WORKING TIME DIRECTIVE: EMPLOYERS SEEK GREATER FLEXIBILITY AND LEGAL CERTAINTY

EXECUTIVE SUMMARY

The Working Time Directive sets out minimum rules for the protection of workers. It is a health and safety measure which has over time done little to either clarify or simplify the law. Employers have found many practical solutions to the problems which the directive has caused, but at a cost to them. CEEMET members do not seek a revision of the directive, but out of pragmatism, look ahead to future developments and what these might mean for Europe's manufacturing employers.

A clear message from MET sector manufacturers.

Cutting edge manufacturing requires a cutting edge workforce – one that is flexible and agile and equipped with 21st century skills. Europe's manufacturers face fierce global competition, and manufacturing in Europe will always incur a global cost disadvantage. Lower cost economies are not only increasingly competing on price, but also on innovation and quality, and our industrial renaissance will succeed, or fail, on the ability of both European businesses and their workers to compete in worldwide markets.

In an age where the fourth industrial revolution will allow digital manufacturers to be based in many parts of the world, but compete on Europe's doorstep, our sector's future growth and its ability to create and sustain high-quality jobs will depend upon the agility of its workforce to meet the challenges of our competitors.

This is why the manufacturers of the future need greater, not less, flexibility, alongside their investment in people and skills. Manufacturers cannot succeed unless they can compete, and workers cannot aspire to high-quality secure jobs without successful businesses.

The Working Time Directive, now with a complex overlay of contradictory decisions from the Court of Justice, has done little to improve Europe's competitiveness. The social partners have frequently, together, found practical ways to heed its decisions, minimising the impractical approach that the Court has often taken. Having undergone this painful process, our members see little advantage in now reopening the insoluble enigma of the organisation of working time at a European level. Success appears unlikely. But at the same time, CEEMET can see pressure again building for another attempt at reforming this directive, and considers here what this might mean for the industrial engine room of Europe – its metals and technology sector.

1. IMPROVING CURRENT FLEXIBILITY

Europe must compete or stagnate. Rigid rules act as a barrier to improving our productivity and competitiveness. The directive's original flexibility has been eroded by the ECJ, to the disadvantage of businesses. New types of production processes need different methods of working, with working time measured over production cycles which could last several years. Workers too are demanding more flexibility, balancing their working lives with other commitments, driven by changes in society and also an ageing workforce.

There are therefore many reasons why employers and workers would both benefit from positive change, but we have to avoid that any attempt at reform will lead to more complex, costly and uncertain rules.

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2. GREATER LEGAL CERTAINTY

The confused approach of the ECJ to the policy objectives of the directive, mixing social policy with health and safety, has resulted in poor legal outcomes. Future developments must focus on increasing legal certainty for employers and workers and reducing the possibility of future inventive interpretation by the ECJ which poorly reflects the intention of the legislators. Achieving legal certainty must be the prime objective and must over-ride any attempts at simply codifying the unpredictable decisions of the ECJ and reducing the opportunity for this uncertainty to arise again in the future. Whilst the social partners have been successful in finding solutions to problems of the ECJ, the decisions of the ECJ have been to the detriment of management and workers who do not wish to see their agreements undermined by future change.

With the original flexibility of the directive now depleted by the Court of Justice, any future possible revision must be sharp, narrow and focussed on correcting the decisions of the Court.

3. SAFEGUARDING MEMBER STATE AND SOCIAL PARTNER AUTONOMY

With a tangible change of direction in Europe through the new EU Commission's agenda on Better Regulation, the future will bring less intervention by regulators and a smarter approach to ensuring health and safety protects workers - this is essentially the better regulation agenda which an important number of stakeholders are committed to. By every measure, the future direction will be one where the social partners and member states have a greater role in deciding for themselves how rules are made and enforced, taking into account their own national systems and traditions.

The current derogations must then be widened and made available to a greater range of employer and worker representatives and also all national governments. Divergent and rapidly evolving labour markets increasingly show policymakers at the EU level and the ECJ to be behind the curve in their approach to the modern workplace. The success of the social partners in reaching common agreement underlines their pragmatic approach and specialist knowledge, which may be lacking at European level.

4. DELETING THE NON-REGRESSION CLAUSE

The current directive and the past decisions of the ECJ have engendered an increasingly conservative interpretation by national governments. Understandably, this has led to an interpretation of the current non-regression clause in a way that prevents reform and leads to an ever greater tightening of the rules. This then acts as a further barrier to innovation and injects further rigidity into the labour market at a time when national governments and European institutions are seeking ways to create more agile, secure and highly skilled labour markets. We therefore believe that the current clause should be repealed.

5. ANTICIPATING A POSSIBLE REVISION

Whilst we do not seek reopening the directive, it is clear that the uncertainty, costs and practical difficulties the decisions of the ECJ have caused are such that a partial revision may at some time occur. In any case, any possible future revision must be narrow, sharp and focussed, extending only to the specific difficulties which the decisions of the ECJ have created, restore legal clarity and enlarge flexibility for employers, workers and national governments which is needed to adapt to rapidly changing working patterns. It should reduce the prospect of further interpretative intervention from the Court of Justice.

Below we focus on what the revision should consider and what it must seek to achieve.

On-call and Standby

Simplicity and clarity are key in setting rules for situations which by their nature are unpredictable. Therefore, all time spent away from the workplace whilst not working should be classified as rest, and conversely time spent actively working whilst on call should be regarded as working time.

Standby time spent away from the workplace should be regarded as rest, but standby time spent at a workplace, or place where the worker may at times work, cannot always be regarded as work – as the worker may be staying at the place of work, both working and resting at different times.

These intricate situations underline how the decisions of the ECJ lack depth and application and show the imperfections of the directive. Technological change and demand from workers and employers for greater agility and flexibility must lead to greater social partner autonomy at all levels, from individual workplaces to the national level, and be mirrored by allowing member states the same flexibility as can be exercised by the social partners.

The reference period

The concept of the reference period, expressed in weeks, is arcane and a further sign of the age of the directive. Working time is in the modern world often no longer organised over periods measured in weeks or months. Frequently, industrial activity, and hence work is linked to cycles of production, measured in years, with stages of work staggered over this. Modern, agile working, supported by employers and workers, does not need and is often incompatible with reference periods as short as 4 months.

A longer reference period than currently stipulated should therefore be available but not compulsory, shaped by the type of work, the demands of the work, the needs of both employer and worker and based on mutual agreement. This should be agreed at the most competent level, between social partners company level. The length of the reference period should be determined by the social partners, or national governments, and should be flexible, governed primarily by the need to safeguard the health and safety of workers within the parameters of minimum health and safety standards.

Future patterns of work

No-where is the directive and the ECJ more transparently removed from the reality of the world of work than in the consideration of evolving and future patterns of work. Conceived in the analogue age, the directive struggles to fit the digital world. The ECJ similarly faces difficulties to mould an historic directive to the 21st century in a pragmatic way.

A traditional approach, dividing work and rest into distinct segments, is no longer the working reality for many. Societal demands increasingly mean workers do not want, or simply cannot, work in fixed blocks of time, needing to balance family responsibilities with their working lives. An ageing workforce requires employers to offer flexible working opportunities, and increasingly the directive demonstrates that it is not fit for modern and changing patterns of work.

The mistakes of the past were to attempt to precisely set out how work should be organised in finite periods of time. If a revised directive is to be future proof, it cannot repeat past mistakes. Instead, it must embrace the fact that the future is not predetermined, and will change in ways that cannot be predicted. EU level rules look increasingly outdated, and the solution, again, is to allow sufficient flexibility for the directive to adapt to changes in society, technology and demography. In practice, this means more derogations from fixed periods of work and rest and allowing these derogations to be exercised more freely without creating new fixed rules.

National rules

Member states have distinct rules governing their labour markets. These often form a unique blend reflecting the rules and benefits governing both the workplace and civil society. Extracting a single element of these rules is not only impractical but undermines the perceived value of the EU in the eyes of its citizens at a time when an unprecedented number of them are questioning the value of membership.

With this background, the use of the opt-out, the rules on autonomous workers and the use of concurrent employment contracts are all areas where the current rules work to the advantage of the affected member states. Reform would be not only unnecessary, but risk creating an imbalance in national systems, damaging to workers and employers.

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