

# EU Employment Law Practice

## European Employment Report February 2009

### EU Labour law

*Working time – “Until everything is agreed, nothing is agreed”*

On 6 February, the Czech EU Presidency obtained a mandate to start informal three-way talks on the revision of the Working Time Directive 93/104/EC, which has been on the table for the last four years. This will lead to a “conciliation procedure” between the European Parliament and Member States in the Council on 17 March, which is the third and final phase of the co-decision procedure. If no agreement can be reached during this conciliation phase, the proposal will be dropped.

The Council paper treats the three matters on which the Council and EP disagree – on-call time, compensatory rest and the opt-out – as a package: “*Until everything is agreed, nothing is agreed*,” it says.

Regarding the possibility to opt-out from the maximum 48-hour week, used by 15 Member States, which the European Parliament had voted to phase out after three years, the Council guidelines say that the negotiations on the EP’s amendments were “difficult,” because its original position was part of a “*fragile political compromise*”. After “several discussions,” there is “*no majority*” within the Council in favour of “*phasing out the opt-out within the time-limit proposed by the EP*”. A majority insists on keeping the ‘*horizontal opt-out either in its current form or in the stricter form proposed in the common position*,’ while some Member States are willing to accept using the opt-out “*only for a certain limited period of time or in certain sectors*”.

Regarding on-call time, the Council says it is reconsidering its long-standing position and “*might be willing, in its effort to reach an overall agreement, to offer a compromise closer to the Parliament’s position on [...] on-call time*”.

It welcomes the possibility to calculate inactive on-call time in a “*specific manner, which needs to be further discussed, clarified and reformulated in the dialogue [...] to reflect [...] various experiences and practices in the sectors concerned as to the specific manner of counting inactive on-call time*”. The Council sees the EP’s amendments on compensatory rest as “*too restrictive and denying the flexibility necessary in various sectors and activities*”. However, just as with on-call time, they are “*willing to negotiate with the Parliament and look at other possible ways of reconciling the workers’ need to rest and recover and necessary flexibility about the organisation of work and rest time in the specific circumstances of certain sectors and activities*”.

Meanwhile the Commission has also delivered its Opinion on the European Parliament’s amendments. On the opt-out, it stated that “*while being in principle supportive of the eventual phasing out of the opt-out*” it “*does not consider that present conditions allow for the phasing-out of the opt-out, in the light of major changes to the pattern of use of the opt-out by Member States and of the positions expressed by Member States during, and since, the Council’s first reading*.” It should be noted that, now that the conciliation process has been launched, the Commission is limited to playing a mediating role between the EP and Council. Its main aim is to reconcile the positions of the two co-legislators while defending, as far as possible, the general interest and the requirements of the Treaty in line with its proposal. At this stage the Commission can no longer prevent the Council from acting by a qualified majority without its agreement.

Link to [Commission Opinion](#)



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## EU endorses penalties for employers of illegal immigrants

On 19 February the European Parliament formally adopted, by 552 votes to 105 (with 34 abstentions) a Directive laying down minimum common standards on sanctions to be applied against employers who employ illegally staying third-country nationals.

**Employer obligations.** The Directive imposes several obligations on employers intending to employ third-country nationals: they must check the worker has a valid residence permit; maintain records for possible inspection and notify the authorities the start of employment of third-country nationals within a certain period.

**Subcontracting.** The Directive also provides that, when the employer is a subcontractor, the main contractor which contracts directly with the subcontractor may, next to or in place of the employer, be held liable to pay financial sanctions or back payments due. However, a contractor that has undertaken due diligence obligations as defined by national law shall not be held liable a breach of the Directive by their subcontractors.

**Financial sanctions.** Member States will have to take the "necessary measures" to ensure that infringements of the prohibition are subject to "effective, proportionate and dissuasive sanctions" against the employer. Specifically, sanctions shall include financial sanctions, rising according to the number of illegally employed third-country nationals and the costs of return of illegally employed third-country nationals in cases where return procedures are carried out.

**Criminal sanctions.** Furthermore, Member State must ensure that the employment of illegal immigrants constitutes a criminal offence when committed intentionally in cases where (a) the infringement continues or is persistently repeated; (b) the infringement is in respect of the simultaneous employment of a significant number of illegally employed third-country nationals; (c) the infringement is accompanied by particularly exploitative working conditions; (d) the infringement is committed by an employer who, while not

having been charged with a human trafficking offence, uses work or services exacted from a person with the knowledge that the illegally staying third-country national is a victim of such trafficking or (e) the infringement relates to the illegal employment of a minor.

**Back payments.** In addition, employers will have to make back payments to any illegally employed third-country national, up to at least the wage provided for by the applicable laws on minimum wages, collective agreements or practices in the relevant occupational branches (unless either the employer or the employee can prove that a different wages would apply, while respecting any national minimum wage). They will also have to pay an equivalent to any taxes and social security contributions that the employer would have paid had the third-country national been legally employed, including penalty payments for delays and relevant administrative fines.

MEPs said the text could have been stricter against employers who act unlawfully but as a balanced compromise it was an encouraging first step which changed the emphasis from condemning illegal immigrants to sanctioning those that exploit them. The European trade Union Confederation said the legislation was "ineffective" and even "dangerous" since it would encourage employers to use complex subcontracting chains and letter-box companies to avoid their obligations and criminal sanctions. "Taking measures against employers sounds nice, but experience in the US has shown that it drives a lot of the illegal work further underground," said ETUC General Secretary Catelene Passchier.

Once the Directive has been published in the Official Journal, Member States have two years to transpose the rules into national law. They must conduct effective inspections in sufficient numbers to monitor the application of the law.

The UK had declined to opt-in to this Directive. Currently EU legislation on immigration adopted by a qualified majority under Title IV of the EC Treaty only applies to the UK if it notifies the Council that it intends to opt in.

Link to [Text adopted](#) and [ETUC Statement](#)

## Member States fail to transpose directive on employee consultation

Member States have been criticised in the European Parliament for failing to set up permanent systems of information and consultation of employees, as required by Directive 2002/14/EC establishing a general framework for informing and consulting employees in the EU. Several States have failed to transpose it into national law. In others, it is not part of the tradition to arrange for such compulsory dialogue, says Jean Louis Cottigny (PES, France), the author of an own-initiative report on the implementation of the Directive, which was adopted by the European Parliament's plenary on 19 February.

According to the report, the "democratic involvement of employees in decisions" should be strengthened, especially in today's troubled economic times. It says that Member States that have not yet fully adopted a "framework for informing and consulting employees" risk facing infringement proceedings by the European Commission before the European Court of Justice. Such proceedings should be initiated against those States that have "failed to transpose the directive" or "have not done so correctly". Cottigny urged the laggard States to rectify this situation "as soon as possible" and simultaneously called on the Commission to "take immediate measures" to guarantee "effective transposition" of the directive. Cottigny's report says that while certain States have already transposed the directive, it was not done in an appropriate manner: "[Implementation] has taken place in a minimal or deliberately vague manner or not at all," he said.

Link to [Cottigny Report](#)

## Presidency dampens calls to speed up revision on Posted Workers Directive

The Czech Presidency has poured cold water on calls to revise the Posted Workers Directive 96/71/EC, which governs the working conditions of workers posted temporarily to another Member State, and specifically the very specific conditions in which the host country's statutory and regulatory

provisions can apply. Most recently these demands have been in the form of a declaration by a number of MEPs attempting to force the Commission to speed up the revision of the directive, following the strikes about 'foreign labour' in the UK and elsewhere. In the UK, workers staged demonstrations against "foreign workers" in particular Italians, after Total, owner of the Lindsey oil refinery in north-east England, hired an Italian company for a temporary project. Trade unions, along with the EP's Socialists, have been calling for the directive's revision ever since the European Court of Justice's judgments in the *Laval* and *Viking* cases, which they state threaten the social protection of posted workers.

According to a statement issued by the Czech Presidency on 6 February, speeding up the analysis of the Posted Workers directive jointly with the social partners would be "counterproductive". The Directive should first be implemented in a "proper way" by all Member States." Referring to the October 2008 forum held in Brussels on 'Workers' rights and economic freedoms', which was attended by several EU ministers of labour and other leading personalities, the Presidency noted that the prevailing opinion was that the directive should be firstly properly implemented by all Member States at all levels, before any attempt to revise the directive is again considered. The Czechs add that that is "currently the overwhelming opinion in the Council of Ministers [...] And this is also the opinion of the Czech Presidency". The Czechs "understand that it is currently up to the European social partners to undertake joint analysis of all obstacles to the workers' mobility in the EU labour market, including the issues related to Posting of Workers Directive". They say they "respect" the competences and role of social partners in this process, and add that the Presidency "is not going to ask the social partners to accelerate the analysis". The Commission has said that it will decide on whether to commence a revision of the directive on the basis of the outcome of the ongoing joint analysis by the social partners.

Link to [Press release](#)

## Labour mobility

### Switzerland extends agreement on EU Workers

On 8 February, Swiss voters elected to extend the agreement allowing European Union nationals to work on the territory of the Swiss Confederation to include Romania and Bulgaria. The official results show that 59.6% voted "yes" in the referendum, with 40.4% of the turnout voting "no". Immediately after the results were announced, the president of the European Commission, Jose Manuel Barroso, telephoned the president of the Swiss Confederation, Hans-Rudolf Merz to congratulate him on the "excellent results". Twenty-two Swiss cantons returned positive votes, with only the voters of three German-speaking cantons and the Italian-speaking Tessin voting against. Freedom of movement, which has been in force since 2002, has allowed some 200,000 citizens of the (25) countries of the EU to work in Switzerland. The poll had a greater EU relevance for the Swiss as, in the event of a 'no' vote, a "guillotine" clause would have suspended a number of related trade agreements between the Alpine country and the EU, which had been negotiated in 1999.

Link to [Barroso statement](#)

### France condemned for failing to recognise professionals from Romania and Bulgaria

On 10 February the European Court of Justice found that France had infringed Directive 2006/100/EC, in that it had failed to adopt or notify the measures necessary to comply with Council Directive 2006/100/EC, which required Member States to adapting certain Directives in the field of freedom of movement of persons following the accession of Bulgaria and Romania, in particular in relation to the system for the recognition of professional education and training, the legal profession, medical and paramedical activities, and architects. France must now comply with the judgment or face financial penalties.

Link to [judgment](#)

## Jobs & Growth

### Social partners are essential to success of EU recovery plan

On 3 February, the European Commission published its 2008 Industrial Relations Report, with a key message: structured dialogue between workers' and employers' representatives can help the EU face the economic crisis and that high quality industrial relations are a key element in managing economic change in the EU. Highlighting the importance of good relations between workers and employers in times of crisis, Social Affairs Commissioner Vladimir Spidla said: *"The recovery plan and our growth and jobs strategy cannot be delivered without the involvement of the social partners. Working conditions, training, or active labour market policies cannot be the sole responsibility of the state, nor be left entirely to market forces. Social partners can play a key role in determining, explaining and implementing such policies"*.

The 2008 report shows, *inter alia*, that: (1) collective bargaining retains an important role in Europe, despite a moderate decline in trade union membership; (2) in 2006, almost two-thirds of European workers were covered by a collective agreement; (3) membership of employers' organisations – which largely determines collective bargaining coverage – appears to be stable; (4) there are marked differences between the Member States; (5) trade union membership ranges from 8%-80% and membership of employers' organisations from 20%-100%; (6) while bargaining coverage is 68% in the EU-15 member states, it is 43% in those countries that joined the EU since 2004.

Link to [Press release and report](#)

## National Developments

### Czech Republic – Czech parliament stalls on equal opportunities measure

The Czech Chamber of Deputies (national parliament) has decided to postpone once again a vote on its long outstanding anti-discrimination bill. The Czech Republic is the only remaining EU country not to incorporate the EU Equal

Opportunities Framework Directive (2000/78/EC) into national law. The bill has, however, previously been voted through by the chamber, but it was vetoed by the state president, Vaclav Klaus.

Link to [Press release](#)

### Portugal – Heavy fines for ‘irregular work’ infringements

The Portuguese labour inspectorate (ACT) has revealed that in 2008, employers were fined a total of 5m euros for employing illegal and ‘undeclared’ workers. ACT visited 21,000 establishments and also secured 2.5m euros in unpaid social security contributions.

Link to [Press release](#)

### Finland – Parental leave in the melting pot

The Finnish social affairs and health minister, Liisa Marja Hyssala, has established a committee to review the current parental leave system. Its main goal will be to encourage fathers to take a greater share of parental leave. The favoured approach at present is a proposal put forward by the gender equality minister, Stefan Wallin, which gives both parents the right to take up to six months’ leave and then to divide a further six months’ leave between them.

Link to [Parental leave rules](#)

## The Weeks Ahead

### Commission

3 March – Launch of Campaign “Gender Pay Gap”

### Council

9-10 March – Employment, Social Policy, Health and Consumer Affairs Council (EPSCO)

19-20 March – European Council

25-26 March – Flexicurity: Lifelong Learning and Social Protection Components (Prague)

### European Parliament

2 March – EMPL Committee meeting

30-31 March – EMPL Committee meeting

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