

WORKING TIME DIRECTIVE

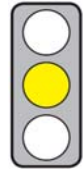
2ND-PHASE CONSULTATION OF THE SOCIAL PARTNERS

Status: 14 March 2011

MAIN ISSUES

Objective of the Communication: With its Communication the Commission launches the second-phase consultation of the social partners to review the Working Time Directive.

Parties affected: All companies and workers.



Pros: (1) More flexible working hours increase economic efficiency and shield the labour market from economic fluctuations.

(2) Retaining the opt-out enables economically weaker Member States to compensate for productivity disadvantages.

Cons: (1) The questions of which on-call time services count as working time should be decided by the social partners.

(2) EU-wide agreements for branches affected by on-call time services ignore the differences in productivity between Member States.

(3) The entitlement of workers who are sick the entire year to paid annual leave should be cancelled.

CONTENT

Title

Communication COM(2010) 801 of 21 December 2010: **Reviewing the Working Time Directive (second-phase consultation of the social partners)** at European level under Article 154 TFEU)

Brief Summary

► General

- Regarding the planned revision of the Working Time Directive (RL 2003/88/EC), the Commission has launched the second-phase consultation (pursuant to Art. 154 TFEU) of the social partners at European level (workers and employers organisations). The Communication contains the Commission's options and proposals.
- On the basis of the social partners' statements given during the first phase of the consultation, the Commission puts forward for discussion two options for reviewing the Working Time:
 - Option 1: Focus just on the regulations regarding the classification of on-call time services as working time and of compensatory rest for on-call work.
 - Option 2: A comprehensive review which includes the following issues:
 - greater working time flexibility;
 - consideration of the "work-life balance";
 - scope and sector-specific issues;
 - opt-out and
 - paid annual leave.

► Dealing with on-call time

- Basically, the Commission's aim is to establish a legal framework which allows local and sector-specific rules.
- The Commission wishes to include in the Directive a principle developed by the ECJ (C-303/98 "SIMAP" and C-151/02 "Jaeger") whereby any on-call time performed at work counts as working time.
- However, the Commission also shares the social partners' view that derogations from collective agreements should be possible where:
 - a workers' presence at work is provided for in the contract but their actual presence at work fluctuates or
 - workers reside at the workplace.
- For sectors in the EU affected by on-call time, the Commission also sees EU-wide negotiations as a possibility.
- On-call time not rendered at the workplace should only count as working time if workers' services are really enlisted.

► **Compensatory rest for on-call time**

- The Commission would like to see new regulations for compensatory rest.
- It appropriates the ECJ case law regarding daily rest periods (C-151/02 “Jaeger”), according to which, missed daily rest periods of 11 hours must be granted immediately after the extended work shift in the form of “equivalent” compensatory rest. The “legal position is not as clear” regarding missed weekly rest (p. 11).
- The Commission considers derogations possible but would like to see these restricted to situations in which more flexibility is “necessary for objective reasons”.
- With reference to the principle of subsidiarity, the Commission leaves the question of whether weekly rest periods should normally be granted on a Sunday or any other day up to the Member States to decide.

► **Greater working time flexibility**

- The Commission would like to see more working time flexibility. The aim is to
 - both boost productivity and competitiveness
 - and guarantee more effective protection against health and safety risks.
- The Commission is considering the following changes to the Working Time Directive “subject to appropriate health and safety protection where applicable”:
 - scope for additional flexibility to decide working time arrangements;
 - more flexible calculation of the average weekly working time; although in principle the reference period of four months in general and six months for certain activities is to remain in effect and this reference period can be extended to 12 months by collective agreements, the Commission wishes to make possible:
 - extensions beyond 12 months by collective agreements and
 - statutory extensions of the reference period to 12 months in sectors and Member States where the “opt-out” derogation is not in use.

► **Consideration of the “Work-Life-Balance”**

- The Commission advocates more flexible working time rules provided that they do not pose a “serious challenge” to workers.
- Therefore, the Commission suggests the following amendments to the Working Time Directive:
 - “encouraging” (p. 12) social partners to support the reconciliation of work and family life;
 - obliging employers to examine workers’ requests for changes to their working hours and patterns and to give reasons if and when refusing such requests.
 - obliging employers to inform workers well in advance of any planned changes to their working time.

► **Scope and specific sectoral problems**

- The Commission refuses to exclude wholesale certain professional groups (e.g. soldiers, voluntary firefighters) from the scope of the Directive. It justifies its decision with reference to the term “every worker” defined under the Charter of Fundamental Rights and backed up by ECJ ruling.
- The Commission raises the question of whether working time rules for “all road transport mobile workers regardless of the type of vehicle they drive” (p. 13-14) shouldn’t be better harmonized.

► **Opt-out**

- The existing statutory maximum average weekly working time is 48 hours; however, Member States may allow for higher working times (opt-out).
- The Commission considers the Unions’ call to abolish the opt-out unenforceable, as the majority of Member States uses this option. Therefore, it proposes:
 - retaining the opt-out;
 - improving the protection of workers subjected to the opt-out derogation and
 - in general, making the provisions under the Working Time Directive more flexible with the aim to reduce the utilization of the opt-out.

► **Paid annual leave**

- The Commission shares the social partners’ criticism of the ECJ ruling (C-350/06 “Schultz-Hoff” and C-520/06 “Stringer”) which held that a worker who is absent from work due to illness throughout the entire year or parts thereof is still fully entitled to paid annual leave in respect of that period.
- The Commission intends to allow Member States to set ceilings for paid annual leave entitlement for workers with long-term sickness to the statutorily required minimum paid leave entitlement of 4 weeks per year.

Statement on Subsidiarity by the Commission

The Commission does not address the issue of subsidiarity any further than mentioned above.

Policy Context

In 2004, the Commission submitted a Proposal [COM(2004) 607] to change the Working Time Directive (2003/88/EC), mainly in response to the ECJ ruling regarding the treatment of on-call time. When this Proposal met with strong opposition both in the European Parliament and in the Council, the Commission submitted a revised Proposal [COM(2005) 246; see [CEP Policy Brief](#), in German]. However, the European Parliament and the Council could not agree on this version either. In 2009, the Commissioner Andor (employment, social affairs and integration) announced that the revision of the Working Time Directive would once again be put on the agenda. Consequently, the first-phase of the consultation of the social partners at EU level was launched [COM(2010) 106; see [CEP Policy Brief](#)]. The survey was interested in hearing about experience with the existing Working Time Directive and opinions on which changes were deemed reasonable.

Taking into account the results of the first-phase consultation, the Commission has now (pursuant to Art. 154 (3) TFEU) launched the second-phase of the consultation. Within this phase, the Commission must consult the social partners with regard to the measures envisaged after the first-phase consultation and give them a chance to negotiate agreements which in a separate act will be declared legally binding (Art. 154 (4) TFEU). If the social partners fail to agree, the Commission may propose a legal act which meets their expectations.

Options for Influencing the Political Process

Leading Directorate General: DG Employment, Social Affairs and Inclusion

ASSESSMENT

Economic Impact Assessment

Ordoliberal Assessment

The proposed flexibilisation of working times and, in particular, the extended right of social partners to deviate from statutory requirements is in line with the principle inherent in the liberal economic system, namely that collective agreements and individual contracts should prevail over statutory provisions whenever this is objectively justifiable.

Impact on Efficiency and Individual Freedom of Choice

The considerations put forward by the Commission regarding **more working hours flexibility are appropriate**. This was also demonstrated by the economic and monetary crisis: **the more flexible labour market regulations are, the less serious is the impact of economic fluctuations on the labour market**.

However, at the same time the Commission chooses to ignore the question of why EU-wide regulations are necessary at all. **The bargaining power of workers varies enormously between Member States; hence, they are better able to decide if and which statutory provisions on working time should be adopted.**

Preference is to be given to the comprehensive revision of the Working Time Directive (option 2). for the aspired to increase flexibility cannot be achieved with option 1.

The proposal to allow derogations from the principle that on-call time is always counted as working time if the worker is at the working place is fair for all situations in which fully counting presence at the work place as working time does not lead to an appropriate outcome (e.g. carers at boarding schools). Naturally, an even better solution would be to delete completely the on-call time provisions from the Working Time Directive. Instead, **the question of which on-call time services are to count as working time should be negotiated by the social partners or on the basis of individual contracts**. On-call time services are mainly rendered at public institutions such as the police, fire services and hospitals. These areas are normally subject to statutory regulations (upon consultation with workers' representatives) or collective agreements; consequently, there is less of a risk that workers' interests are not taken enough into account. In sectors without any collective agreements, workers will seek compensation for on-call time by demanding higher wages.

EU-wide sector negotiations on the treatment of on-call time would undermine the possibility to balance out existing productivity differences between Member States through overtime and thus **would further exacerbate the real economic upheavals in the EU**.

The possibility to **extend** by collective agreement **the reference period for calculating the average weekly working hours to 12 months increases the flexibility of companies and workers alike. However, this puts companies that are not subject to collective agreements – which holds particularly true for SMEs – and companies located in countries without any tariff system at a distinct disadvantage**, as it limits their flexibility. This distorts competition to the benefit of companies subjected to collective agreements. The extension of the reference period should therefore also be possible for non-tariff companies.

The suggestion to "encourage" social partners to support the reconciliation of work and family life is not the right approach. The relevant working time models can only be successful if they are tailored to the companies'

specific needs. Therefore, agreements have to be reached on an operational level. Especially companies with few workers could be overburdened by agreements made at central level.

Keeping the opt-out derogation enables economically weaker Member States, and in particular workers, to compensate for productivity disadvantages without cuts in wages and consumption. However, as flexibility is again limited by workers' protection rights, this option loses attractiveness. **The option for Member States – created as a response to the excessive ECJ jurisdiction – to cut leave entitlements of workers with long-term illness does not go far enough.** If a worker is ill throughout the entire year, there is no need for recovery from work stress.

Impact on Growth and Employment

Maintaining the opt-out could help reduce the macro-economic differences between Member States of the eurozone. For longer working hours in economically weaker Member States have a positive impact on economic growth and on GDP.

Impact on Europe as a Business Location

With each additional regulation on working time the EU loses its attractiveness for investors, whereas, on the other hand, the more the Directive limits itself to framework legislation and allows for as much both individual and collective agreements as possible, the more the quality of Europe as a business location increases.

Legal Assessment

Legislative Competence

The proposed measures are covered by Art. 153 (1) TFEU.

Subsidiarity

The Commission is right to refuse to bindingly prescribe Sunday as an off-work day. Such a provision would infringe the principle of subsidiarity due to its lack of cross-border relevance. However, the Commission fails to address the compliance of the Working Time Directive with the principle of subsidiarity. Deriving a cross-border issue from the mere existence of national rules on working time – which remain in effect even under the Working Time Directive – and thus justifying harmonized rules is intolerable. Such an argument could justify the full harmonisation of the entire legal system.

Proportionality

Unproblematic.

Compatibility with EU Law

Unproblematic.

Compatibility with German Law

Unproblematic.

Alternative Options for Policy Actions

It would be more appropriate to strengthen solutions on the basis of individual and collective agreements as well as to leave the establishment of statutory standards solely to the Member States discretion.

Possible Future EU Follow-Up Actions

The Commission will probably submit a legislative proposal as the social partners' positions differ substantially; therefore, it is unlikely they will reach an agreement.

Conclusion

More flexible working time regulations increase economic efficiency and are more effective in shielding the labour market from economic fluctuations. However, there isn't actually a need for EU-wide harmonized provisions on working time. Furthermore, the question of which on-call time services should count as working time could be decided by the social partners. EU-wide agreements for sectors affected by on-call time ignore the differences in the Member States' productive output. The possibility of extending the reference period for calculating the average weekly working time by collective agreements to 12 months improves the flexibility of both companies and workers but puts companies that are not subject to collective agreements at a disadvantage – normally SMEs and their employees. Retaining the opt-out derogation enables economically weaker Member States to compensate for disadvantages in productivity. Limiting paid annual leave entitlement of workers with long-term illness does not go far enough; if a worker is ill throughout a year, employers should have the option to delete his or her paid annual leave completely.