

April 2009

# EU Employment Law Practice

## European Employment Report

### April 2009

#### EU Labour law

##### Talks on revision of Working Time Directive collapse

A few minutes after midnight on 27 April, following hours of intense discussion, the talks on the revision of the Working Time Directive collapsed without a deal. The decision was taken by an overwhelming majority in the European Parliament's delegation with 15 votes in favour, 5 abstentions and 0 against. The biggest stumbling block was the controversial opt-out clause staunchly defended in particular by the UK but also favoured by Germany, Malta and Poland. Other problems blocking the deal included on-call time and multiple contracts.

This is the first time since the entry into force of the Amsterdam Treaty that no agreement has been found in a conciliation committee for negotiations between Council and Parliament. The Amsterdam Treaty significantly extended the scope of the co-decision procedure for legislative acts.

Both sides were quick to blame each other for the failure. According to sources, the European Parliament showed less flexibility during this last conciliation round than it had previously. Despite previous indications that it might accept a draft which did not specify an end date for the opt-out, in these final talks it insisted on having an end date in the draft. The Council refused to such an end date in the draft, ending five years of efforts to revise the directive.

German Socialist MEP Mechtild Rothe, who led the Parliament's delegation said, *"Unfortunately, after five years of negotiations, it was not possible to reach an agreement. The EP negotiating team made several proposals on the opt-out so that it would become 'exceptional and temporary'. The opt-out cannot be forever. On the Council side, any attempt to put an end to the opt-out was not acceptable."*

*"The Socialist-dominated negotiating team interpreted their mandate from the Parliament very rigidly, and refused to accept compromises regarding on-call time, which were on the table, unless there was a parallel agreement to phase out the opt-out. It was obvious from the beginning that the blocking minority in the Council would never agree to this, and so the Parliament's 'all or nothing' approach ensured that the result was nothing,"* commented the centre-right EPP-ED group's employment and social affairs coordinator, Philip Bushill-Matthews.

The European Commission now wants to "reflect and analyse" the result before deciding on the next steps. For the time being the current directive will stay in place. The Commission has three options: do nothing, start infringement procedures against those Member States facing problems complying with recent ECJ judgments on on-call time and/or start a new proposal from scratch focusing solely on the treatment of on-call time.

Link to [European Parliament press release](#), [Spidla statement](#) and [ETUC reaction](#)

##### Recast European Works Council Directive adopted

The Council had rubber stamped adopted the recast Directive on European Works Councils (EWCs). This is not a major overhaul, rather a 'recasting' of the Directive aimed at increasing the use of EWCs, clarifying existing areas of uncertainty and bringing the rules in line with current practice. Among other things, the new Directive introduces a definition for 'information' and "clarifies" the meaning of 'consultation'. It also provides for the adaptation of EWC arrangements if the structure of a company or group of companies changes significantly (e.g. due to a merger, acquisition or division).

Importantly for companies with EWC already in place, the recast Directive does not



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establish a general obligation to renegotiate agreements already concluded or concluded until two years after the Directive enters into force. Similar to Article 13 of the existing Directive 94/45/EC, Article 14 of the recast Directive excludes certain agreements already in force. It excludes agreements which were previously covered by Article 13, as well as agreements concluded under Article 6 of the existing Directive 94/45/EC which have been signed or revised within two years of the recast Directive coming into force.

A fuller discussion of the main changes introduced by the recast Directive will follow once the final text is published in the Official Journal.

Link to [European Council Press release](#) and [European Commission statement](#)

### European Parliament wants 20 weeks of paid maternity leave

The European Parliament's Women's Rights Committee is seeking to extend the minimum period of maternity leave to a minimum of 20 weeks (adding two weeks to the European Commission's proposed extension from 14 to 18 weeks), with eight weeks of compulsory paid leave, with the adoption of the report by Portugal's Edite Estrela (PSE) in its first reading. A right to two weeks of paternity leave, including two compulsory weeks after the birth, was also included by the EP's Committee.

On 5 May in Strasbourg, the plenary will vote on this text, which follows the Commission's proposal in October 2008 to revise the Pregnant Workers Directive 92/85/EEC as part of the Commission's 'work-life balance package', aimed *inter alia* at promoting gender equality on the labour market.

The Committee also wants to prohibit the dismissal of women during their maternity leave, and to require that any dismissal within 12 months to be justified in writing and not linked to maternity. The Committee also approved a provision that allows women to find an "equivalent" job after they return from maternity leave. Employers should also take measures to facilitate breastfeeding, for example by giving women extra breaks.

This text still has to obtain the agreement of Member States in the Council. Member States are still far from reaching an agreement on the proposal. Some, along with many business organisations, fear that an extension of the terms and period of maternity leave could negatively affect women's participation in the labour market and lead to extra costs. The issue will return to the Employment Council's agenda in June, but agreement there is not likely before the end of the Swedish EU Presidency, in December 2009.

Link to [Estrella report](#)

### Commission launches legal actions against Member States on the recognition of qualifications

In April, the European Commission sent formal letters of notice (the first stage of an infringement action before the European Court of Justice) to Luxembourg, Spain and Greece, as well as a reasoned opinion (the second stage of the infringement procedure) to Germany in respect of their failure to transpose various directives on the recognition of qualifications.

Luxembourg's formal letter of notice related to its failure to execute a 2008 judgment of the ECJ concerning the non-communication of measures taken to implement Directive 2006/100/EC, which provides for technical adaptations to the directives on professional qualifications further to the accession of Bulgaria and Romania.

Spain's formal letter of notice requests information on the measures it has taken to comply with the Court's judgment of October 2008 which ruled that Spain's legislation on the recognition of air traffic controller qualifications failed to comply with Directives 89/48/EEC and 92/51/EEC on a general system for the recognition of qualifications.

While Greece's formal letter of notice requests information on the measures it has taken to comply with the Court's judgment of 23 October 2008 regarding the recognition of professional qualifications of engineers, under Directive 89/48/EEC (replaced by Directive 2005/36/EC on the recognition of professional qualifications). The Court

had held that Greece failed to recognise diplomas awarded under a franchise agreement, provided for the application of compensatory measures in more cases than those allowed, and did not allow – in the public sector – the reclassification at a higher grade of persons recruited at a level lower than that to which they would have been entitled if their diplomas had been recognised in accordance with that directive.

Germany's reasoned opinion requests it to amend its legislation on the recognition of manual therapists' qualifications. According to German law, all physiotherapists who provide manual therapy services for patients insured by the health insurance funds have to complete a post-graduate training course in manual therapy if they want their patients to receive reimbursement of the fees for those services from the health insurance funds. On this basis, the German authorities refuse to recognise manual therapists' qualifications obtained by EU citizens in other Member States because their training is different from the German training requirements. In the Commission's view, such refusal contradicts the principle of mutual recognition established by Directive 2005/36/EC.

Link to Commission webpage on [infringements](#)

## Labour Mobility

### Single Permit and Common Rights for Foreign Workers

On 6 April, the European Justice & Home Affairs Council held a political debate on a proposal for a draft Directive, submitted by the Commission in October 2007, on a single application procedure for a single permit for third-country nationals to live and work in a Member State and on a common set of rights for third-country workers legally residing in a Member State.

The exchange of views focused on the scope of the directive and was conducted on the basis of a compromise text. According to sources Germany and Austria were initially opposed to the scope but now back the text. Spain, the Netherlands, Luxembourg and Slovenia are also opposed, as is the Czech

Republic, but the Czechs are playing their role as EU President.

The Council has instructed its preparatory bodies to continue the examination of the proposal with a view to concluding negotiations on the directive as soon as possible.

Link to Council [Press Release](#) and Commission [Proposal](#)

### Opening of labour markets to workers from new Member States

On 1 May 2009, Belgium, is due to open its labour markets to workers from eight Eastern European countries which joined the European Union in 2004 (Poland, Czech Republic, Slovakia, Slovenia, Hungary, Lithuania, Latvia and Estonia).

The 15 "old" Member States were able to restrict access to these countries until 30 April 2009. They may ask the Commission for a further two years of restrictions if they can demonstrate that such migrant workers risk causing significant disruption to the functioning of their labour market. Belgium has abandoned this idea fearing that it would damage its image not long before it takes over the Presidency of the EU in July 2010 but it will however maintain until the end of 2011 its restrictions on workers from Bulgaria and Romania.

Also on 1 May, Denmark will be opening its labour market to workers from Bulgaria and Romania.

Although all citizens of EEA states will be able to work in Denmark without a work permit, foreign companies posting workers to the country must submit a prior notification to the register of foreign services operated by the Danish Commerce and Companies Agency.

Only Germany and Austria have requested an extension, citing their borders with the eastern countries as a reason.

Link to article in [Le Soir Belgium](#)

## Growth and Jobs

### Monitoring the EU employment and social outlook in the current economic crisis

On 7 April, the European Commission published its monthly monitoring report on the employment situation and economic outlook in light of the current global economic crisis. The April report includes a special focus on financial services, the sector at the origin of the current downturn and one of the most seriously hit by job losses, as well as a supplement with the standard quarterly review of EU labour market developments. The report shows that although companies across Europe are continuing to make substantial job reductions, there has been a fall-off in the number of announced job losses in March compared to previous months and there are tentative signs of expectations starting to improve in several sectors namely construction, services and retail trade.

According to statistics published by Eurostat on 1 April, the eurozone's seasonally adjusted unemployment rate was 8.5% in February 2009, compared with 8.3% in January 2009 and 7.2% in February 2008. The EU unemployment rate was 7.9% in February 2009, compared with 7.7% in January 2008 and 6.8% in February 2008. According to estimates, 19.156 million men and women in the EU, of whom 13.486 million were in the eurozone, were unemployed in February 2009. Amongst the Member States, the lowest unemployment rate was recorded in the Netherlands (2.7%), and the highest in Spain (15.5%).

Meanwhile, MEPs in the European Parliament's Committee on Employment and Social Affairs adopted (by 38 votes in favour and 2 against), on 31 March, a report by José Silva Peneda (EPP-ED, Portugal) reaffirming the "*importance of a strong social Europe*" and asking for "*an ambitious agenda*" at EU-level in the social and employment field. The plenary vote is scheduled for May.

MEPs on 31 March also approved an "*active inclusion strategy*", based on three pillars: adequate income support, inclusive labour markets and access to quality services. The report by Jean

Lambert (Greens-EFA, UK) on the active inclusion of people excluded from the labour market was adopted by 25 votes in favour, 2 against and 15 abstentions. People who are excluded from the labour market should be reintegrated into work that is "sustainable, of high quality and adequately remunerated," say MEPs. The European Commission and the Member States are asked to implement "*the right to adequate income support*" with the aim to fight poverty and social exclusion. However, the committee rejects the idea of a directive on minimum income in the context of the European Year for Combating Poverty and Social Exclusion, as proposed by the rapporteur. Quality education is a "vital prerequisite" for successful future employment and integration, MEPs say, and they ask Member States to "*eliminate barriers to education*". The situation of young people seeking employment should be taken carefully into account, say the MEPs, asking for measures to foster the transition from education into the labour market.

Link to [April Monitoring Report](#), [Silva Peneda Report](#) and [Lambert Report](#)

### Business leaders want European Skills Pact

On 26 March at the European Business Summit, a new report urged governments to pay to train workers who would otherwise be laid off, in an effort to address the skills gap opening up across Europe. According to research by the Federation of Enterprises in Belgium, despite growing unemployment, millions of jobs across the EU cannot be filled because the 18 million unemployed Europeans do not have the qualifications required to take up the available positions. Language and ICT skills are amongst the areas highlighted as requiring improvement, but it is also often noted that in Europe entrepreneurial education is weak when compared to the US, and that this can stand in the way of innovation.

Under the proposed plan, companies considering lay-offs or putting staff on shorter working weeks can apply for public funds to boost the skills of their staff. The study on skills and innovation, conducted by business school INSEAD, shows Europe faring well in basic skills

and literacy but paints a grim picture of Europeans' ability to compete in the "global knowledge economy". The study stressed that high levels of education alone are no guarantee of sustainable competitiveness. The report, sponsored by Microsoft and Shell, calls for a 'European Skills Pact' between Europe's educators, employers, investors, policymakers and citizens and sets out six priority actions which should be taken immediately:

- Launch a Europe-wide private-public alliance to ensure the re-skilling of excess labour in times of crisis;
- Re-focus the European Structural Funds earmarked for training and re-training in 2007-2013 towards the sectors most likely to contribute to Europe's competitiveness in post-crisis times;
- Identify and scale-up successful public-private initiatives and partnerships aimed at stimulating young people's interest in mathematics, science and careers in engineering, information and communications technologies and environmental protection;
- Enhance and develop high-level business-university partnerships to generate the 'Global Knowledge Economy' skills which Europe needs to realise the benefits of its Lisbon strategy and be a leader in innovation;
- Encourage skills mobility within Europe, as well as between Europe and other parts of the world, and;
- Foster innovative approaches to education, including through e-learning and distance learning, competition and innovation.

The report was presented to European Commissioner Verheugen, who said skills would be at the centre of the Commission's plan for a successor to the Lisbon Agenda.

Link to [INSEAD Report](#) and [European Business Summit](#)

## Corporate Responsibility

### Eurosif lobbies EU on mandatory CSR reporting

The European Sustainable Investment Forum (Eurosif), has stepped up its campaign to lobby the European Commission to adopt mandatory requirements for large companies to report on their environmental, social and governance (ESG) performance and for institutional investors to disclose how they use this information to invest. Eurosif is also willing to encourage the EC to allow long-term investors to maintain their voting rights for shares that have been loaned to third parties via stock lending.

Additionally, Eurosif would also ask the EU to improve transparency along the voting chain by requiring custodians and proxy voting agencies to be accountable for clear reporting of how shares are voted and for providing companies with up-to-date registers of all of their shareholders. In its letter to the Commission Eurosif laid out the three major points that it aims to persuade the European Commission and European Parliament to take up for the preparation of a new regulation.

The first point was an update of the EU Modernisation Directive to oblige large companies to report ESG data using standardised key performance indicators. Secondly, Eurosif wanted institutional investors to be bound by a statement of investment principles. The final point on stock lending and shareholder visibility was an attempt to generate discussion within the Commission on voting process and disclosure.

Link to [Eurosif press release](#)

## National Developments

### Finland – Call for pay moderation

National talks between the Finnish government, employers and trade unions have resumed following a stand-off between the government and unions over a proposal to raise the retirement age to 65. At this month's meeting, employers called for zero pay growth during the rest

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of 2009. This view was supported by the Prime Minister, Matti Vanhanen, who indicated that the income tax system would be used to encourage pay freezes or to keep pay increases at a minimal level.

Link to [Eurofound article](#)

### UK – BERR consultation on European Commission proposals to amend Pregnant Workers Directive

The UK Government has recently launched a consultation in relation to the Commission's proposals to amend the Pregnant Workers Directive (92/85/EEC). The current maternity regime in the UK is, in many ways, more generous than the Commission's proposed minimum standards. However, several of the Commission's proposals (if incorporated into an amended Pregnant Workers' Directive) would provide greater rights for women and therefore result in amendments to UK legislation. The UK currently requires two weeks' compulsory leave after the birth, which the Commission proposes to increase to six weeks.

Link to [BERR Consultation](#)

## The Weeks Ahead

### Council

7 May – Social and Employment Summit

8-9 June – Employment, Social Policy, Health and Consumer Affairs Council (EPSCO) meeting (Luxembourg)

### European Parliament

5-7 May – Plenary

2 September 2009 – EMPL Committee meeting

29-30 September 2009 – EMPL Committee meeting

EUROPEAN EMPLOYMENT REPORT is a White & Case LLP Newsletter produced by the Brussels Employment Team. Due to the general nature of its content, this report is not and should not be regarded as legal advice. For further information please contact:

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