Brussels, 12 January 2007
CP/WW/em

To:
- the members of the ETUC Social Policy and Legislation working group
- the ETUC member organisations

FOLLOW UP WORKING TIME DIRECTVE
January 2007

Urgent question to ETUC affiliates
to evaluate infringements regarding the working time Directive

Deadline for response 16 February 2007

Dear colleagues,

The ETUC has asked the ETUI-REHS to help us investigate urgently the current situation in Member States with regard to the implementation of the Working Time Directive, with a view to develop a proper response to the announcement of the European Commission to start infringement procedures.

The aim of this questionnaire is

1) to evaluate if the information on the various infringements by Member States, that could be the basis of infringement procedures as announced by the European Commission, is correct;
2) to evaluate which of these infringements are – from the point of view of the protection of the health and safety of workers and from a trade union perspective – serious infringements that should be addressed without delay by way of infringement procedures, and which ones in your view can be addressed in a later stage and/or in a different manner;
3) to evaluate if the situations, that in the current situation are formally infringements of the existing Directive as interpreted by the ECJ (including the SIMAP and Jaeger judgements) would still be infringements, if the proposals of the European Parliament as adopted in the Cercas report would have been implemented already in your national legislation?

You find attached two documents:

1.) Annex 1: information on the points the Commission considers to take up for infringement procedures;
2.) Annex 2: summary of the amendments adopted by the European Parliament on opt-out, reference period and on-call time.

Please send your response before 16 February 2007 to
wwarneck@etui-rehs.org and cpasschier@etuc.org

Thank you for your cooperation,

Yours sincerely,

Catelene Passchier
Confederal Secretar

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QUESTIONNAIRE

Please answer the following questions:

1.) Please check the information given by Annex 1 regarding your country. What is your opinion on the given points in case they are correct? Are those listed violations in practice bad for the workers in your country, and to what extent? Have these points been raised before at national level by your organisation or otherwise?

2.) On what issues do you yourself consider your national legislation infringing the European Directive 2003/88/EC as it stands (including ECJ interpretation)? Please take into specific consideration the conditions for the opt-out, the reference periods and on-call time.

3.) Would the solutions as presented by the European Parliament (Annex 2) solve or partly solve (to what extent?) the mentioned infringements?

4.) Is your country planning to introduce/use the possibility of the opt-out given by the Directive? Or is your country already using this option? If yes, please explain in which way, in which sectors and under which conditions.

5.) What could trade unions in your country already now – within the framework of the current text of the Directive, as interpreted by the ECJ - offer as solutions to the perceived problems of certain sectors with regard to on-call work, and to limit the use of the opt-out? Please do not hesitate to mention negotiated solutions, as well as other ideas and suggestions (such as campaigns; for instance: refusal to sign opt-outs, etc.).

Please attach any information (copies of relevant legal articles, letters that you have written to your government about problems with implementation etc.), that may help us to understand better your response.

Annex 1: Europolitics[2] "Working time Directive: 23 countries face Commission action if no settlement is reached"

23 COUNTRIES OUT OF LINE

According to a first analysis carried out by the Commission, the implementation by Member States of the Working Time Directive 2003/88 is shaky. 19 countries contravene the on-call time (Austria, Belgium, Cyprus, Czech Republic, Germany, Denmark, Estonia, Greece, Spain, Finland, France, Hungary, Ireland, the Netherlands, Poland, Sweden, Slovenia, Slovakia and the United Kingdom). 21 countries contravene the compensatory rest (Belgium, Cyprus, Czech Republic, Germany, Denmark, Estonia, Greece, Spain, Finland, France, Hungary, Ireland, Lithuania, Latvia, Malta, the Netherlands, Portugal, Sweden, Slovenia, Slovakia and the United Kingdom). 4 countries contravene the reference period (Germany, Lithuania, Malta and Poland). And 4 countries… the individual opt-out (Spain, France, Hungary and the United Kingdom).

The legislation of only Luxembourg and Italy would appear to be entirely in conformity, at least for the time being. Certain amendments to the legislation in Slovakia and in the Czech Republic, for example, could change the situation.

COMMISSION CONCERNS

Belgium. No legal definition of working time or the arrangements applicable to on-call time. Neutralisation of on-call time at the workplace in several collective agreements. No provision in the Act (16 March 1971) on compensatory rest in the event of derogation from the daily rest period. In the public sector (Act of 14 December 2000), the arrangements for compensatory rest (within the following fortnight) is contrary to case-law.

Cyprus. No definition in the Act (on working time of 2002, which entered into force on 1 January 2003) of on-call time, which is not therefore considered entirely as working time. No legal standard on compensatory rest.

Czech Republic. On-call time is not considered as working time by the labour code. No legal definition of compensatory rest.

Germany. The Working Time Act (Article 7) allows derogation from the working time limits by collective agreement for on-call time (contrary to the Directive). In addition, it permits certain collective agreements allowing extreme derogations to remain in force until end-2006. Compensatory rest in the month following. The daily limit on working time exists, but can be calculated over a six-month period (the Directive provides for 4 months) and even longer by collective agreement (without limiting it to 12 months as provided for by the Directive).

Denmark. The collective agreements (traditional means of applying European social law) do not provide systematically that on-call time at the workplace must be considered as working time. The law does not impose a maximum period for granting compensatory rest.

Estonia. The Working Time and Rest Periods Act provides (Article 2.1) that on-call time is a period of rest, without drawing a distinction according to whether or

[2] By Nicolas Gros-Verheyde

not the employee is present at the workplace. No legal provisions on compensatory rest.

Greece. For want of a legal definition, ministerial orders impose on-call periods in the public hospitals which, added to the normal working time, *«go far beyond»* the 48-hour limit. The granting of compensatory rest by collective agreement, without legal framework, is contrary to the Directive.

Spain. Although an Act of December 2003 (55/03) brought the legislation in line with the case-law (Simap judgment), this reform is confined to the statutory personnel of the health sector; other sectors (prison sector, police, etc.) still fail to conform. Provision is made for compensatory rest, but on the basis of a weekly average, over a reference period.

Finland. Finnish law does not draw a distinction between on-call time at the workplace and at home or elsewhere. The compensatory rest may be taken within a period of one month (daily rest) and three months (weekly rest).

France. The system of «equivalent periods» (Article L.212-4 of the Labour Code), allowing certain «periods of inaction» not to be taken into account, was condemned by the Court of Justice (Dellas judgment) and does not conform to the objective of health and safety of workers. No law or regulation (Article D.220-1) guarantees that compensatory rest immediately follows the working time.

Hungary. According to Hungarian law, on-call time with physical presence at the workplace is not considered entirely as working time. In addition, case-law and practice have established the stand-by job concept, which includes a significant proportion of activity. The working time is then increased considerably (by 8 to 12 hours more per day in addition to the normal working time). No legislative provisions on compensatory rest.

Ireland. The 1997 Organisation of Working Act contains a definition of working time which is similar to that of the Directive. However, it does not specify that the on-call time is considered entirely as working time, as provided for by case-law. Likewise, the concept of compensatory rest recorded is not strictly in accordance with case-law.

Lithuania. No legal standards on compensatory rest in accordance with case-law. In several sectors (agriculture, telecommunications, fishing, transport, etc.), the derogations relating to the reference period exceed that which is permitted by the Directive.

Latvia. No legal provisions on compensatory rest in accordance with case-law.

Malta. Act 247/2003 does not define on-call time or provide for applicable arrangements. This gives rise to legal uncertainty. The law does not require the compensatory rest to be guaranteed in the period immediately following the working time concerned. A reference period of one year is provided for by law in sectors (processing industry, tourism) where it is authorised only by collective agreement.

The Netherlands. Collective agreements may derogate from case-law regarding on-call time. The law also provides for derogations regarding daily and weekly rest which are not in keeping with the case-law.

Poland. In the health sector, on-call time is not taken into account for the calculation of working time, even though it is more generously remunerated than ordinary working time. The reference period may be increased to 12 months by law.

Portugal. Derogations from the daily and weekly rest periods may be granted by law, on condition that compensatory rest is guaranteed within the following 90 days (Articles 176, 207, 202 of the Labour Code).

Sweden. Although the Working Time Act, amended in 1996, provides that collective agreements may not reduce the level of protection provided for by the Directive, the national authorities tolerate in practice and in the collective agreements that on-call time with physical presence at the workplace is not taken into account entirely in the working time. The law does not require the compensatory rest to be guaranteed in the period immediately following the working time concerned.

Slovenia. According to the legislation specific to the health sector, only the active part of on-call time is considered as working time. In the other sectors there is a lack of precision, since the Labour Relations Act (42/02) contains no provisions. Compensatory rest is only guaranteed within a period of two months.

Slovakia. To date, the Slovakian Labour Code does not consider the inactive part of on-call time as working time. The on-call time is however limited to 8 hours per week, 36 hours per month (this legislation is apparently in the process of amendment). The law does not require compensatory rest to be guaranteed in the period immediately following the working time concerned.

United Kingdom. The 1998 Working Time Regulations, amended in 2003, contain a definition equivalent to that of the Directive but do not integrate the interpretation of the Court of Justice. Although provision is made for compensatory rest, it is not specified that it must follow the working time.

OPT-OUT INFRINGEMENTS

Spain. The individual opt-out is authorised for the staff of health centres, but it is left to them to establish the terms for the agreement of the worker. It also provides for a minimum period in which the agreement cannot be terminated. This is in contradiction with the Directive *«in view of the exceptional and derogating nature»* of this measure.

France. By decree (No 2002-1421 and following), workers are permitted *«on a voluntary basis» to have «additional working time»* beyond the weekly limits, but without benefiting from the guarantees provided for by the Directive (Article 22 §1 (b) to (e)).

Hungary. The individual opt-out is permitted in the health sector. The agreement of the worker is required, but without incorporating all the guarantees provided for by the Directive (Article 22 §1 (b) to (e)).

United Kingdom. The supporting arrangements for the individual opt-out give rise to several questions. The obligation to keep registers on hours worked has been reduced to the obligation to keep registers of all workers having signed an opt-out agreement. Freedom of choice is not guaranteed, since law and practice allow the simultaneous signature of the opt-out agreement and the contract of employment. Only a general clause, which is too vague, guarantees that the

worker will not suffer any disadvantage. The period of notice to cancel the opt-out (three months) is disproportionate.

On-call time. The time, even the inactive part, with physical presence at the workplace must be taken in account in full in the working time (Simap judgment 3 October 2000, Jaeger 9 September 2003, Dellas 1 December 2005). The Directive does not allow any derogation from the maximum weekly working time by collective agreement.

Compensatory rest. In the case of derogation from the daily and weekly rest periods, compensatory rest must immediately follow the working time concerned (Jaeger judgment).

Reference periods. The current Directive only authorises derogations from the reference period in certain cases: 1. for mobile workers, offshore activities, doctors in training (during the transitional period) by collective agreement or by law; 2. for certain jobs: managing executives or other persons with autonomous decision-taking powers, workers on board sea fishing vessels.

Annex 2: Summary of proposals as given in the Cercas report of the European Parliament[3]

On-call time:

The entire period of on-call time, including the inactive part shall be regarded as working time.
However inactive parts may be calculated in a specific manner to comply with the maximum 48 hrs/week and taking into consideration the protection of health and safety of the workers, if this is done by collective agreements or agreements between the two sides of industry or by laws or regulations.

Definition of on-call time:
Period during which the worker cannot dispose freely of his time and has the obligation to be available at his workplace or at another workplace determined by his employer in order to take up his habitual work and/or certain activities and tasks associated with being on duty, in accordance with national laws and/or practice in the Member State concerned.

Inactive part of on-call time:
Period during which the worker is on call but is not performing his habitual work or any activities or tasks associated with being on duty, in accordance with national laws and/or practice in the Member State concerned.

Reference periods:

The basic reference period of 4 months is kept and a maximum of 12 months is possible for objective or technical reasons or reasons concerning the organisation of work, if complying with the protection of health and safety of the workers.
Under the following conditions:
- Collective agreement or agreements of two sides of industry if workers are covered
- If workers are not covered by collective agreements - by means of law or regulation ensuring:
    - employer informs + consults workers and/or their representatives on the introduction of the proposed working time pattern and alterations
    - employer takes measures to prevent health + safety risks

Opt-out:

Phasing out in 36 months after the entry into force of the Directive.

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[3] A6-0105/2005FINAL – 25.4.2005
Report on the proposal for a directive of the EP and of the Council amending Directive 2003/88/EC concerning certain aspects of the organisation of working time
http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//NONSGML+REPORT+A6-2005-0105+0+DOC+PDF+V0//FR
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