Revising the Working Time Directive. A long and winding road

In November 2011, the European social partners notified the European Commission of their plans to start negotiating on working time. They have set a deadline of September 2012 to agree on a revision of the Working Time Directive after an unfruitful five years of discussions by the European institutions. The rocky road travelled shows the enormity of the task which will not be plain sailing, despite both sides’ avowed commitment to shoulder their responsibilities.

Séverine Picard
Legal Advisor, European Trade Union Confederation (ETUC)

16 December 2008. The ETUC demonstrates in Strasbourg against the working time proposal being defended by the Council. Parliament rejected the text the next day.

Image © Image Globe
Nearly 20 years after the Directive was adopted, the European Trade Union Confederation (ETUC) is still hoping for bold measures to get rid of the opt-out. European Court of Justice (ECJ) rulings have piled the pressure on the European institutions. The ECJ has held that “on-call time” (i.e., any period during which the worker has to be at the workplace at the employer’s disposal) must be classified as part of working time within the Directive. On-call time therefore has to be included in the calculation of weekly working hours. It must also be immediately followed by a compensating rest period.

Some Member States have dismissed these rulings and used them as excuses for applying the opt-out in order to by-pass the working time regulations in sectors like health services. This makes a revision more necessary now than ever to re-establish clear rules for a modern organization of work.

### Strike one: 2004-2009

In September 2004 the European Commission published a proposed revision of the Directive. Five years’ discussions failed to get it through the European Parliament and Council of Ministers.

The Commission proposal kept the opt-out, but on the basis of a collective agreement. In cases where no such agreement could be negotiated (small business; restrictive national legislation), the opt-out on the basis of an individual agreement would be maintained.

The Commission also proposed introducing the ideas of “on-call time” and “inactive on-call time” into the Directive. The so-called “inactive” part of on-call time – i.e., the period during which the worker must be available at his workplace but is not required to carry out his activity – would not be regarded as working time unless otherwise specified by national law.

The proposal would also have allowed the reference period to be extended to 12 months just through consultation with the social partners.

The ETUC was highly critical of these proposals which it argued would seriously water down the EU working time rules, rendering them virtually toothless.

The ETUC therefore stepped forcefully into the debate on the legislation which was subject to the co-decision procedure whereby the Council (composed of representatives of the national governments) and the European Parliament must reach agreement in order for it to be adopted.

Under the leadership of Spanish Socialist MEP Alejandro Cercas, rapporteur for the European Parliament’s Employment and Social Affairs Committee, MEPs adopted a proposal for a new Working Time Directive in first reading in May 2005. The ETUC acclaimed the parliamentarians’ clear progressive approach to the revision. The proposed text provided for the opt-out to be phased out over three years. Following ECJ case law, on-call time was treated as working time, although the EP included a specific system in which inactive on-call time could be counted. In exchange for scrapping the opt-out, the

---

EP agreed to extend the reference period to twelve months, but subject to certain conditions relating to workers' health and safety and on the basis of negotiations with the unions. Finally, the MEPs included a number of proposals to improve lifelong learning and work-life balance. The text also made it clear that working time had to be calculated per worker and not per contract to ensure adequate protection for workers with multiple employment relationships.

The European Parliament's amendments remained blocked in Council for almost three years! This foot-dragging was due to two weighty Council delegations (Germany and the UK) linking the revision of the Working Time Directive to another hotly disputed issue, the proposal for a Directive on temporary agency work. This strategy effectively road-blocked progress on both issues. Not until a compromise on temporary agency work was adopted in autumn 2008 was the impasse on working time finally resolved.

The Council finally adopted a position far short of Parliament's by a slim majority.² It wanted to keep the opt-out indefinitely, and introduce a new weekly maximum of 60 hours. For on-call time, only the active period was to be defined as working time, while the inactive period could even be treated as a daily or weekly rest period. Finally, Member States would be free to establish a 12-month reference period by legislation rather than only through social partner negotiation of collective agreements.

The ETUC found these proposals unacceptable. Far from being restricted, use of the opt-out would be increased with the practical outcome that Europe would head towards capping the working week at 60 hours. The Council's position on on-call time would have had far-reaching ramifications for work organization in many sectors, whereby any period of "inactivity" at the workplace would be apt to be treated as a rest period. Finally, there was no point in extending the reference period if opting out were to become the norm.

The ETUC therefore ran a large-scale awareness-raising and action campaign. It called a major protest in Strasbourg on 16 December 2008 to urge Parliament to reject the Council's decision and stand by its own first reading position, which the EP did by a hefty majority the following day. The subsequent last-ditchconciliation procedure to broker agreement between the EP and Council failed in early May 2009.

So, despite five years of discussions, the European institutions have failed to revise the Working Time Directive. But going back to square one is not a good result for anyone. A Commission report published in December 2010 revealed a high level of infringements of the Directive requiring repeated Commission action against Member States. Also, use of the opt-out is spreading (16 Member States in 2011). The Commission therefore quickly initiated a second attempt to revise the Directive.

Second go: via social dialogue?

In March 2010 the Commission adopted a Communication on reviewing the Working Time Directive. It was the first step in fresh social partner consultations on the possible direction of European action. It was followed in December 2010 by the second phase consultation canvassing the social partners' views on concrete proposals which gave them the option to reach their own agreement.

The European treaties allow the social partners to engage a dialogue that can reach an agreement within nine months. They have wide discretion as to both the content of the dialogue and the structure of discussions. The Commission then puts forward whatever agreement the social partners reach as a proposal for a directive for adoption by the Council. The Commission refrains from taking any initiative while the discussions are ongoing. If no agreement is reached, the job of coming up with a new legislative initiative goes back to the European institutions.

During both phases of consultation, the ETUC renewed its key demands: scrapping the opt-out; following ECJ case law on on-call time and compensatory rest; no extension of reference periods; and maximum working hours calculated per worker and not per contract.

The employers' organizations want more flexibility in the current rules. Specifically, they called for a review of the case law on on-call time and annual leave (recent cases had held that workers retained their annual leave entitlement even when on long-term sick leave). They also wanted the reference period extended and the opt-out maintained.

The ETUC and employers' organizations appeared to be poles apart. Concerned to should the responsibilities and mindful of the importance of European social dialogue, the social partners therefore took the time to consider whether negotiating would serve a purpose. Both sides came forward with a shared desire to engage a good faith dialogue to take this crucial matter forward.

In November 2011, the European social partners told the Commission of their joint intention to start negotiations in December 2011. The Commission will be informed of the outcome of that dialogue in September 2012.

Clearly, the outcome of the discussions cannot be second-guessed. But one thing for sure is that the failure of five years of negotiations by the European institutions presages a bumpy ride.