The Working Time Directive – what should be the EPSU position in its further treatment?

1) The revision of the Working Time Directive (WTD)[1] remains on the European Commission's agenda and it is expected to bring forward a new proposal in 2015, following the failure of the social partners to reach a negotiated agreement on the WTD in 2012/13. Currently under way is a health sector-specific study on the WTD which the Commission are commissioning and which is due to being launched now. As can be seen from an article published by NHS Brussels office, more 'flexibility' is expected for a new drafting of the working time. [2]

2) The Director for Employment and Social Legislation, Social Dialogue, Armindo Silva, addressed on 21 May a letter to both the EPSU General Secretary and the HOSPEEM Secretary General. In this letter he informs both organisations that the DG Employment of the European Commission has contracted 2 consultancies (ICF-GHK and the Fondazione Giacomo Brodolini) with studies to measure:

   - "The economic impacts of various possible changes to EU working time rules, including the assessment of administrative and regulatory costs and burdens and, a review of evidence and analysis of the broader economic impact of the working time organisation, and
   - The economic/financial/organizational implications for public health/care services of various possible changes to EU working time rules."

   The EPSU Secretariat has been contacted by a Danish consultancy COWI (subcontractor to Fondazione Giacomo Brodolini) for an interview on experiences with the implementation of the WTD.

   The CEMR Employers' Platform have also proposed to EPSU to address the working time directive as part of the social dialogue in local and regional government. The CEMR have not specified as to what form this should take and the EPSU secretariat has so far turned any discussion of such a proposal down, arguing with a lack of mandate.

   These developments do however underline the need for EPSU to clarify its position to any new attempts to revise or to negotiate on the working time directive. Especially, a scenario of a further negotiation would obviously have to be extremely carefully examined, who would negotiate with whom, on the basis of what type of mandate. Importantly, also to underline, a revision of an existing directive through negotiation must imperatively lead to a legally binding instrument. Since the problems with the transposition of the framework agreement on health and safety in the hairdressing sector, this no longer appears to be an automatic given.

[1] http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:32003L0088:EN:HTML

[2] http://www.nhsemployers.org/about-us/nhs-european-office/working-time-directive

3) For context: The newly elected European Parliament will have its inaugural session on 1 July, the deadline for the constitution of the different political groups was 24 June. The debates about the establishment of a new Commission have not yet started with the current debates focusing on the selection of the Commission President. It is therefore difficult at this stage to ascertain what the policies of the future Commission might be on the subject, nor for that matter would we be able to say anything on the position of the European Parliament.. As a reminder: In its Communication (2013) 685 of 2 October 2013 on Regulatory Fitness and Performance (REFIT)[3] the outgoing Commission states that at the forefront of REFIT is the action to reduce regulatory burdens on SMEs…, the most burdensome EU legislation identified, amongst others, is health and safety. The entire acquis on occupational health and safety (directive 89/391/EEC and its 23 related directives) is currently submitted to a full evaluation which will include specific consultations of social partners…The conclusion of this expert evaluation will be made available before the end of 2015." In a recent press statement of June 2014, the Commission considers it good legislative management to withdraw proposals that do not advance in the legislative process, in order to allow for a fresh start or for alternative ways to achieve the intended legislative purpose.

4) This overall deregulatory approach could possibly also have an impact on the working time directive as integral part of the EU health and safety package. As can be seen from the formulation of the questions in point 1) the emphasis seems to be on 'regulatory costs and burdens and financial/organizational implications' and not on the benefits of health and safety for workers and the general public. This approach is in contrast to the one taken by the EU-OSHA, for example, that has consistantly argued for investment in workplace health and safety, also for reasons of economic competitiveness.

5) Still it also noteworthy that the European Commission has brought a number of proceedings against Member States for not correctly applying the provisions of the working time directive. With two exceptions these cases concern doctors (see inventory of cases in Annex).

6) The EPSU resolution on 'strengthening workers 'rights and employment in Europe through collective bargaining, social dialogue and industrial relations', adopted at the May 2014 Congress in Toulouse foresees in point 20, that "*EPSU will evaluate its policy on the reduction and reorganization of working time and continue to fight against any changes to the definition of working time and for the abolition of the opt-out in the Working Time Directive".*

7) This position clearly echoes the line taken in the attempt to negotiate a revision of the Working Time Directive throughout 2012 and was also reflected in the ETUC negotiating mandate from September 20, seeking to

- To include the end or phasing out of the individual opt-out in the near future.

[3] http://ec.europa.eu/finland/pdf/20131002-refit_en.pdf

- To keep the status quo concerning reference periods
- To ensure compliance of the ECJ judgments on on-call time and compensatory rest.

Other points of the mandate aimed to limit the derogation for 'autonomous workers, the limitation of working time on a 'per worker' basis.

Once concluded, the European Social Partners would jointly request that the agreement be implemented as a Directive by a Council decision on a proposal from the Commission.

8) The negotiations started in December 2011. There were altogether 9 formal meetings between the employers side, consisting of representatives from Business Europe, UAPME and the CEEP and the ETUC with representatives of the national confederations (1/country) as well as 3 representatives from the European Trade Union Federations, 1 representative each of the ETUC Women's Committee and the Youth Committee, 1 representative of Eurocadres as well as the CEC (Conféderation Européenne des Cadres). EPSU was a member of the drafting group. A two-day meeting in May 2012 was dedicated to a fact-finding seminar that examined a number of cases submitted by both trade unions and employers. September 2012 marked the end of the official nine-month period for negotiations, but in fact it was only in September that both parties addressed the substantial points. The employers side introduced the following points:

   - Scope / definition of working time: employers want the directive to cover 'on-call time'. In the definition they want to make the distinction between active / inactive working time, with only the active part of on-call being counted as working time;
   - Annual leave: formulation in article 7, 1 to include a minimum period of work to qualify for entitlement to paid leave. A link is also made with other forms of leave.
   - Reference to extend to 12 months by means of national legislation, administrative provisions, collective agreements concluded between the two sides of industry.
   - Compensatory rest period in article 17,2 and 18 'within a reasonable period' to be determined by national legislation, collective agreement or agreement concluded between the social partners.

9) ETUC proposals:

   - Rework preamble to take account of various treaty provisions and articles in the European Charter of Fundamental Rights (articles 31 and 33), reference to directive 2002/14/EC, reference to WHO definition of health; reminder of the link between health and safety for workers and possible impact for broader public, especially in transport or major industrial installations, such as power plants, the need to introduce working time models providing a better balance for the reconciliation of working, family and private life, the need for workers to have control over their working time;

- New article 13 – reconciliation of working, family and private life picking up the points made in proposals for preamble under a.
- Tighter definition in article 17 (a) to refer to 'persons with direct and final responsibility for the daily management of a corporate undertaking and who are authorised to engage the company and take corporate decisions, i.e. chief executive officer (or persons in comparable positions) and senior managers, directly subordinate to the latter and persons who are directly appointed by a board of directors in public or private sectors.'
- Final provisions: ETUC conditions for individual opt-out to tighten of the conditions for the individual opt-out, for instance by stating that no employer requires a workers to work more than 48 hours over a seven-day period, calculated as an average in a four month reference period, unless he has obtained the worker's agreement. Such an agreement is only valid for a period of four months. No individual opt-out during the first 4 weeks of an employment relationship or during any probation period. Workers to be entitled to withdraw agreement in writing. No worker shall suffer any detriment because he is not willing to perform such work. Information and consultation processes need to be respected by employers wanting to use the opt-out. Employers must offer free voluntary health assessments to the workers concerned and keep up-to-date records. These records have to be placed at the disposal of the competent authorities. In case of non-respect of these conditions effective sanctions are to be introduced by Member States. Ultimately, the ETUC delegation wanted to see a phasing out of the opt-out.

10) The main sticking points during the negotiations were the definition of working time and the refusal of the employers to agree to an eventual phasing out of the opt-out.
The employers stressed the cross-sectoral nature of the directive, as there were problems across all sectors. The opt-out was used by many sectors and not restricted to areas where on-call is being undertaken. Whether private, public, large or small companies, they all needed the opt-out as a 'general option'. The additional proposals made by the ETUC to control the opt-out were seen as too restrictive. The employers' spokesperson said that current article 22 already contained a rule, it must be put into practice.

The employers frequently made the argument that any final agreement would have to live up to the scrutiny of the Council, implying in fact that the social partners were not free to negotiate autonomously. They time and again referred to the need of 'legal certainty' and that a revised directive should not give rise to further challenges. It was therefore necessary to introduce a definition of inactive on-call time. It was crucial to end ' absurd situations where workers on on-call could sleep for 10 hours'.

The latter point was countered by the ETUC proposing to look at particular circumstances in areas where a 24-hour service is required for objective reasons, for example public security or health, as demonstrated by the fact-finding seminar. The ETUC spokesperson also stressed the need for legal certainty, referring in particular to the EU legal acquis in Article 31 CFR, whereby the EU and Member States have to ensure that 'every worker has a right to limitation of his working hours' and ' to progressively reduce working hours, while improvements are being maintained

(Article 151 TFEU). Moreover the WTD states that the ' improvement of workers' safety and health at work is an objective which should not be subordinated to purely economic considerations'. The ETUC expressed willingness to give an opening whereby the opt-out should 'naturally disappear'. Equally, the ETUC spokesperson indicated openness to discuss the reference period, favouring negotiated solutions. The need for a balanced agreement was underlined. It was however made very clear that the ETUC was not willing to touch the definitions of working times as laid down in articles 1 and 2 of the WTD. The ETUC also considered it necessary to tighten up the definition of 'autonomous workers', another possible let-out from applying the directive.

In the event the negotiations ended in stalemate. The positions of both parties remained diametrically opposed. Understandably, within the ETUC delegation there were difficult discussions, as to where to draw the red-lines, there was however a clear view in the ETUC Executive Committee of December 2012 not to continue negotiations.

11) When agreeing the negotiating mandate in November 2011, the EPSU Executive Committee also approved the setting up of a Working Time Advisory Group (WTAG) that would meet during the negotiations and provide the opportunity for EPSU affiliates to discuss progress in the main negotiations as well as feed into and react to discussions in the ETUC drafting group. The Group provided a very valuable forum for discussion and a number of its proposals for additions to the general provisions of the Directive have been taken up by the ETUC drafting group.

12) The WTAG discussed in some detail ways of tackling the central issues of on-call time and the opt-out. Among the ideas discussed were:
    - Change to article 22 (the opt-out) that would allow for longer working under very specific conditions
    - Derogation of 48 h week only if widespread use of on-call time at work – possibility of basing it only on cases where 50% or more of working time is on-call time, but some doubts as to whether this would cover all cases or in an appropriate manner all economic sectors where on-call is an issue.
    - Need to set upper limit across all sectors and professions (for health and safety reasons) – eg 56, as currently applies in some collective agreements and also may be able to specify that any hours over 48 would be on-call hours only. However, further discussion was needed on this and whether it would be possible to formulate a general provision that would work across different sectors.
    - Link to specific sectors
    - Covered by collective or social partner agreement but opt-out would still be subject to individual agreement with clear right to cancel
    - Need to stick to four-month reference period
    - Use of the special rule would also mean employers required to carry out health monitoring of affected staff, same or similar to that currently required for workers on night shifts
    - New regulations on monitoring and especially on sanctions for misuse or failure to monitor and supply information

- Time limit for phasing out and link a longer phasing out of the opt-out with an on-call work requirement.

The discussions in the WTAG remained non-conclusive, with however a general affirmation of the treatment of on-call duty as working time and the objective of restricting the use of the opt-out to a limited number of sectors. Issues of work-life balance are all the more important in situations where there is more working from home and a blurring of the work / home boundary. The issue of stand-by was raised as example.