existing models, which would highlight the scope for dealing with work-organisation problems resulting from the interpretation of the Court of Justice of working time for on-call stand-by hours at the workplace in the health sector by means of increasing recruitment, introducing new work practices and new patterns of working for different staff groups including, possibly, new ways of delivering health services, changing the number of medical rotas, developing multi-disciplinary teams, making more

effective use of information technology and the possible extension of roles for non-medical staff;

- Calls on the Commission in the next stage of consultation to bring forward as a priority concrete proposals, within the framework of Directive 93/103/EC, for a long-term and sustainable response to the problems raised by the Simap and Jaeger judgments;
- Calls on the Commission to produce an additional communication containing a specific and reasoned statement of its attitude regarding all the provisions of the directive that may need to be revised, to examine solutions to re-establish in the framework of a revision of the directive clear obligations on employers properly to measure working time, and to submit its views to Parliament for consultation as soon as possible.

In summary, the Parliament is critical towards the individual opt-out and calls for its phasing-out of the Directive. The Parliament recognises the difficulties raised by the ECJ definition of working time and calls for exchange of good practises on national level, but also recommends that the existing flexibilities in the Directive are used.

The opinion of the Council of Ministers (preliminary information)

On 4 March 2004, the Ministers for health and social affairs met in Brussels. The EWTD was discussed over lunch, and the discussion concentrated on the three key issues: reference periods, individual opt-out and definition of working time.

The Irish Presidency has proposed an extension of the reference period to one year to allow for more flexibility for employers. In general, delegations expressed satisfaction with this change.

The United Kingdom wants to see the opt-out clause kept on in the Directive, as British companies have widely used this provision which enables them to employ workers for longer than 48 hours a week, providing that the workers themselves have volunteered for the opt-out. There was general consensus that some sort of opt-out would be appropriate, but agreement on the exact definition of it could be far harder to reach.

Delegations agreed that there is a need to revise the definition of “working time”, but not what the new definition should be.

Positions taken by the PWG

In its October 2003 Plenary Assembly, the PWG decided on the following principles, which are expressed in the CPME 2003/176:

- 1) The opt-out clause should be deleted from the directive
- 2) The reference period for the 48-hours weekly limit should not be more than 6 months and should not exceed the length of the employee's contract
- 3) The time spent on call in hospital (on call/ de garde in the Jaeger case) has to be counted as working time, in accordance with previous ECJ decisions
- 4) The PWG is concerned that a widespread and unjustified use of on call off site (stand by/ astreinte in the Jaeger case) could be a masked and unfair form of opt-out clause.

Basis and proposal for CPME reply to the Commission consultation

1) Reference period

- Currently, the reference period for counting the average weekly working time is 4 months, which can be extended to 6 months by the Member State. By a collective agreement, it is possible to extend the reference period up to 12 months.
- The shorter the reference period, the more protective it is. A long reference period (e.g. 12 months) would make it possible for the employer to make the doctor work very long hours for many months, by giving compensatory rest in the latter part of the year. This could lead to doctors becoming over-tired, with consequences on patient safety.
- Particularly young doctors, in the beginning of their career, are often employed in short-term contracts and by different employers. The Directive leaves unsaid whether the time worked for different employers will be counted towards the same limit, or whether working time is studied separately for every employer. Therefore, it can and is interpreted liberally. With a 12-month reference period, if the doctor is employed in two 6-month contracts with different employers, the work intensity for both these employers can be very high, and the actual working time could far exceed the average 48 hours.
- However, the fact that the extension of the reference period to 12 months would only be possible via an agreement between the national or regional workers' and employers' representatives diminishes the danger of this possibility being abused. In some countries, doctors have chosen to use the 12-month reference period.
 - **A unilateral extension of the reference period from 6 months to 12 months should not be possible. The provisions of the EWTD concerning reference periods should therefore not be changed into more a liberal direction. In addition, the reference period should not be longer than the work contract.**

2) Definition of working time

- When a doctor is on-call at the hospital, he/she is required by his/her employer to be present at the working place and prepared to provide his/her professional services. The doctor is not at liberty to leave the hospital. In addition, during on-call the doctor is away from home and his/her family regardless of whether he/she is working actively the whole time or not.
- If the doctor is required to stay at the working place, there is clearly a reason for why the doctor's professional services are required rapidly. Therefore, being available on-site is part of the doctor's work.
- Even if the doctor could occasionally sleep during an on-call night, the sleep is fragmented by pages and calls. A period of fragmented sleep is not as refreshing as an equivalent period of continuous sleep, because the amount of deep sleep phases (S1-S2) is lower. Cardiac arrhythmias have been observed in doctors

who are suddenly woken up from sleep. Being on-call at night is physically demanding and can be harmful to the doctors' health.

- All these aspects considered, the logical conclusion is there should be no difference in the definition of normal work and on-call work.
- **The time doctors spend on-call at the working place should be counted working time as defined in the SIMAP and Jaeger judgements.**

3) Individual opt-out

- The possibility to opt out of the protection provided by Article 6 of the EWTD undermines the basic principle of the Directive. There is evidence that workers have been pressured to sign the opt-out form, and it is likely that the ones who can most easily be pressured are the youngest and most inexperienced of the workforce.
- The pressure can be direct or indirect; even if there were no direct pressure from the employer's side, the worker can be expected by others at the workplace to opt out.
- The purpose of the EWTD is to protect the health and safety of workers. In the case of doctors, there is a link between doctors' and patients' health. Doctors should be responsible for their own health and performance in order to protect their patients.
- **The possibility for individual opt-out for doctors in training should be abolished from the Directive.**

4) Measures aiming at improving the reconciliation between work and family life

- Reconciliation between work and family life is an increasing problem nowadays when the percentage of women in medical workforce is continually growing. Long working hours and night work that have been customary for doctors are not easy to combine with family obligations. If the work is not organised properly at the hospital, doctors are often expected to work more than they planned or would want. Therefore, the employer should have clear regulations on the basis of which the work in the hospital must be arranged.
- Within the EWTD, the most important ways to promote reconciliation between work and family life is to strengthen the protection afforded by Article 6 (maximum average working hours) by removing the possibility to opt out of this Article individually, as well as defining on-call work as working time.
- Possibility to work part-time is another important measure. The current EWTD does not have provisions on part-time work, but there are other Community instruments that regulate this aspect.
- **The answers to points 1-3 provide an answer to this point as well.**

5) Whether an interrelated approach to these issues would allow for a balanced solution capable of meeting the criteria set above

- It might be argued that abolishing the individual opt-out, strengthening the definition of working time and maintaining the current provisions on reference periods would not provide enough flexibility for employers or the health care system, and that some concessions should be given. There can also be legitimate worries on the availability of medical workforce. But while some member states have during the prolonged implementation period prepared for the provisions in the EWTD; others have not.
- Adaptation to the provisions in the EWTD means not only recruiting more medical staff, but also organising work in a way that consumes fewer working hours on call in hospital. This includes both organising on-call from home where possible and concentrating services where a doctor on call in hospital is necessary.
- In many countries, the medical profession has lost some of its attractiveness. The main reasons for this are intimidating working conditions and especially fears of long working hours. Young people prefer choosing other professions where they feel they have more autonomy and the possibility to combine work with family life.
- It is likely that, were the working hours made more sensible, more students would choose the medical profession than now. It is also likely that female doctors with small children would be able to resume work instead of staying at home with children. Therefore, strengthening the working time regulations should be seen as a positive recruitment factor.
- As proposed by the European Parliament, the Member States should exchange best practise models on implementation of the EWTD and especially the flexibilities provided now. The social partners at national level should be actively encouraged to study the possibilities for flexibility.
- The Jaeger decision on when to give the compensatory rest (immediately after the work period) is unclear: while the purpose of the decision is to protect the doctors, its lack of clarity makes the planning of organisation of work very difficult. The decision should be re-examined and more detailed, the best parties for this being the relevant social partners at European or national level.