



empl-labour-law@cec.eu.int

Ministry of Employment  
Ved Stranden 8  
DK 1061 Copenhagen K  
Denmark  
Tel. +45 33 92 59 00  
Fax +45 33 12 13 78  
bm@bm.dk

**The Danish Government's comments to the Communication from the Commission concerning the Re-exam of the Directive 93/104/EC concerning certain Aspects of the organization of working time**

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**Introduction**

Denmark welcomes the Commission's initiative which on the one hand aims to consider and solve the difficulties the 2 ECJ rulings (the Simap and Jaeger cases) have caused in the member states, and on the other hand fulfils its revision's obligations according to article 17 and article 18 of the Working Time Directive 93/104/CEE (WTD).

Seen from a Danish perspective it is imperative that a sustainable solution on working time in general is found that respects the employee's health and safety, society's need for a well-functioning labour market, and the employer's interest in flexible and definite legislation.

The Danish Government welcomes the Commission's initiative including the use of Article 138. The Communication itself, and the Commission's handling of the question at the Employment Council at the 4 March indicate that the Commission is fully aware of the substantial problems the present legal situation creates for the member states, and is committed to find a legislative solution to the problem.

**The five issues listed in the Communication**

**Re.: Reference periods**

Even though the majority of the labour force is covered by collective agreements in Denmark thus having the possibility to prolong the reference period up till 12 months cf. art. 17, the Danish Government believes it could be useful to allow for a legislative possibility to prolong the reference period for up till 12 months. Part of the labour market requires more flexibility than the existing legislation permits. Extending the reference period up to 12 months will facilitate the work organization in general. This is i.a. the case for employees who are not covered by a collective agreement.

**Re.: The Court of Justice's interpretation of the concept of working time in the SIMAP and JAEGER cases**

The 2 cases have an impact on the future work organization on the Danish labour market in relation to on-call duty and compensatory rest.

***On-call duty in the health sector***

The Health sector is affected because of the frequent use of on-call duty on the work place. This concerns mainly doctors because of their work organization. Bringing doctors' working time in line with the rulings would require a reorganization of their working time and estimated up 80 additional doctors, mostly senior doctors. However, the hiring of doctors is difficult, since Denmark suffers from a shortage of doctors.

***On-call duty in other sectors***

Approximately 3000 teachers at continuation schools are affected. A reorganization of their working time is not sufficient to solve the impact of the rulings. Hiring of additional staff is therefore necessary, but will cause difficulties.

According to the Kriminalforsorgen 655 employees working in Danish prisons will be affected. The impact of the 2 rulings might be eliminated by reorganizing their schedules. However, a reorganization of the working time will create problems in the sector.

According to the Government's information sectors operating in the field of IT-surveillance, telecommunication, guard and security are facing problems. Also the service industry and production industry in general have special functions where on call duty is a part of the working time schedule.

Finally, the Danish Government finds it relevant to add that some employees find on-call duty as a work organizing instrument very attractive. This is due to the fact that the full time employee's *presence* at the work place with on call duty in reality is limited. The reason for this is the fact that the employee that can spread his/her working time over a limited number of days per week. If a reorganization of the working time is required as a result of the ECJ's rulings, some employees will feel that they lose an important work benefit that until now has giving them flexibility in their daily life.

***The Danish Proposal for solving the problems related to on call duty***

The Danish Government believes that it is necessary to find a legal solution to the problems related to the ECJ's interpretation of the working time concept. The Danish Government suggests amending the working time definition e.g. by introducing a new time concept in the directive "in-active time".

This should permit a certain period of time where the employee's presence at the work place do not count as neither working time nor as resting time, if the employee is not required to carry out his/hers activities or duties, and is free to sleep/rest.

### ***Compensatory rest periods in the health sector***

The most serious impact of the 2 cases, seen from a Danish perspective, is the limitations the ECJ sets up in the Jaeger-case regarding the postponing of compensatory rest periods. The guidelines for the handling of compensatory rest is set up in item 94, which states the following: "Such rest periods must therefore follow on immediately from the working time which they are supposed to counteract in order to prevent the worker from experiencing a state of fatigue or overload owing to the accumulation of consecutive periods of work."

According to the relevant health authorities the ruling will create problems, because the different occupational groups according to their collective agreements to a large extent postpone a part (up to 3 hours) of their resting time to some later point in time, thus not meeting the criteria of the ruling. In the health sector such occupational groups as doctors, nurses, midwives and care assistants are concerned.

Depending on the occupational group the problem can only partly be solved by reorganization and will in any case require hiring of additional staff. According to the relevant authorities the rulings cause even greater problems in relation to compensatory rest than on-call duty where the estimate was up to 80 additional doctors. It is unfortunately not possible to give a more precise estimate. As mentioned above the hiring of additional doctors is problematic, since there is a shortage of doctors.

The recruitment situation is also critical for nurses and midwives who also will be affected if the present work organization cannot be upheld.

### ***Compensatory rest periods in other sectors***

Even though the 2 ECJ's rulings concerns doctors, and thus the focus of the implications of the 2 rulings has been on the health sector, the Danish Government is deeply concerned of the impacts the rulings may/will have in other sectors, where employees work in shifts with on call duty and where presence is required 24 hours.

The examples in the text below show how far reaching the rulings are for society in general. For some sectors it is possible to solve the problems caused by the strict interpretation of the working time concept, for others it is not possible because of recruitment problems or the need for human contact with the same employee for the longest period possible.

Firefighters: estimate 1200 workers and autonomous workers will be affected.

Educationalist in kindergartens etc. and teachers in the county schools (55,000 teachers) will to some extent be affected because of various activities e.g. meetings with parents, annual camps and excursions which are a normal and important part of their employment, and the education of the children.

Educationalists working with people with special needs: As a starting point a reorganization of their schedule is possible. However, from an educational and emotional point of view a reorganization of the working time could have a negative effect on the individual, because the individual would have to be confronted with more staff members during a week. Depending on the individual this could have serious impact for his or her well-being.

The care sector: Staff helping and participating in excursions with elder citizens living in residential homes will be affected.

***The Danish proposal for solving the problem with compensatory rest***

It is the Danish Government's opinion that there is an evident need for preserving the existing working time organization thus allowing work places to continue using on-call duty combined with ordinary shifts. An amendment of the directive permitting a postponing of the compensatory rest period within e.g. 72 hours of the missed daily break would solve the problem.

An amendment in this direction could ensure flexibility in general and limit the main impacts of the rulings namely recruitment problems and the economic consequences.

**Re.: The conditions of application of Article 18.1 (b) (i) (opt out)**

The opt out clause has not been implemented in Danish legislation; however, the Danish Government fully recognizes other member states' need for this provision, and with the ECJ's strict interpretation of the (WTD), Denmark cannot exclude that the opt out clause might be interesting for the social partners.

The opt out clause provides flexibility for the benefit of both the employee and the employer. The provision is far reaching in that respect that the employee renounces his/her weekly working time protection. The reasons for this renunciation can be various, but it is up to the individual to take that decision. The important thing in this respect is to ensure that the employee is secured an adequate protection, when he or she decides to activate the opt out clause. The present wording of the opt out does not qualify conditions which have to be observed in order to conclude an opt out clause.

*The Danish Government proposes the following amendments/clarifications to the opt out provision:*

1. The conclusion of an opt out agreement has to be in writing and separated from the conclusion of the employment contract.
2. An opt out should be limited in time.

3. The opt out agreement has to include a paragraph allowing the employee to withdraw his/her consent to opt out. The notice period should not exceed the notice period in the employment contract.

4. Taken into account that the collective agreements - especially in the health sector - are used in a substantial number by the member states, the Danish Government believes it would be a useful possibility to link an opt out agreement to the conclusion of a collective agreement.

### **Re.: Measures aiming at improving the reconciliation between work and family life**

The social partners have a long tradition for negotiating solutions that respect the 2 sides of industry's different interests. On a European level this is illustrated with the framework agreement on parental leave concluded by UNICE, CEEP and the ETUC, which was transposed to directive 96/34/EC of 3 June 1996, the framework agreement on part-time work concluded by UNICE, CEEP and the ETUC, which was transposed to directive 97/81/EC of 15 December 1997, and the framework agreement on telework.

On a national level the social partners also take on the responsibility for improving the reconciliation between work and family life. The examples are various, but just to illustrate the initiatives the social partners have taken the following examples should be mentioned:

- The first day your child is ill the employee is entitled to be absent from work.
- In case of serious illness in the family absence from work is allowed for 8 days.
- Care days depending on the collective agreement between 2 days up till 10 days. Care days entitle an employee to stay at home with out prior notice and gives thus flexibility especially for employees with minor children.
- Salaried maternity leave between 14 and 26 weeks depending on the collective agreement.
- 5 days of extra holiday.

The examples above show that the social partners have taken initiatives which to a large extent reconcile work and family life.

It is the Danish Government's firm conviction that the reconciliation between work and family life to the largest extent possible should be handled by the social partners. However, the Danish Government is aware of its responsibility and do if it finds it necessary take legislative initiatives, improving the flexibility for employees on the labour market. The amendment to the law on part-time work from September 2002, where the employer and the employee can agree on part time work irrespective a prohibition of part time work in a collective agreement, illustrates this.

This spring the Danish Government has taken the initiative to set up a committee of ministers aiming at improving the conditions for reconciling family life and work life. The problems the families are facing differ of course, but a general need for flexibility in relation to work time organization, access to day care facilities and telework would be an improvement for a lot of people.

The examples described above show that the social partners are aware of their responsibility on both European and national level. The present wording of the directive allows for national differences. The Danish Government believes that the present directive should continue to focus on the regulation of the workers health and safety in relation to working time at the work place, and not expanding its scope to more general working conditions.

**Re.: Whether an interrelated approach to these issues would allow for a balanced solution capable of meeting the criteria set above**

Based on the Danish experience it is possible to establish a balanced solution which takes into account both health and safety of the concerned, and the demands for a well-functioning labour market including the safety of and the considerations to the patients and other groups.

The Danish Government believes that an amendment of the directive is necessary, which on the one hand respects/safeguards the employee's health and safety, and on the other hand enables a work organization that takes into account that some occupational sectors and professions are obliged to use on call duty, and to postpone compensatory rest periods. The reasons for this are both linked to the nature and purpose of the work concerned, to recruitment problems in various sectors and to the economic consequences. The Danish Government asks the Commission to recognize these facts. Compliance with the ECJ's rulings is simply not a possibility in some sectors. It is the Danish Government's opinion that an amendment of the directive should secure an adequate level of protection for the benefit of all parties involved.