



## **Working Time Directive: No exceptions to the 48-hours maximum working week and opt-out scrapped after three years say MEPs**

**MEPs say that there must be no exceptions to the 48 hours-maximum working time calculated over a reference period of 12 months and say the opt-out must end three years after the adoption of the directive. It also says that any period of on-call time should count as working time. A conciliation committee with the Council is now likely. MEPs adopted the amendment on the abolition of the opt-out 36 months after the entry into force of directive with 421 votes for 273 against and 11 abstentions.**

By adopting amendments from Alejandro **Cercas** (PES, ES), the Parliament expressed its disagreement with the Council (where a common position was adopted on 9 June 2008) notably regarding the “opt-out” and on on-call time, an issue of particular importance for the health sector.

Mr Cercas said after the vote in plenary: "This is a triumph for all the political groups in the European Parliament - for the whole Parliament. It is a victory for the two million doctors and medical students across the EU. I would like to congratulate the ETUC. This is an opportunity for the Council to engage with the citizens' agenda and to have a constructive conciliation. I call on the Commission to stop supporting the Council and play the role of an arbitrator."

### **Conciliation**

The directive is now likely to go into conciliation -the final stage of negotiations with Council.

An absolute majority of 393 votes was needed in plenary to confirm the Employment committee's amendments or to adopt any other amendment to the Council's common position.

### **The future of the opt-out clause**

In 1993 the United Kingdom won an opt-out clause allowing it not to apply the maximum 48-hour working week if a worker agrees to work longer. The Parliament proposes the abolition of this clause, which is used in some Member States, three years after the revised directive, enters into force. Most MEPs feels that an annualisation of the reference period for calculating weekly working hours would allow a sufficiently flexible organisation of working time. Fifteen Member States currently exercise the opt-out.

## **MEPs adopted the amendment on the abolition of the opt-out 36 months after the entry into force of Directive with 421 votes in favour 273 against and 11 abstentions.**

In June this year, EU employment and social affairs ministers reached an agreement. Under their common position of 15 September 2008, working time in the EU must be limited to 48 hours maximum unless a Member State introduces an opt-out clause and a worker decides to use that clause. For workers who opt for the derogation, the legislative text lays down a maximum of 60 hours of work a week on average over a three-month period. This can be increased to 65 hours a week on average over three months where there is no collective bargaining agreement and where the inactive period of on-call time is regarded as working time. The text also stipulates various safeguards for workers who use the opt-out clause.

### **Annualisation of the reference period**

In May 2005, at first reading, Parliament proposed extending the reference period for calculating weekly working hours from four to twelve months under certain conditions, in order to prevent any risk to workers' health and safety.

The aim was to strike a balance between health and safety and the need for work to be organised flexibly, as well as to simplify the existing directive, which allowed various derogations and exceptions.

The text approved by the Council allows Member States to provide for a twelve month reference period in the legislation following consultations with employers' and employees' organisations. However, the maximum reference period will be six months in Member States which decide not to use the opt-out clause.

### **Definition of on-call time as working time**

The Council and Commission introduced the ideas of "active" on-call time (a period during which the worker must be available at the workplace in order to work when required by the employer) and "inactive" on-call time (a period when the worker is on call but is not required by his employer to work).

In its common position the Council says that inactive on-call time should not count as working time unless otherwise decided by national law or by agreement between employers' and employees' representatives in accordance with national law.

At its second-reading vote, the Parliament reiterated its position that any period of on-call time, including inactive time, is to count as working time. However, inactive on-call periods can be calculated in a specific way for the purposes of complying with maximum weekly average working time.

### **Other provisions**

In addition, Member States must ensure that employers inform workers in good time of any planned major changes in the organisation of working hours. For the Parliament, employers will have to inform workers well in advance of any changes in working hours. In addition, workers will be entitled to request changes in their working hours, and employers will have to take account of such requests in a fair manner and can only refuse them for valid reasons

Regarding rest periods, the general principle is that, where normal rest periods cannot be taken, workers should be given periods of compensatory rest. The Council's common position states that it shall be up to Member States to determine the length of a "reasonable period" within which compensatory rest is to be granted. The EP believes that compensatory rest periods should be granted "following periods of time spent on duty", in accordance with the relevant law or an agreement between the two sides of industry.

The Parliament adopted other amendments clarifying the situation of workers bound by more than one contract. Here it says that working time is to be defined as the sum of the periods of time worked under each contract.

It also stipulates the categories of senior executive exempted from the directive: chief executive officers, senior managers directly subordinate to them and persons directly appointed by a board of directors.

## Background

The 1993 directive on the organisation of working time lays down basic principles concerning maximum weekly working hours, daily rest time, breaks, weekly rest time, annual holidays and the duration of night work. It also lists various derogations that Member States may allow for certain categories of worker (for example senior executives) or certain sectors.

Some articles of the directive were due to be reviewed after ten years. The review must also take account of rulings of the Court of Justice regarding on-call time. The Court has delivered two judgments - in the SIMAP and Jaeger cases - which define as working time doctors' on-call periods taken as a whole, in the light of the rules requiring their physical presence in a health care establishment.

Against this background, the Commission in September 2004 put forward a proposal to amend the directive. Parliament voted at first reading in May 2005. After three years of deadlock, the Council reached an agreement in June 2008 (Belgium, Cyprus, Greece, Spain and Hungary did not support the compromise). The EP Committee on Employment and Social Affairs voted at second reading on 5 November 2008 (rapporteur: Alejandro Cercas, PES, ES) and restated its first-reading position, notably on the two controversial points: opt-outs and on-call time.

## Debate 15 December 2008

In the debate on Monday (15 December), MEPs were divided as to the continuation of the opt-out. The Employment Committee, ahead of the vote, says that the ability to opt-out from the EU maximum should end within 3 years after adoption. In 1993, the UK won a general opt-out clause allowing it not to apply the maximum 48-hour working week if a worker agrees to work. In other Member States the opt-out applies only in some sectors.

The Employment Committee calls for no exceptions to the 48-hours maximum working time calculated over 12 months and calls for the end of the opt-out within three years after adoption of the directive. The committee also says that any period of on-call time, including inactive time, should count as working time.

An absolute majority of MEPs (393) is needed in plenary to confirm the Employment Committee's amendments or to adopt any other amendment to the Council's common position.

## Rapporteur

The revision of the directive is worrying millions of workers and this vote is an opportunity to reconnect with citizens, said the rapporteur Alejandro **CERCAS** (PES, ES). The 48 hour working week was established in the first ILO convention. The idea to "work to live and not live to work" has been achieved, we cannot go backwards".

The opt-out abrogates this law and will lead to social dumping. In addition, surveys show that it harms health and safety at work, and makes it very difficult for people to reconcile work and family life. The proposed Council compromise makes "the opt-out a permanent general rule", said Mr Cercas.

On-call time should be considered as working time. In addition, the compromise by the Council weakens the right to compensatory rest.

The Council did not want to negotiate with the Parliament. "We need to put a stop to the Council's intentions. We hope, at conciliation, an acceptable compromise can be reached so that flexicurity and reconciliation of work and family life has a real meaning".

## Council -French Presidency

The text is very important for all European workers, stated Valérie **LÉTARD**, French Secretary of State for Solidarity. The compromise reached in June, was a deal that improves the conditions of interim workers.

The compromise established limits to the opt-out, i.e. 60 to 65 hours instead of the current 78 hours maximum.

The compromise also enables employers to take into account the specificity of on-call time. This text is a compromise, which means that some of the initial objectives are abandoned such as the phasing out of the opt-out. The objective is to have an acceptable text and to avoid conciliation.

## **European Commission**

"Does the EP want to stick to its first reading position in 2005 or does it want to take into account the Common position of the Council and changes its initial position? That is the key question", stated Commissioner Vladamír **SPIDLA** responsible for Employment and Social Affairs.

The revision constitutes an important task to clarify the legal position on on-call time, there has been such a lack of certainty so far, he said.

In 2005, the Commission suggested the abolition of the opt-out, taking into account the EP first reading. "But the EP has to take reality into account: in 2003 only 4 Member States were using the opt-out, now they are 15". "We need to make sure that we get guarantee for the people who want to sign an opt-out clause".

"The position of the EP and Council are clearly different, it will not be easy to reach an agreement, we don't have much time this parliamentary term. It will be difficult to make changes to the compromise. The Commission is willing to play the role of arbitrator", he concluded.

## **Political group speakers**

Speaking for the EPP-ED group, José Albino **SILVA PENEDA** (PT) believed that agreement could have been reached before the EP's second reading but, "thanks to the French presidency, the Council seemed to have no negotiating mandate". He stressed "We seek compromise, dialogue with Council".

Regarding on-call time, Mr Peneda asked "why not implement the ECJ's position", especially if we go to Conciliation? This has been accepted by the European doctors' associations who've been demonstrating outside the building.

Regarding the opt-out, he said "This has nothing to do with labour market flexibility. The key issue: do we want Europe's workers to do more than 48 hours/week?" and argued that it damaged the relationship between work and family life. In this connection, he reminded the House that the legal basis was health and safety of workers.

For the Socialists, Jan **ANDERSSON** (SE) asked "Do we need a directive on working time?" and his answer was "Yes, because we have a common market", so we need common rules on health and safety.

Of the differences between the two sides (EP and Council), he said "Council is saying that on-call time is time off. We say that if you've left the house you're working". Regarding the opt-out, he contended "it can't be voluntary in today's jobs market". He added "What about equal opportunities? Who is working a 60-65 hour week? It's men who have women looking after the home. That's why women support the directive".

Elizabeth **LYNNE** (UK), for the ALDE group, believed that "the Council position is not ideal but it is the fruit of many years of negotiations by the Member States." She had always supported retention of the opt-out and was now "pleased that the opt-out cannot be signed at the same time as a contract", adding that "it's more transparent now" since "employers can't put the same employee on one, two or three contracts".

She did feel that "In difficult economic times it is important to allow workers to work overtime" so flexibility was needed. However, on-call time was a more difficult matter. She had submitted amendment in the Employment Committee saying on-call time should be classed as working time, but "I got no support from PES and EPP". "I suspect this may have to go to Council and Council might not move", she said.

On behalf of her group, Elisabeth **SCHROEDTER** (Greens/EFA, DE) emphasised that "Excessive working

time makes you ill" and "This affects not just individuals but those around them", in the case of drivers, for example.

Her group would be tougher than the Council, she said, in that it would vote for definite "figures, not just guidelines". She believed it was right for Member States to have three years to implement the legislation but "we would not vote for a British-style opt-out, nor for on-call time to be classed as resting time".

She also insisted that "Working hours should be calculated for the individual, not for each contract". Concluding, she told the House "We must confirm the EP first reading position and try to preserve jobs".

Roberta **ANGELILLI** (JEN, IT) said that any 'cut-price compromise' would be at the cost of Europe's workers in terms of health, safety and reconciliation of work and family life. On the opt-out, she spoke of a 'hidden ransom' if Parliament accepted the position of the Council.

Dimitrios **PAPADIMOULIS** (EL) said that his group, the GUE/NGL, was radically opposed to the Council position, which would turn back the clock of history by 90 years to when the idea of the 48-hour week was introduced. The opt-out was, he said a 'trick' begun by Mrs Thatcher years ago and to keep it would be to deny the very basis of social Europe. He urged the Council, if they truly had workers' interests in mind, to listen to the ETUC and the medical council rather than the employers.

Derek Roland **CLARK** (IND/DEM, UK) went through the history of various EU presidencies attempting to find agreement on the issue. But the Working Time Directive is a waste of time, he said. It raises unit costs, means companies fail to compete and jobs are lost, which is why the French had abandoned the 35-hour week.

Irena **BELOHORSKÁ** (NI, SK) argued that if workers are on call they cannot freely organise their time and feared that a whole 'army' of health professionals would be open to abuse unless on-call time was considered as working time, with the end-result being that patients could be put at risk.

## ***British and Irish speakers***

Philip **BUSHILL-MATTHEWS** (EPP-ED, UK) congratulated the Commission and the French Presidency, which has "displayed great skill to get as far as we've got" on an issue that has been blocked by previous Presidencies. He said that millions of EU citizens are worried that politicians are going to block them from working freely. "I was elected to look after the people I serve. I was elected to help and not to stand in their way. If people don't get the opt-out, they will know who to blame," he concluded.

Jean **LAMBERT** (Greens/EFA, UK) pointed out that the long hours culture is contributing to illness and depression, which is costing the EU a lot in economic terms. "There is enough flexibility in the current directive and proposed changes for companies to be able to cope if they have a sudden rush of work on," she said. She also stressed that tired workers are dangerous workers. "The decline in productivity and creativity is not good for a knowledge-based society. 66% of workers in the UK are not paid for the overtime that they do, and their commitment is shown by being present and not through productivity".

Speaking for the non attached groups, Jim **ALLISTER** (UK) said that the Parliament and Council "need to get their priorities right". "Control of working hours is exclusively for national control and not for European dictates. If British workers are permitted by their own elected government to work more than 48 hours per week, then why should it matter to other Member States that are more prescriptive?" "At the time of an economic downturn, less regulation is key to economic recovery," he added.

Marian **HARKIN** (ALDE, IE) said we need to send a clear signal to the EU that a "social Europe is alive and well". In Ireland we ask if we are closer to Boston or Berlin, and in this context we need to be closer to Berlin, but only if Paris and Berlin can deliver on health and safety. This directive, she said, is an opportunity for the European Parliament and Council to ensure that citizens can achieve a good work/life balance.

Stephen **HUGHES** (PES, UK) said he was in favour of scrapping the opt-out because the directive is a health and safety law, and the 12 month averaging of working time, as opposed to the four-month average,

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offers businesses "phenomenal flexibility" for work time planning. So much so that that "Council was going to fix a limit of 65 hours a week depending on the averaging period," he said.

Proinsias **DE ROSSA** (PES, IE) said he supported the Cercas package. The bottom line on this debate is, he said, that human beings are social beings: they are not machines and they should not be treated as such in the workplace. A person applying to an employer for a job has no freedom to refuse to sign a form saying they are denying themselves the right to the coverage of the Working Time Directive, so to argue that abolishing the opt-out is in some way an attack on freedom is not right: it is actually an attack on the abuse of an employee who needs to work in order to live. Mr De Rossa was of the view that the current opt-out in use in 14 Member States is an attack on the idea of building Europe on the basis of common decent working and living conditions, and this, he said, must not be allowed to happen.

Mairead **McGUINNESS** (EPP-ED, IE) *in writing*. – "The debate on the organisation of working time is complex. But the most difficult issues are the future of the opt-out and the treatment of on-call time." "Under the Council agreement, the possibility for an employee to opt out of the maximum average working week of 48 hours, provided for in the original Working Time Directive, is subject to more stringent conditions in order to protect the health and safety of workers. Employees will not be required to work in excess of 60 hours a week averaged over three months, or 65 hours a week averaged over three months, when the inactive part of on-call time is regarded as working time. Ireland has never used the opt-out, so a stricter implementation of the available opt-out is both welcome and necessary."

**N.B. :**

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