Extract from Experts' Group on the Transparent and Predictable Working Conditions Directive

1.6. Exceptions (Articles 1(6)–(8))

Article 1(6): Member States may provide, on objective grounds, that the provisions laid down in Chapter III are not to apply to civil servants, public emergency services, the armed forces, police authorities, judges, prosecutors, investigators or other law enforcement services.

Recital 9: It should be possible for Member States to provide, where justified on objective grounds, for certain provisions of this Directive not to apply to certain categories of civil servants, public emergency services, the armed forces, police authorities, judges, prosecutors, investigators or other law enforcement services, given the specific nature of the duties that they are called on to perform or of their employment conditions.

1.6.1. Issues

(a) In general on exceptions

Recital 1 of the Directive refers to Article 31 of the Charter of Fundamental Rights of the European Union, which provides that every worker has the right to working conditions which respect his or her health, safety and dignity, to limitation of maximum working hours, to daily and weekly rest periods and to an annual period of paid leave. Article 52(1) of the Charter states the following: "Any limitation on the exercise of the rights and freedoms recognised by this Charter must be provided for by law and respect the essence of those rights and freedoms. Subject to the principle of proportionality, limitations may be made only if they are necessary and genuinely meet objectives of general interest recognised by the Union or the need to protect the rights and freedoms of others."

Recitals 2 and 3 refer to principles No 5 and 7 of the European Pillar of Social Rights, the former stating, inter alia, that regardless of the type and duration of the employment relationship, workers have the right to fair and equal treatment regarding working conditions.

These principles must be kept in mind when assessing any exceptions from the Directive. Furthermore, case-law from other fields of labour law may also provide useful indications. By analogy, for instance, in Case C-428/09, *Union Syndicale Solidaires Isère,* concerning the Working Time Directive,[i] the Court holds the following "*As exceptions to the [EU] system for the organisation of working time […], those derogations must be interpreted in such a way that their scope is limited to what is strictly necessary in order to safeguard the interests which those derogations enable to be protected*".[ii]

This principle should be the starting point when applying the exemptions. In this respect, it should be recalled that Article 21(4) of the Directive provides that Member States shall, in accordance with their national law and practice, take adequate measures to ensure the effective involvement of the social partners and to promote and enhance social dialogue with a view to implementing this Directive.

According to the statement tabled by the Commission to the Resolution of the European Parliament and to the minutes of EPSCO Council-meeting adopting the Directive, the Commission undertakes to pay particular attention, in its report on the review of the Directive, to the application of Article 1 by Member States.

(b) Article 1(6)

Article 1(6) gives the Member States the possibility, on objective grounds, to exempt civil servants and a catalogue of (other) specific groups of workers from the provisions laid down in Chapter III. The provision must be read in conjunction with Recital 9, which states that "[i]t should be possible for Member States to provide, where justified on objective grounds, for certain provisions of this Directive not to apply to certain categories of civil servants, public emergency services, the armed forces, police authorities, judges, prosecutors, investigators or other law enforcement services, given the specific nature of the duties that they are called on to perform or of their employment conditions." This is a permissive disposition which gives the Member States the opportunity to apply it if so they wish.

Several elements can be drawn from this wording:

1) it is required that any exemption is justified on *objective grounds*;

2) the material scope of the exemption is limited to *certain provisions* (within Chapter III),

3) the personal scope of the exemption is limited to (certain) *civil servants* and the other *categories indicated*,

4) it is of no relevance whether the public emergency service is publicly or privately owned,

5) the justification on objective grounds must be linked either to *the specific nature of the duties that they are called on to perform* or *their employment conditions* (or both).

(c) Specific derogations

Some of the articles in Chapter III have specific derogations. In keeping with the principle of interpreting any derogations restrictively, there should be no reason to make use of the general possibility to exempt civil servants under Article 1(6) if the desired result can be achieved by making use of the specific derogation in question. For instance, should a Member State want to apply longer probation periods for their civil servants than the main rule stipulated in Article 8(1), due to their special protected status, the first place to start would be the derogation laid down in Article 8(3), rather than Article 1(6).

However, one Member State expert was of the opinion that if the general exemption of Article 1(6) applies, there is no scope for recourse to Chapter III.

(d) "Certain provisions"

Recital 9 refers to the possibility to exempt, amongst others, civil servants from "certain provisions of this Directive". This indicates that the Member States, should they want to make use of the possibility to derogate, must assess the justification on objective grounds for each provision in Chapter III. A blanket exemption from Chapter III, without assessing each individual provision, would be contrary to the Directive. It also follows, logically, that such an approach would be more difficult to qualify as "objectively justified" and could risk going "beyond what is necessary to obtain the objective", for instance if the exemption from every provision is not necessary. Moreover, such a method would not be in keeping with the principle of interpreting derogations restrictively.

(e) Civil servants

There is no EU definition of the term "civil servant". EU law is neutral with respect to the internal organisation of Member States, something that is usually known as the principle of 'organisational and procedural autonomy of the Member States'. An example of this can be found in Regulation (EC) No 883/2004, where the term is defined as follows: "civil servant' means a person considered to be such or treated as such by the Member State to which the administration employing him/her is subject". Consequently, the term "civil servant" is for the Member States to define in national law.

(f) Public emergency services

No all-encompassing EU definition of "public emergency services" exists. Again, this term will be for the Member States to define in accordance with national law and practice. However, Directive (EU) 2018/1972 and Commission Delegated Regulation (EU) No 305/2013 (Articles 2(39) and 2(a) respectively) contain the following definition that may serve as a source of inspiration: "emergency service' means a service, recognised as such by the Member State, that provides immediate and rapid assistance in situations where there is, in particular, a direct risk to life or limb, to individual or public health or safety, to private or public property, or to the environment, in accordance with national law[/legislation]."[iii]

In the Commission services' view, the term "public" is aimed at clarifying that such services serve the public, and not its organisation or ownership. Consequently, the possibility to make use of the exceptions should be the same, regardless of the organisation of those services as public or privately run.

(g) The armed forces, police authorities, judges, prosecutors, investigators or other law enforcement services

Once more, no EU definitions of these terms exist in the field of labour law, and it will be for the Member States to define them in accordance with national law and practice.

(h) Objective grounds

Recital 9 reads as follows: "It should be possible for Member States to provide, where justified on objective grounds, for certain provisions of this Directive not to apply to certain categories of civil servants, public emergency services, the armed forces, police authorities, judges, prosecutors, investigators or other law enforcement services, given the specific nature of the duties that they are called on to perform or of their employment conditions."

The Recital provides guidance on the assessment of objective grounds by pointing out two elements in particular as part of the justification of this provision: the specific nature of the duties that the workers in question are called on to perform and/or of their employment conditions. This indicates that the assessment of objective grounds should be focused on these two items, meaning whether the tasks of the workers at hand or their specific employment conditions may objectively justify their exemption from certain provisions.

In Article 9(2) of the Directive, as examples of objective grounds, reference is made to health and safety, the protection of business confidentiality, the integrity of the public service or the avoidance of conflicts of interests. Although the elements referred to here are explicitly linked to Article 9(2), and without suggesting that they are exhaustive in any way, they may serve as examples of considerations the legislator have found capable of constituting "objective grounds" more generally.

Further, inspiration for the assessment of justification on objective grounds can also be found in case-law of the Court. In Case C-410/18, *Aubriet*, paragraph 29, which relates to freedom of movement for workers under Article 45 TFEU and the non-discrimination principle in accordance with Article 7 of Regulation (EU) No 492/2011,[iv] the CJEU offers clarification as regards the related term "objectively justified", where it holds that: "*In order to be justified, [indirect discrimination] must be appropriate for securing the attainment of a legitimate objective and must not go beyond what is necessary to attain that objective*."[v]

Inspiration can also be drawn from case-law concerning Clause 4(1) annexed to the Fixed Term Directive and the principle of non-discrimination. In Case C‑619/17, *Porras*, the Court holds that according to its settled case-law, the principle of non-discrimination, of which Clause 4(1) of the framework agreement is a specific expression, requires that comparable situations should not be treated differently and different situations should not be treated alike, unless such treatment is *objectively justified*.[vi]

Further, the Court clarifies that the concept of 'objective grounds', within the meaning of Clause 4(1) of the framework agreement on fixed-term work, rules out a difference in treatment between fixed-term workers and permanent workers being justified on the basis that the different treatment is provided for by a general or abstract measure, such as a law or a collective agreement.[vii] In other words, the fact that differential treatment would be laid down by law or a collective agreement is not sufficient for it to be justified on objective grounds. This principle must apply equally to Article 1(6) of the Directive.

Moreover, the Court holds that the unequal treatment found to exist must be justified by:

- the presence of precise and specific factors, characterising the employment condition to which it relates;
- the specific context in which it occurs; and
- on the basis of objective and transparent criteria;

in order to ensure that that unequal treatment in fact:

- responds to a genuine need;
- is appropriate for the purpose of attaining the objective pursued; and
- is necessary for that purpose.[viii]

In addition, the general principle of equal treatment applies: Comparable situations must not be treated differently and different situations must not be treated in the same way unless such treatment is objectively justified.[ix]

Exchanges in the Expert Group raised the issue of the way the Member States should notify the Commission of any exemptions applied, or more precisely, whether all exemptions must be explicitly laid down in the implementing law, or whether it would be sufficient to notify the Commission of any already existing exemptions and the respective justifications.

The Commission services replied that if the national law already provides for longer probation periods, that law does not need to be modified as long as the exemption can be objectively justified. In other words, it is not necessary to spell out the justifications in the implementing law, but the justifications must be notified to the Commission.

The notion of civil servant and how far that term can be extended resurfaced in the discussions, with reference to for instance central public administration or even local authorities, workers employed

in the public health system etc. It was also highlighted that sometimes there are two groups of workers performing the same tasks in public administration, but with different statuses.

On this issue, the Commission services reiterated that there is no EU definition of civil servant, and therefore it is to be defined in national law. They also stressed that there is no requirement under the Directive to change the definition of civil servant. However, the Commission services underscored that the justification on objective grounds must be fulfilled. Further, the Commission services explained that the co-legislator intended a narrow exemption, and that it was not the aim to exclude any worker employed by the public.

The ETUC expressed opposition to these exemptions, however, should Member States decide to make use of the exemptions in Article 1, the ETUC considers that the "objective grounds" and modalities should be subject to consultation with the relevant trade unions, in line with Article 21(4) of the Directive.

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[i] Directive 2003/88/EC of the European Parliament and of the Council of 4 November 2003 concerning certain aspects of the organisation of working time, OJ L 299, 18.11.2003, p. 9.
[ii] Case C-428/09, *Union Syndicale Solidaires Isère*, para 40.
[iii] The Directive uses the wording "national law", whereas the Regulation uses "national legislation".
[iv] Regulation (EU) No 492/2011 of the European Parliament and of the Council of 5 April 2011 on freedom of movement for workers within the Union (OJ 2011 L 141, p. 1)
[v] Case C-410/18, *Aubriet*, para 29.
[vi] Case C-619/17, *Porras*, para 60. See also Case C--619/17, *Montero Mateos*, para 49.
[vii] Case C-619/17, *Porras*, para 67.
[viii] Ibid. para 68.
[ix] Case C-477/14, *Pillbox*, para 35.