



EU Employment Practice Group

March-April 2011

EU Developments

Social partners set to negotiate revision of Working Time Directive

The European social partners are expected to start negotiations on the revision of the revision of the Working Time Directive 2003/88/EC before the autumn. The last attempt to revise the Directive collapsed in 2009 after disagreement between the European Parliament and the Council over the availability of an “opt out” of the 48 hour working week and the treatment of “on-call” time as working or non-working time.

Last year, the Commission consulted European social partners on the revision of the Working Time Directive, inviting them to start negotiations themselves. Once the social partners formally notify the Commission that they will start negotiating, they have nine months to reach an agreement. If there is no agreement after nine months (a very real possibility), the Commission is entitled to propose amendments itself, which would then have to be agreed by the European Parliament and Council through the ordinary legislative procedure.

To give context to these discussions, the European Working Conditions Survey has compiled an interesting range of questions on the different elements of working time. In particular it reported that there is a substantial number of workers working long hours (over 48 hours a week), including working outside work hours such as nights and weekends. Such employees report problems with their health and work-life balance. With longer working hours, there are calls for improvements in working conditions. Some companies, such as Hungarian oil and gas group MOL, have integrated employee health as part of the company’s management philosophy.

Link to [ETUC Press release](#) and [Eurofound Report](#)

Key issues discussed at European Council meeting

A number of topical issues were discussed at the Council’s meeting on 7 March. It adopted the joint employment report, which points to unemployment as a major concern and the need for urgent action to address structural problems in European labour markets. It concludes that a ‘greener’ business environment, with strong economic growth driven by innovative and high value-added economic activities, are necessary to create more and better jobs. It also calls on Member States to set more ambitious employment targets and to focus on promoting social inclusion by reducing poverty. Finally, the Council endorsed the key messages on the social dimension of the Europe 2020 strategy which included targets on social inclusion and poverty reduction.

The Council also endorsed a pilot phase for an electronic exchange system facilitating administrative cooperation in the framework of the directive on the posting of workers, which will test the usefulness of a separate model of electronic information exchange in improving Member State’s administrative cooperation.

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This newsletter briefly describes EU employment developments. Due to the general nature of its content, this newsletter is not and should be regarded as legal advice.

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The Council also adopted a new European Pact for Gender Equality for the period 2011-2012 and noted the Commission's report on equality between men and women which will be the basis of discussions at the gender dialogue as part of the Commission's new Equality Strategy.

Finally, the Council reviewed the report on the consultation on the Green Paper "*Towards adequate sustainable and safe European pension systems*", emphasising the importance of avoiding a one-size-fits-all approach. The issue of higher effective retirement age was recognised but the Council emphasised that this should be determined by national policies with the involvement of the social partners.

Link to [Council conclusions](#)

Commission reassures Germany as it opens labour markets to EU-8

1 May 2011 was the deadline by which all the EU Member States had to allow full access to their labour markets to workers from the 8 countries of Central and Eastern Europe which joined the EU in 2004 (the Czech Republic, Estonia, Hungary, Latvia, Lithuania, Poland, Slovakia and Slovenia). While some Member States (UK, Ireland and Sweden) had opened their labour markets directly from 1 May 2004, others had done so more gradually. The last two countries with labour market restrictions still in place were Germany and Austria, and these have now to be lifted.

On 30 March, Social Affairs Commissioner Andor, speaking in Berlin attempted to allay any fears of a mass influx of foreign workers and any need for protectionism, highlighting that nationals from the "new" Member States account for only 1% of the working age population in Germany; that Germany has weathered the employment crisis particularly well, was one of the few countries where unemployment was stable in 2009 at 7.5% and that in January this year it was down to 6.5% - the fifth lowest in Europe and the lowest among the large Member States.

He went on to set out the main findings from the Commission's monitoring of the impact of enlargement:

- Recent intra-EU mobility has not led to serious disturbance of the labour market, even in Member States where there was a relatively large influx of workers;
- Before the economic crisis, unemployment did not increase significantly after enlargement, but actually declined in many countries;
- Workers from the "new" Member States came to the countries of destination to work. They have made an important contribution by alleviating labour shortages in sectors and occupations where

demand for labour was high and could not be met by local workers.

He pointed to other recent studies which confirmed that:

- there will be no massive influx from the EU-8;
- since the 2004 enlargement, the number of people in the EU-8 residing in Germany has increased only moderately and has stabilised at around 470,000 since 2009, meaning that the potential influx into Germany has largely already taken place;
- due to a significant rise in national per capita income, earnings and employment in the main traditional Member States of departure, the incentive to work abroad has dampened;
- full labour mobility between Member States will in fact help to address the challenges and imbalances facing the German labour market.

He highlighted that Germany lacks engineers, master craftsmen and doctors, and is struggling to fill vacancies because it is proving difficult to find people with the right skills. Germany is taking steps to remedy the mismatch between skills available and skills needed by approving legislation to recognise qualifications and degrees from foreign institutions, making it easier for foreign professionals to find work. Mobility is also highly valued by employers; however cross-border mobility is a minor phenomenon in the EU. Only 2.8% of EU working-age nationals reside in a Member State other than their home country. Andor reiterated that one of his strategic initiatives for 2011 is a directive to better enforce the Posting of Workers Directive.

Link to [Commissioner Andor speech](#) and [Commission Press Release](#)

Netherlands curbs Bulgarian and Romanian workers

As regards, Romania and Bulgaria, Member States have until 31 December 2013 to open their labour markets. Today, workers from Bulgaria and Romania enjoy full rights in 15 Member States. The Netherlands, Belgium, Germany, Ireland, France, Italy, Luxembourg, Austria, Malta and the UK all typically require Bulgarian and Romanian citizens to hold a work permit.

In the Netherlands, the press has reported on a proposal by Social Affairs Minister, Henk Kamp, backed by the Dutch government, to only grant a work permit in the Netherlands under 'exceptional circumstances' to workers from Bulgaria and Romania.

Kamp wants employers in certain areas traditionally occupied by foreign workers to offer jobs to unemployed Dutch nationals in line with the government's policy of putting the jobless under pressure to accept work. Despite having the lowest unemployment rate in the EU

at 4.5%, the Netherlands has been struggling for many years to find employment for the job-disabled. Employers who claim to need Bulgarian and Romanian workers must apply for an employment licence from the country's public employment service, UWV. Kamp wants the system to become more stringent. Any employer who seeks to hire a Bulgarian or Romanian would have to substantiate his claim that no suitable candidate can be found within the Netherlands or the rest of the EU.

Link to [Press Release](#)

ECJ Developments

Rome Convention ruling – employees working in more than one Member State

The ECJ held in the case of *Heiko Koelzsch v Luxembourg* that in the event that an employee carries out his work in more than one Member State, the law of the country where the employee performs the greater part of his activities will apply when resolving a dispute.

The case concerned an international transport driver, Heiko Koelzsch, employed by a company established under Luxembourg law. Despite being domiciled and working the majority of his time in Germany, his employment contract stated that Luxembourg law would apply in the event of a dispute. Following an announcement of the restructuring of the company, the employees established a works council in Germany of which Mr. Koelzsch was a member. Shortly after, his contract was terminated.

The dispute concerned whether or not Mr. Koelzsch could bring his dismissal before the German courts, by virtue of the Rome Convention, since German law afforded mandatory special protection prohibiting the dismissal of members of a works council. Article 6 of the Rome Convention limits the freedom of parties to exclude the application of the mandatory rules of the law which would govern the contract in the absence of an agreement. The Luxembourg courts decided to refer this question to the ECJ.

The ECJ held that the Rome Convention was in fact designed to ensure the adequate protection of employees, being the weaker party to an employment contract. Accordingly it held that where an employee carries out his activities in more than one Member State, the law of the country where he performs the greater part of his professional obligations would apply when resolving a dispute relating to his employment contract.

Link to [Judgment in Case C-29/10](#)

Significant changes in insurance and pensions following “invalid” Article 5(2) of the Gender Directive

The recent case of *Test-Achats* caused a huge stir in the insurance world following a judgment issued by the ECJ

which stated that Article 5(2) of the Directive 2004/113 on equal treatment in the access to and supply of goods and services, which permits “*proportionate differences in insurance premiums and benefits where the use of sex is a determining factor in the assessment of risk based on relevant and accurate actuarial and statistical data*” is invalid.

Article 5(2) was a derogation of Article 5(1) which prevented the use of gender as a factor in calculating premiums and benefits. However, Member States who chose to adopt the derogation, were required to compile, publish and regularly update the relevant data as well as review the decision to adopt the derogation after five years, whilst taking into account a European Commission report.

The underlying Belgian case relates to the different cost of car insurance for men and women. The Belgian Constitutional Court referred two questions to the ECJ for a preliminary ruling regarding the compatibility of Article 5(2) with the principle of equality and non-discrimination.

The ECJ considered the European Convention of Human Rights and Fundamental Freedoms and highlighted the fact that Article 5(2) was silent as to the length of time during which gender differences could be taken into account, thus potentially permitting the derogation indefinitely. Accordingly, the ECJ held that Article 5(2) was invalid.

Due to the significant implications on the insurance industry across the EU, the ECJ provided for a transitional period. Therefore, Article 5(2) was deemed invalid with effect from 21 December 2012, leaving insurers until the end of the year to make significant changes to their business. Commentators predict this decision will lead to increases in insurance premiums for both men and women, as well as affecting annuities, pensions and life insurance.

It is important to note that Directive 2004/113 does not in fact apply to the field of employment law and therefore this decision will have limited effect in that field. Equal Treatment in the employment context is governed by Directives 2000/43/EC and 2000/78/EC.

Link to [Judgment in Case C-236/09](#)

Fixed term contracts to be in line with the Fixed-term Working Directive

The case of *Deutsche Lufthansa AG v Kumpan* concerns a flight attendant employed by Lufthansa, who from the age of 55, had to enter into annual fixed term contracts with her employer. The last of these fixed term employment contracts was not extended past her 60th birthday in accordance with Lufthansa's age limit for cabin staff contained in a collective agreement. The case went before the German courts following an application by Ms Kumpan to continue her employment,

stating that the expiry of the fixed term was invalid being neither objectively justified nor compliant with EU law in terms of non-discrimination on the grounds of age and equal treatment in employment. The Federal Labour Court referred two questions to the ECJ for a preliminary ruling regarding the validity of German National law which allowed the conclusion of fixed term employment contracts on the basis of age.

The ECJ held that German law must be interpreted in a consistent manner with clause 5(1) of the Framework Agreement (put into effect by the Fixed-term Working Directive) which was specifically intended to prevent abuse arising from the use of successive fixed-term employment contracts.

Link to [Judgment in Case C-109/09](#)

Employee protection in the event of employer insolvency

A preliminary ruling was sought in *Defossez v Christian Wiart, liquidator of Sotimon Sarl and others*, by the Belgian courts following the unfair dismissal of an employee whose employer (a French established company) was subsequently wound up by the courts. Mr. Deffosez was awarded compensation for the dismissal by the Belgian employment tribunal however to obtain payment he sought the intervention of the Lille CGEA (Management and Study Centre of the Association for the management of the employee payment guarantee scheme) and in the alternative the Belgian FFE (Closure of Undertakings Fund of the National Employment Office). The preliminary ruling put before the ECJ concerned which of these institutions the judgment should be enforceable against.

The ECJ held, in accordance with ensuring worker protection, that Council Directive 80/987/EEC could be interpreted to mean that the guarantee institution responsible for employment debts in the event of an employer who is declared insolvent before 8 October 2005, is the institution of the Member State where the employer is established and has social security payment obligations, rather than the Member State in which the employee is habitually employed.

Link to [Judgment in Case C-477/09](#)

Pension schemes may limit freedom of movement

The case of *Maurits Casteels v British Airways plc* (BA) concerns an employee who worked at BA establishments in various different Member States since 1974. Between 1988 and 1991 he worked at the BA establishment in Düsseldorf where he participated in the BA German occupational pension plan before voluntarily moving to a BA establishment in France. A collective agreement that applied to Mr. Casteels stated that any employee who left service voluntarily before completing five years of service would be entitled only to the benefits made by their own personal contributions. BA

argued that Mr. Casteels had voluntarily left his employment before the five year threshold and as such refused to grant him a pension out of the German plan. The German courts referred the issue to the ECJ who ruled that a collective agreement resulting in an employee being treated less favourably for exercising his right to free movement, is contrary to Article 45 of the TFEU.

Link to judgment in [Case C-379-09](#)

Member State recognition of professional experience

A recent ECJ judgment determined how professional qualifications acquired in a Member State should be recognised. The case of *Toki v Ipourgos Ethnikis Pedias kai Thriskevmaton* concerned a Greek national who was qualified as an environmental engineer in the UK however was refused recognition by the Greek state on the basis that she was not a full member of the Engineering Council and did not hold the title of Chartered Engineer. The court stated that there were two mechanisms of professional recognition in the EU: the individual holds a diploma in a Member State which regulates the profession, or the individual pursued the said profession full time for at least two years in another Member State that does not regulate the profession. Such professional experience must be taken into account if the following three conditions are satisfied: i) the experience must consist of full time work for at least two of the previous 10 years; ii) the work must have consisted of the continuous and regular pursuit of a range of professional activities characterising the profession; and iii) the profession pursued in the original Member State must be equivalent in respect of the activities it covers to the progression which the individual sought authorisation to pursue in the host Member State. The case was sent back to the Greek courts to decide whether these conditions have been satisfied.

Link to judgment in [Case C-424/09](#)

Jobs in the Economic Crisis

The impact of the economic crisis on training and development

The European Foundation for the Improvement of Living and Working Conditions has produced a report on the issue of training and qualification of employees during the economic crisis.

The report highlights the key trends, in particular that companies are, in general, decreasing their training activities for employees, especially smaller and medium sized companies.

The report therefore emphasises that public measures are all the more important since investment in training and development is recognised as a key engine for economic growth and social cohesion. This follows the European's communication "*New Skills for New Jobs*"

which once again emphasises the importance of skills being upgraded and kept up-to-date.

Link to [Report](#) and [Executive Summary](#)

A failure to agree on flexicurity

The European social partners failed to achieve a common message following a conference on 'flexicurity' taking place on 31 March and 1 April, highlighting the divisions between employers and the European Trade Union Confederation (ETUC). Flexicurity combines flexible labour markets and a high level of employment and income security. Whilst employers favour flexicurity principles, the ETUC is in strong opposition, arguing that it will not create jobs but will increase uncertainty. Instead, the ETUC favours job security over flexibility. The social partners will produce a joint report on this issue over the coming weeks.

Link to [Press release](#)

The impact of the economic crisis on young workers

The European Foundation for the Improvement of Living and Working Conditions produced a report on "*helping young workers during the crisis: contributions by social partners and public authorities*". It discusses the difficulties faced by Europe's youth, particularly hard hit by the economic crisis. This is an area of serious concern for policymakers, with youth unemployment high and the situation likely to worsen. The report comments that governments have been the principal drivers in implementing initiatives to help young workers, whilst collective bargaining mechanisms and social partnership mechanisms have played a lesser role. The report suggests that training and apprenticeship opportunities should be expanded, and advises governments to pay greater attention to properly evaluating the measures to support young workers. It warns against the current emphasis on getting young people into work with little regard to the quality of job. The report calls for governments instead to put greater emphasis on improving job security for the young.

Link to [Report](#)

Social dialogue to overcome the economic crisis

A report published by the Commission on 3 March 2011 highlighted the importance of social dialogue between workers' representatives, employers' representatives and governments in shaping Europe's response to the economic crisis. Such dialogue has enabled companies and workers to adapt to change thus minimising job losses. However such social dialogue is uneven across the EU. In particular, the report suggests that the Member States that joined in 2004 and 2007 were lagging behind in this area. In addition, the report discusses the issue of tackling climate change and the need for a transition to a low carbon economy both of which require social dialogue in order to ensure a well-managed and "just" transition. The report also mentions

the debate concerning wage flexibility and the minimum wage which has taken on extra importance during the economic crisis. It states that there is a trend towards decentralisation of wage setting arrangements and towards company and single-employer bargaining. It also reports that low pay is a more significant problem in countries with more decentralised bargaining structures and low collective bargaining coverage. Nevertheless, the report confirms that despite a decrease in trade union membership, membership of employers' organisations remains stable and two thirds of all workers are covered by a collective agreement.

Link to [Commission report](#)

National Developments

United Kingdom

Equal rights for longer-term agency workers

The UK Agency Workers Regulation 2010 (AWR) will come into force in October 2011, implementing the EU Directive on Agency Workers. An agency worker who has spent 12 weeks in an assignment with the same user company will then be entitled to be treated equally to a permanent employee of that company doing comparable work, in respect to basic working and employment conditions. Although the regulations contain anti-avoidance provisions there are many grey areas in the legislation and many loopholes may therefore appear.

Link to [Legislation](#)

Employment changes introduced

On 23 March the following employment changes were announced in the Budget:

- (i) *Start-ups and small businesses exempt from new laws.* A general moratorium for start-ups and employers with less than 10 employees will be introduced, lasting three years, exempting those companies from compliance with new domestic regulation. The moratorium will start on 1 April 2011.
- (ii) *Flexible working extension removed.* The Flexible Working (Eligibility, Complaints and Remedies) (Amendment) Regulations 2010 (SI 2010/2991) which would have extended the right to request flexible working to parents of children under 18 years of age, will be repealed despite being due to come into force on 6 April 2011.
- (iii) *Dual discrimination will not be brought forward.* The Equality Act 2010 provisions on dual discrimination will not be brought forward as expected.
- (iv) *Third-party harassment may be removed.* The government will consult on removing the duty on employers to take reasonable steps to prevent

third-party contained in the Equality Act 2010 due to being “unworkable” in practice.

Link to the full [Budget 2011](#)

Employment tribunal system reforms

At the end of January 2011, the Department for Business, Innovation and Skills (“BIS”) launched a consultation on wide-ranging reforms to the UK’s employment tribunal system which closes on 20 April 2011. The reforms aim to:

- achieve more early resolution of workplace disputes so that parties can resolve their own problems, in a way that is fair and equitable for both sides, without having to go to an employment tribunal;
- ensure that, where parties do need to come to an employment tribunal, the process is as swift, user friendly and effective as possible; and
- help business feel more confident about hiring people.

Link to the [full consultation](#)

Portugal

Decentralisation of collective bargaining

The Portuguese employment ministry has been holding talks with both sides of industry in order to achieve further decentralisation of collective bargaining. Currently unions may only formally delegate bargaining powers to local worker representatives in companies with 500+ employees. The government would like this threshold reduced to 250 employees and for collective bargaining to be focussed at the enterprise level. Collective agreements in Portugal currently cover between 80% and 90% of private sector employees – largely because agreements are normally extended by government to all employees in an industry, rather than just the signatory parties.

Link to [Labour Ministry Website](#)

France

Act on renewal of social dialogue

The law on the reform of collective bargaining in the public sector has finally been approved by the French parliament after two years of discussions. The law alters the way trade unions’ representativeness is assessed in the public sector, in line with regulations already in place in the private sector. Workplace elections will now determine the extent to which trade unions are involved in negotiations, can sign agreements and hold seats on tripartite advisory bodies.

Link to [Act](#) (in French)

Italy

Re-launching apprenticeships

Recently, Italy’s central, regional and provincial governments, as well as the social partners, signed an agreement to re-launch the apprenticeship contract. Through this agreement, the signatories aim to make apprenticeships the most important way in which young people enter the labour market. It is hoped that the new-style apprenticeships will help reduce the worrying unemployment rate among young people in Italy, which is one of the highest in Europe.

Link to [Agreement](#)

Norway

Board refuses to extend collective agreements on wage dumping

In December 2010, the Norwegian Tariff Board decided not to allow the extension of two of the four collective agreements presently in general application in sectors of the Norwegian economy. The board argued that the general application resolutions in these agreements have served their purpose, and that there is no longer a need for them. The decision was made against the advice of the Tariff Board representative from the employee side, and has been criticised by trade unions.

Link to [Tariff Board Website](#) and [Norwegian wage settlements in 2011](#)

Belgium

Reactions to 2011–2012 cross-sectoral agreement

Belgium’s social partners have finally reached a cross-sectoral agreement after bargaining since November. The main issues discussed were wage increases, welfare benefits and harmonising conditions for the country’s blue-collar and white-collar workers. To be valid, it has to be approved by all sectoral organisations involved in the negotiations and there is still some union dissent. Without full agreement, the government will have to make the final decision.

Link to [Press release](#)

Latvia

Restrictions on benefits

The Latvian government has defended its decision to retain restrictions on sickness, maternity, paternity, parental and unemployment benefits until 31 December 2014.

The restrictions effectively limit any of these benefits to 11.51 lats per day, plus 50% of the amount above 11.51 lats that an individual would have been entitled to.

Link to [Press release](#)

Romania

New legislative initiative to amend Labour Code

Faced with the need to reform labour relations in order to stimulate economic growth in the wake of the economic crisis, the Romanian government has put forward a bill to further amend the Labour Code. The amendments, which have been criticised by the social partners, seek to extend the probation period of new employees, the conditions of fixed-term employment contracts, temporary agency contracts, notice periods, working time flexibility and collective dismissals.

Link to [Press release](#)

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