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EUROPÄISCHE UNION DES HANDWERKS UND DER KLEIN- UND MITTELBETRIEBE
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UEAPME report on the practical implementation of Directive 2003/88/EC concerning certain aspects of the organisation of working time

Introductory remark:

The directive 2003/88/EC concerning certain aspects of the organisation of working time is an essential piece of legislation in the field of labour law especially for SMEs. Working time is one of the main components of internal flexibility and a key feature for the competitiveness of small businesses. Therefore the way it has been implemented at national, sectoral and enterprise level is an important factor for small companies' economic success.

1. TRANSPOSITION

1. Do you consider that the Working Time Directive has been transposed in a satisfactory way in the EU Member States?

The working time directive has been transposed in each of the 27 member states, but the appreciation of the transposition varies greatly among member states, in particular if we consider the jurisprudence of the European Court of Justice on the SIMAP/JAEGER cases concerning the topic of "on call time".

It seems that in certain countries like in Italy the national legislation is perfectly in line with the European directive, whereas in several other member states like Austria, Belgium, Germany, Luxemburg or Sweden the national rules are stricter than the ones defined in the European directive, which in practical terms considerably limits the internal flexibility of companies.

2. If you consider that there is room for concern about transposition in specific sectors or concerning specific provisions, please give details.

Currently one of the most problematic topics is the discussion on "on call time", following the SIMAP/JAEGER judgements of the European Court of Justice which created a huge legal uncertainty at national level and therefore had negative consequences for employers.

Practical examples of specific problematic provisions:

According to article 6b of the directive, the average working time for each seven-day period, including overtime, should not exceed 48 hours. This can be organised over 4 days (12 hours per day).

In **the German legislation** the working day is limited to 10 hours. (Para 3 Art 2 ArbZG). The only way to derogate from this clause is by collective agreement and under very specific conditions. Defining the maximum working time on a weekly basis rather than on a daily basis could help to make the organisation of working time more flexible.

In Sweden, when transposing the working time directive, the government did not use the possibility of derogations provided for in Article 17 Para.2 despite the great companies' need to use these derogations particularly in some specific sectors.

When transposing the directive, the Swedish government connected the minimum daily rest period of 11 consecutive hours per 24-hour period to the night time for every 24 hours and thereby maintained the prohibition of night work previously existing in the Swedish working time legislation. This represents an additional limitation of flexibility for companies.

In the Czech Republic, provisions dealing with “on-call duty” in the transport and health sector seem to be problematic.

3. If you consider that transposition of the Directive has been particularly satisfactory in any respect, please give details.

In Austria, the transposition of the night work clause takes into account the interest of workers for additional rest periods without imposing disproportionate burdens on employers.

4. Do you consider that any particular issues arise regarding implementation as concerns the previously excluded sectors (implementation of Directive 2000/34/EC)? If so, please give details.

The vast majority of UEAPME members are hardly concerned with the excluded sectors.

2. FORMERLY EXCLUDED SECTORS

1. Do you consider the transposition and application of directives 2000/34/EC satisfactory, as regards doctors in training?

The vast majority of UEAPME members are hardly concerned with doctors in training.

The Czech Republic does not apply the relevant provision dealing with the doctors in training despite the opposition of trade unions.

2. Has this aspect been transposed in any Member States by way of collective agreement? Please give details

In the Czech Republic, it has been transposed by guiding rules and collective agreements

3. Please refer to any particular effects of transposition in this area, and to any positive or negative effects you perceive

In the Czech Republic the provisions were formulated with more precision.

3. SOCIAL PARTNERSHIP

1. Do you consider that the social partners have been sufficiently consulted and involved by the national authorities, regarding the transposition and practical implementation of the Directive?

The situation differs greatly from country to country. Whereas in certain countries like in Austria, Belgium, Germany, Italy, Luxembourg or the Czech Republic, national social partners are rather satisfied of the way they have been fully involved and heard during the preparation of the national law, in other countries the situation is far less satisfactory.

In Spain, social partners, notably the ones representing SMEs have not even been consulted by the government and in Sweden partners have been formally consulted but their views have not been taken into account.

2. The Directive provides at Articles 17 and 18 for derogations by means of collective agreements or agreements concluded between the two sides of industry. Please indicate how you evaluate the experience in this regard. Are there any examples which you consider as providing possible models of good practice?

Models of good practices come essentially from the Member States, where the national legislation allows social partners to play an active and effective role through the negotiation of collective agreements.

In **Austria**, the working time legislation gives social partners at national, sectoral but also company level room for manoeuvre with the organisation of working time, on call time, extension of normal working time and of the reference period for the calculation of the average weekly working time, etc... This greatly facilitates the adaptation to the specific needs of sectors and is therefore widely used.

However, linking the authorisation for company agreements to the existence of collective agreements is problematic in particular for businesses without works councils, because they cannot use this additional opportunity to be more flexible.

Some examples of Austrian good practices in several areas:

- In the retail sector, collective agreements give the possibility to companies and individuals to jointly decide on a twelve month reference period, which is essential to be able to cope with the seasonal variations (end of the year, etc...)
- In the road transport sector, negotiations are currently taking place, where the new legislation on working time of lorry drivers should be integrated.
- The collective agreement covering white colour workers in the conveyance sector foresees the extension of the weekly working time to 43hours calculated over a three week reference period, and this can be further extended by company agreement to 45hours calculated over a 52 week reference period. In addition, through company agreement, the daily working time can be extended to 10 hours per day during 4 days or through the accumulation of periods of compensatory rests.
- For the garage and patrol station sector there is the possibility to extend the normal working time to a weekly working time of 60 hours (12 hours per day through on call time)
- The information technology and consulting sectors benefits from a sectoral collective agreement defining the maximum weekly working time to 45 hours, the daily working day to 9 hours (sometimes 10 hours under certain conditions), daily rest period of 10 hours with compensation) and the reference period is calculated over 12 months.

In **Belgium** possibilities to derogate from the daily and weekly working time are limited and expensive (overtime payment). Especially for SMEs flexible arrangements where working time can be calculated over a longer period without overtime payments would be desirable.

In the **Czech Republic**, contrary to the directive, the existing law determines in which cases the conditions covered by the collective agreements could be set up differently.

In **Germany**, social partners have a great room for manoeuvre to negotiate on various derogations such as a longer daily working time or a longer reference period.

In **Italy**, one good example is the collective agreement for SMEs in the textile and clothing industry sector foresees the extension of the reference period to 6 months which can possibly be increased to 12 months in specific cases indicated by the collective agreement.

4. MONITORING OF IMPLEMENTATION

- 1. Please indicate whether you consider that the enforcement and monitoring of the Directive at national level is satisfactory.**
- 2. If you see any problems, please indicate their overall impact and make recommendations for improvement.**
- 3. Can you identify any examples of good practice as concerns monitoring and enforcement?**

Globally, the enforcement and monitoring of the directive is satisfactory. Member States have put in place controls and if necessary financial sanctions. In many countries employers have the obligation to keep records of the working hours of their workforce. However the decision of the European Court of justice concerning “on call time” as full working time creates huge legal uncertainties.

National practices:

In **Austria**, the working time legislation is controlled by the labour inspector at company level. Moreover, and because of the obligatory membership of companies with the Economic Chamber and of its capacity to conclude collective agreements, nearly all workers of the private sector are covered, creating indirectly an additional monitoring tool.

In **Sweden**, the fact that the EU case law settles new rules afterwards is considered as a problem. The SIMAP/JAEGER cases create uncertainty for enterprises and furthermore this is not within the common principles of Swedish law, which could negatively affect the principles of rule of law.

5. EVALUATION

- 1. Please list any positive and negative aspects of the practical implementation of the Directive.**
- 2. Does the practical application of the Directive in the Member States, in your view, meet its objectives (to protect and improve the health and safety of workers, while providing flexibility in the application of certain provisions and avoiding imposing unnecessary constraints on SMEs)**

National evaluation of SMEs organisations:

Austria:

In Austria the working time regulation is much stricter than the European legislation:

- the weekly rest period is 36 hours (against 24+11 in the EU directive) and in most cases it comprises Saturday from 3.pm onwards and Sunday.
- in the hotel and catering sector it is necessary to organise the work of the service people according to the following timetable: from 7.00 to 10.00 am (breakfast service) and from 7.00 pm to 11.00 pm (diner). For such specific activities, the current rest period regulation is not adapted to the real practice and needs on the ground, although the working time directive and the directive on youth work allow some special arrangements for specific cases.
- concerning taxi drivers the various regions “Bundesländer” have different collective agreements with different regulations.

In the future the possibility for flexibility provided by the various agreements should be extended at federal level to the full sector of individual personal transport.

In Austria the transposition of the working time directive protects the health and safety of workers and at the same time foresees some possibility for flexibility.

However the provisions are very complex and difficult to understand particularly for SMEs.

The law provides for flexibility only if it is specified in the collective agreement. If it is not clearly written down, there is no room for manoeuvre at enterprise level, whereas the directive foresees that derogations may be adopted by mean of collective agreements or agreements between the two sides of industry at lower level.

Consequently it affects particularly SMEs and micro-companies employing less than five employees which is the threshold for electing works councils, and therefore where there is no possibility to negotiate an agreement at enterprise level.

In order to overcome this heavy constraint, the solution should be to give the possibility to companies without work councils to provide for flexibility of working time through the signature of a written agreement with the support of all workers.

Czech Republic:

For the Czech SME employers the current main problem is the question of on call time and the negative consequences of the ECJ judgment, which have created a significant increase of costs and administrative burdens.

The legal decision concerning on call time should in theory contribute to the security of workers, but in practice it goes against their interest. The increasing of the so called “security” costs will be compensated by changes in the work organisation or in a reduction of jobs which goes totally against the Lisbon Strategy on growth and jobs.

Instead of improving the health and safety of workers, the current provisions concerning on call time brought higher costs for employers without taking into account the reality of certain branches and professions.

In addition, the existing way of extending the reference period only by collective agreement does not sufficiently take into account the broad diversity of situations in the 27 Member States and in particular the fact that in certain Member States working time rules are defined by law and social partners do not have the possibility to intervene.

The practical implementation of the directive limits the possibility to fully use the provisions for flexibility existing in the previous Czech regulation. It creates specific problems mainly for SMEs which in most cases are not covered by a collective agreement.

Germany:

In Germany, the main current problem is the difficulty created by the judgment of the Court of Justice in the SIMAP/JEAGER case law and which has to be introduced in the German law. In practice employers are facing huge problems in branches with a lot of on call duties. Therefore it is urgent to find a workable solution at European level which takes into account the increasing need for more flexibility.

Luxembourg:

According to the employers, the main problem and most negative effect of the implementation of the directive in Luxembourg is that the government does not stick to the “one to one transposition”. The national law is stricter. One example is the night time working period which starts at 10 pm in Luxembourg, whereas the directive allows Member States to extend the normal working time until 11pm..

Sweden:

The practical implementation of the working time directive in the Swedish working time law presents several negative aspects.

The prohibition of night work substantially reduces flexibility for companies and creates negative consequences for the competitiveness of the economy. According to the Swedish law a waiving right exists which means that an employer could be exempted from the prohibition of night work after applying to the Swedish working environment authority. This means a legal insecurity because there is no clear line in the decisions taken by the authorities.

The complexity of the Swedish working time regulation is very difficult to understand especially for SMEs which don't have the administrative capacity to fully deal with these tasks.

Furthermore, managing the organisation of working time for micro-companies with very few employees is felt as very burdensome.

At the end it makes it even more difficult for employers to accommodate the wishes of employees in terms of organising the working time.

In this context it is essential to outline that the Swedish culture is very specific and differs substantially from many other countries. Swedish employees prefer to work longer shifts in order to be able to have longer equivalent periods of time off. However with the obligations of the EU directive concerning compensatory leaves this is not possible anymore.

These constraints have resulted in reducing opening hours and downsizing companies, leading at the end to job losses. Finally according to the Swedish employers this inflexible regulation increased the need for temporary work and fixed time contracts, whereas employers would have preferred to hire people under indefinite duration contracts if the rules would have been more flexible.

6. OUTLOOK

- a. any priorities for your organisation, within this subject area.**
- b. any proposal for additions or changes to the Directive, stating the reasons.**

For UEAPME and its member organisations, the main priorities in the field of working time legislation are the following:

- 1 – to urgently find a workable compromise for the “on call “ time issue which definitively rules out the legal uncertainty created by the SIMAP/JAEGER cases laws

through the adoption of the current proposal of the Commission aiming at creating a new concept of “inactive part of on call time”

2 – to agree on a reference period of 12 months as the general rule and to have the possibility to extend it for a longer period through collective agreements. This would greatly contribute to adapt to the production cycle and respond to the change on the market and consumers demand.

3 – to maintain the opt out clause at individual level but to make it also accessible through collective agreements.

For the UEAPME national members:

In **Austria** the priority should be to give to companies more room for manoeuvre at plant level through legislation and not only through collective agreements.

In **Belgium** and **Luxembourg**, employers would greatly welcome more flexibility in the national working time legislation.

In **Sweden** employers would like that the Swedish government allows the use of the opt-out clause.

In addition, they would like a better exploitation by the national social partners of all existing possibilities for specific arrangements of the working time, in order to better suit the need for flexibility of employers and workers.

c. Flanking measures at EU level which you consider could be useful

The exchange of good practices could facilitate a better transposition of the directive at national and enterprise level.

Conclusions:

Working time and flexible work arrangements are key components of SMEs’ internal flexibility. Small and micro-businesses are the ones suffering most from the rigidities of labour legislation in particular of working time regulation because of the small number of employees.

In order to remain competitive, they need to have a European and national legislation which provides for sufficient flexibility and guarantees legal certainties particularly in the case of on call duties.

Therefore UEAPME is calling for accelerating the talks at the Council levels in order to find a rapid solution on the three main topics, namely on call time, reference period and opt-out.

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