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### European Working Time Directive: update

Since the Employment, Social Policy, Health and Consumer Affairs Council failed to reach a political agreement on the first reading of the European Parliament on the revision of the European Working Time Directive last 8 and 9 December, the incoming Austrian EU Presidency has had bilateral talks with some member states.

However, the Presidency considered that it was still not possible to find agreement on the proposal. Therefore, the item was simply taken out of the March agenda of the Council. According to EU officials, it is still possible to find some agreement at the June Council under the Austrian Presidency. Otherwise, the Finnish Presidency (July-December 2006) will take up the dossier.

The two main issues still debated within the Council relate to **the opt-out provision** as well as to the question of whether **the maximum weekly working time** is calculated per contract or per worker.

**Background:**

Since 22 September 2004, when the European Commission adopted its proposal<sup>1</sup> to modify the European Working Time Directive, many lobbying actions have been carried out jointly by CPME<sup>2</sup>, FEMS and PWG.

By adopting MEP Cercas' report<sup>3</sup> on 11 May 2005, the European Parliament echoed the main concerns put forward by the above –mentioned medical organisations.

MEPs voted out the opt-out to the 48-hour limit on the working week clause, voted to define “on-call time” – irrespective of it being active or so-called inactive - as being work, and as far as the extension of the reference period is concerned, it will only be allowed if safeguard measures have been introduced first.

### ***Results of the EP plenary vote***

The **definition of on call time** has been completed: it covers the time available at the work place or **at other workplace decided** by his employer in order to take up **habitual** work and/or certain activities and tasks associated with being on duty, in accordance with national laws and/or practice in the Member State concerned.

The definition of inactive part of on call time is maintained and completed. It is defined as a period during which the worker is on call but is not performing **habitual** work or any activities or tasks associated with being on duty, in accordance with national laws and/or practice in the Member State concerned.

Even if the entire period of on call time shall be regarded as working time, the report introduces the possibility **to calculate differently inactive parts of on call time in order to comply with the maximum weekly average of working time**. This specific manner of calculation has to be decided either by collective agreements or by laws/regulations.

Concerning **the opt-out**, it will be phased out but the way to calculate its end is changed: it should be 36 months after the entry into force of the Directive.

**The reference period** has been extended up to 12 months but under certain guarantees. The **compensatory rests** should be granted **immediately after periods of time spent on duty**, pursuant to the terms laid down in the relevant law, collective agreements or other agreements between the two sides of industry.

### ***Reaction of the European Commission***

After the 1<sup>st</sup> reading carried out by the European Parliament, on 31 May 2005 the European Commission modified its proposal<sup>4</sup> by including some of the amendments put forward by Parliament, but also rejecting some of them.

The amendments accepted concern the **reference period**, which is subject to stricter conditions than those set by the Parliament. Commission endorses Parliament's position on the **compensatory rest**.

On the **definition of working time**, Commission rejects the principle introduced by the EP stating that the entire period of on-call time, including the inactive part, shall be regarded as working time. Instead, the Commission sticks to its presumption that inactive part of on-call time is not working time unless decided otherwise by national law or collective agreement.

Concerning the **opt-out**, Commission proposes a compromise that would give the possibility for Member States to derogate, if so allowed by national law or collective agreement, for a period not

<sup>1</sup> COM(2004)0607 final: Proposal 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.  
[http://europa.eu.int/eur-lex/lex/LexUriServ/site/en/com/2004/com2004\\_0607en01.pdf](http://europa.eu.int/eur-lex/lex/LexUriServ/site/en/com/2004/com2004_0607en01.pdf)

<sup>2</sup> CPME 2004/155Final: <http://cpme.dyndns.org:591/database/cpme%202004-155%20final%20en.pdf>

<sup>3</sup> European Parliament legislative resolution P6\_TA(2005)0175:  
<http://www.europarl.eu.int/omk/sipade3?PUBREF=-//EP//NONSGML+TA+P6-TA-2005-0175+0+DOC+PDF+V0//EN&L=EN&LEVEL=1&NAV=S&LSTDOC=Y&LSTDOC=N>

<sup>4</sup> COM(2005)246 final:  
[http://europa.eu.int/eur-lex/lex/LexUriServ/site/en/com/2005/com2005\\_0246en01.pdf](http://europa.eu.int/eur-lex/lex/LexUriServ/site/en/com/2005/com2005_0246en01.pdf)

exceeding 3 years after the date of implementation of the Directive (which should also be of 3 years). After this period, Member States would still have the possibility to ask the EC to prolong this option for reasons relating to their labour market arrangements.

### ***Reaction of the Council of the EU***

At its meeting on 2 and 3 June 2005, EU ministers for Employment, Social Affairs, Health and Consumer protection failed to find a political agreement on the Parliaments' 1<sup>st</sup> reading report and the Commission's modified proposal.

The most diverging issue was the opt-out, some Member States defending the freedom of choice, and some others considering that the extension of the reference period to 12 months gives the necessary flexibility.

Council failed to reach a political agreement again in December, and the 1<sup>st</sup> reading of the Council is still pending. It is expected that the Austrian Presidency will include the issue on the 1-2 June 2006 Council meeting in Luxembourg; otherwise, the Finnish Presidency will take up the dossier.

### **European Court of Justice rulings: the Dellas case**

On 1 December 2005, the European Court of Justice (ECJ) **confirmed that on-call duty is classified as working time**, in its judgment on Case C-14/04, *Abdelkader Dellas and Others v Premier ministre and Others*<sup>5</sup>.

In France, a decree lays down, for periods of night duty by workers in certain social and medico-social establishments, a weighting mechanism for the purpose of calculating pay and overtime which is intended to take account of the fact that there are periods of inactivity during on-call duty.

The decree establishes a 3 to 1 ratio for the first nine hours followed by a 2 to 1 ratio for subsequent hours between the hours of presence and the working hours actually counted. An employee, Mr Dellas and a number of trade unions brought proceedings before the Conseil d'État (Council of State) for the annulment of the decree in question. The Conseil d'État essentially asked the Court of Justice whether such a system is compatible with the Working Time Directive<sup>6</sup>.

The Court of Justice found, that the directive does not apply to the remuneration of workers.

On the other hand, night duty on site must be counted in their entirety as working time for ascertaining whether all the minimum requirements laid down by the Directive in order to provide effective protection of the safety and health of workers have been complied with. The flat-rate weighting mechanism in question takes the hours of presence of the workers concerned into account only in part and is invalid. The total working time of a worker may thus amount to, or even exceed, 60 hours a week. Consequently, such a national system of calculating on-call time exceeds the maximum weekly working time fixed by the directive at 48 hours.

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<sup>5</sup> C-14/04: <http://curia.eu.int/jurisp/cgi-bin/form.pl?lang=en&Submit=Submit&docj=docj&numaff=C-14%2F04&datefs=&datef=&nomusuel=&domaine=&mots=&resmax=100>

<sup>6</sup> Council Directive 93/104/EC of 23 November 1993 concerning certain aspects of the organisation of working time (OJ 1993 L 307, p. 18). It applies to all sectors of activity, both public and private, with the exception of air, rail, road, sea, inland waterway and lake transport, sea fishing, other work at sea and the activities of doctors in training.