



# The Revision of the Working Time Directive: Where Do We Stand?



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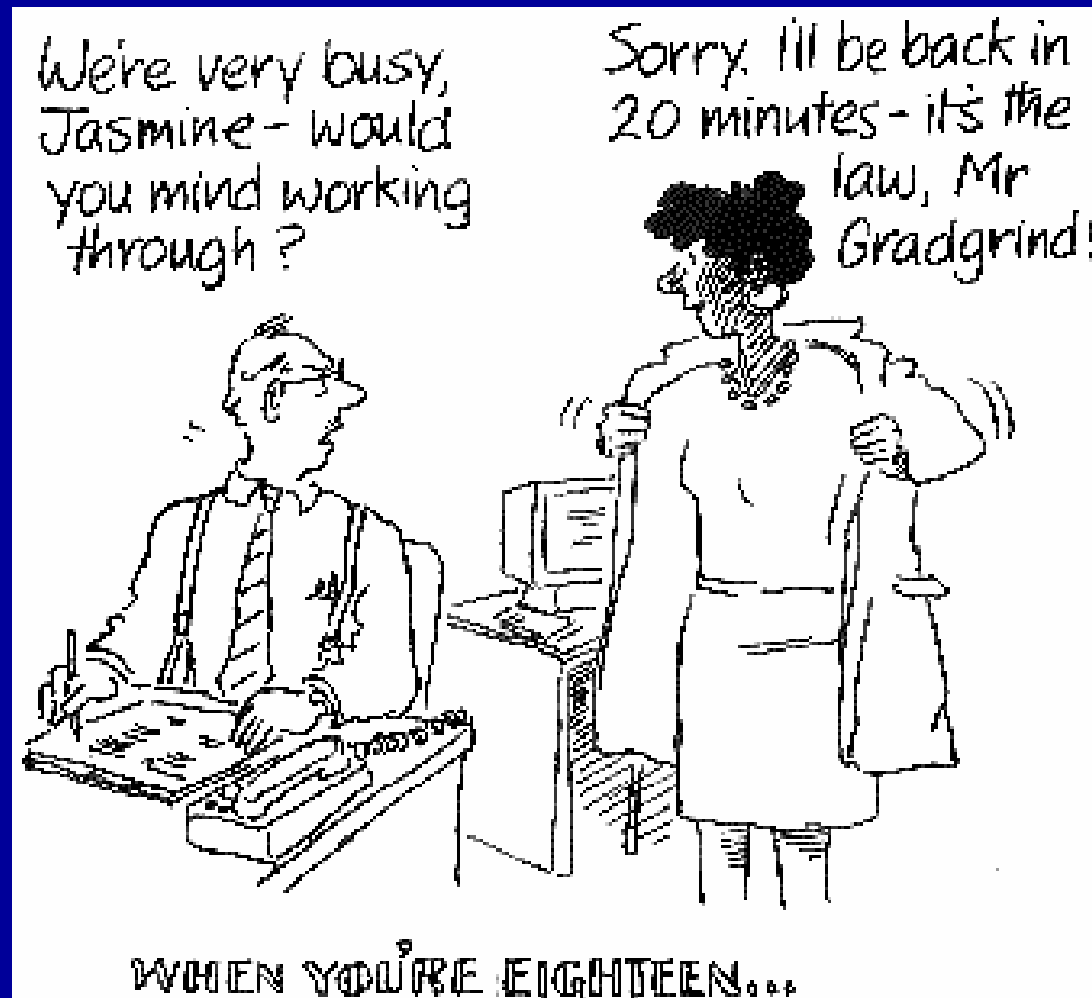
Forum Malta in Europe

# Presentation Outline

- Introduction to the Working Time Directive
- The Maltese Scenario
- Raison d'Être of Proposed Revision
- The (In)Famous Opt-Out
- 'On Call' Periods
- Latest Developments
- Conclusions



# The Working Time Directive



... An Introduction

# Introduction to the Working Time Directive

- Council Directive 93/104/EC of 23 November 1993 concerning certain aspects of the organization of working time as amended by Horizontal Amending Directive 2000/34/EC [consolidated Directive 2003/88/EC]
- Minimum requirements concerning the organisation of working time - to ensure a better level of health and safety protection for workers

# WTD 1993 & the Horizontal Amending Directive

- The HAD extends the provisions of the 1993 WTD to:
  - all non-mobile workers in road, sea, and inland waterways transport and seafishing;
  - the activities of junior doctors;
  - to those workers in aviation not covered by the Aviation Directive; and
  - to all workers in the rail and offshore sectors.

# What is Working Time?

any period which the worker is working, at the employer's disposal and carrying out his activity or duties, in accordance with national laws and/or practice



# What are the Key Features of the WTD?

- maximum weekly working time of 48 hours on average (calculated over a period of four months), inclusive of overtime
- a minimum rest period of 11 consecutive hours for each 24-hour period
- a rest break where the working day exceeds 6 hours' duration
- a minimum weekly rest period of one day
- four weeks of paid annual leave
- an average of no more than 8 hours of work at night in any 24-hour period

# Derogations



- derogations from the reference period for the application of the rule on the maximum working week
- the option of not applying the 48-hour rule if the worker agrees to carry out such work, better known as the opt-out rule.

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The image features a hand-drawn illustration of the European Union flag, which consists of a blue field with twelve yellow stars arranged in a circle. Overlaid on the flag is a map of the Maltese archipelago, showing the main island of Malta and the smaller islands of Gozo and Comino. The map is rendered in a light pinkish-red color. The entire illustration has a textured, brush-stroke appearance. The title 'The Maltese Scenario' is written in a bold, white, sans-serif font across the center of the flag.

# The Maltese Scenario

# Process Leading to Issue of Legal Notice

- Malta - process leading to the issue of a Legal Notice is a tripartite one.
- Draft version initially sent from the Ministry responsible for Employment and Industrial Relations to a tripartite board, known as the Employment Relations Board
- Following discussion sessions, draft is amended and returned to the Ministry for final review.
- Directive is implemented in Malta by means of a Legal Notice which has the force of Law. Employment-related directives are issued under the Employment and Industrial Relations Act of 2002 (EIRA).

# Organisation of Working Time Regulations (Legal Notice 247/2003)

- Came into force on 5 April 2004
- **BUT:**
  - => **31 July 2004** in some manufacturing sub-sectors:
    - food & beverages, textiles, clothing and footwear, transport equipment
  - => **31 December 2004** in respect of Collective Agreements in the above sectors, existing on 12 December 2001 and with clauses with validity beyond July 2004.



# The Reference Period

- Generally - Any period of 17 consecutive weeks
- 52 weeks - manufacturing and tourism [including travel & catering] sector
- Collective Agreements – may substitute 17 week reference period with a period of up to 52 weeks, if sufficient objective reasons exist.



# The Opt-Out



- Individual right, no detriment if refuses.
- Written agreement.
- Agreement terminable by worker giving at least 7 days' written notice [or other period not more than 3 months as stipulated in written agreement].
- Records



# Raison d'Etre of Proposed Revision

# Raison d'Être of Revision

- 5 January 2004 - Commission launched a consultation on working time, indicating a possible revision of the Working Time Directive (WTD)
- The Commission's document has three goals:
  - to analyse the implementation of the opt-out and of derogations to the reference period over which working time is calculated;
  - to analyse the impact of recent case-law, such as *SIMAP [2000]* and *Jaeger [2003]*, on the definition of working time and the qualification of time spent 'on-call';
  - the consultation of interested parties on the possible future revision of the Directive

# The (In)Famous Opt-Out



# The (In)Famous Opt-Out

- Most important feature - the decision not to be covered by the rule on maximum weekly working time must be taken by the worker himself.
- This point also made by the ECJ - the consent given by trade union representatives in the context of a collective or other agreement is not equivalent to that given by the worker himself
- UK Concerns when the WTD was still in embryonic form - working hours there were then the longest in the Member States.

# The (In)Famous Opt-Out & the UK

- 1992 - nearly half of the seven million male workers in the EU working 48 hours or more a week were employed in the UK
- Opt-out provision primarily designed to give the UK the opportunity to bring its working time practices more in line with those prevailing in other EU Member States over a ten-year period.
- Instead, the opposite has occurred - a TUC study of February 2002 reported that four million people were then working over 48 hours a week and that the numbers working over 55 hours a week had risen to 1.5 million.
- The proportion of workers in the UK exceeding the 48-hour limit is still the highest in the EU.

# A Snapshot Across the EU

- UK - the only MS to apply the opt-out on a general basis
- Post-enlargement, Cyprus and Malta applied it on a general basis
- Other countries (eg Luxembourg) apply it only to certain sectors - eg Luxembourg applies it to its restaurant and catering sector



**On-Call Periods**

**&**

**Working Time**

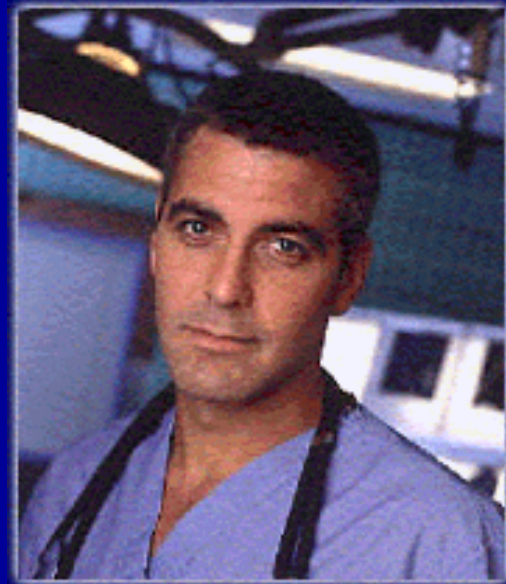


# On Call Periods and Working Time

- WTD defines 'working time' as comprising three conditions: (a) any period during which the worker is working, (b) at the employer's disposal and (c) carrying out his activity or duties, in accordance with national laws and/or practice.
- *SIMAP* and *Jaeger* - Does time spent on call constitute working time?
- Both concerned the health sector. In both these cases the ECJ ruled Yes

# *SIMAP* – 9.9.2003

- Court adopted theory that 3 features of working time are cumulative
- In *SIMAP*, the ECJ held that time spent on call must be regarded in its entirety as working time and, where appropriate, as overtime, if doctors have to be present at the health centre.
- If they must merely be contactable at all times when on call, only that time relating to the actual provision of primary health care services is to be considered as working time, for calculation purposes.



# Jaeger – 9.9.2003



- The ECJ elaborated further in *Jaeger*.

In this decision, which will probably also impact on the Commission's review of the WTD, the Court held that working time includes the time when the person concerned is permitted to rest at the place of work during the periods when his services are not required

# *Pfeiffer* – 5.10.2004

- Emergency medical workers filed proceedings against the German Red Cross,
- ECJ confirmed:-



- (1) WTD applies to the activities of emergency workers in attendance in ambulances as part of a rescue service;
- (2) Extensions of the 48-hour period of maximum weekly working time requires each worker individually to give his consent, expressly and freely;
- (3) When calculating maximum period of daily and weekly working time, periods of duty time must be taken into account in their totality.
- (4) Therefore, the average weekly duty time of emergency workers, during which they have to make themselves available to their employer at the place of employment and remain continuously attentive in order to be able to act immediately, should the need arise, cannot exceed the 48-hour limit.

# Implications of these Judgements

- These judgements, will undoubtedly affect the health sector mainly, but not exclusively.
- Eg could increase costs in the private care sector and in certain industries where certain employees have on-call duties.
- Significant consequence for the staffing levels required to secure continuous service provision.





# The Commission Proposal

# Commission's Proposal for Modification of WTD - Sept.2004

The areas where changes were proposed are the following:-

1. To keep the individual opt-out however tightening the conditions for its application when there is no collective agreement in force or no such agreement can be concluded;
2. To correct the definitions of working time, so that the inactive part of on-call time is not considered as working time.
3. To grant Member States the possibility to extend the reference periods to not more than 12 months, subject merely to consultation of the social partners concerned;

# 1. Tightening of Opt-Out

- **Conditions attached to the worker's individual consent are tightened:-**
  - (a) it cannot be given during a probation period or at the time when the contract of employment is signed;
  - (b) it has to be in writing;
  - (c) it is valid for a maximum period of one (1) year (can be renewed);
  - (d) no worker can work more than 65 hours a week. This is however not a mandatory maximum and opt-outs will be possible by employer-worker agreements or collective agreements;
  - (e) employers are obliged to keep records that have to be accessible to the competent authorities, if required.

# Opt-Out May Be Applied If:

- expressly allowed under a collective agreement or an agreement between the social partners; **and**
- the individual consents;
- However only individual consent is required where there is no collective agreement in force and where there is no workers' representation within the undertaking or the business that is entitled to conclude a collective agreement or an agreement between the two sides of the industry

## 2. On-Call Time

- Introduces New Definitions – following *SIMAP* & *Jaeger*

**“On call time”** - the period during which the worker has the obligation to be available at the workplace to intervene, at the employer’s request, to carry out his activity or duties

**“Inactive Part of On-call time”** - the period during which the worker is on call but is not required by his employer to carry out his activity or duties

- **The Commission proposed that the inactive part of on-call time shall not be regarded as working time, unless national law or, in accordance with national law and/or practices, a collective agreement or an agreement between the two sides of industry decides otherwise.**

### 3. Implementation of Reference Periods

- Art.16 of Dir 93/104/EC - reference period is 4 months. But possible to extend to 6 months, and by collective agreement or agreements concluded by the social partners, to 12 months.
- **The 6 month reference period has been removed in the Proposal.**
- **Other changes proposed:**
  - => MS can extend the period up to one year, following consultation of concerned social partners;**
  - => Duration of the reference period can under no circumstance exceed the duration of the employment contract.**

# Compensatory Rest

- **Article 3 (daily rest)** - workers shall be entitled to a minimum daily rest period of 11 consecutive hours per 24-hour period
- **Article 5 (weekly rest periods)** – each seven-day period, every worker is entitled to a minimum uninterrupted rest period of 24 hours
- **Commission Proposal** - this period of compensatory rest is to be granted within a reasonable time and, in all cases, within a time limit that does not exceed 72 hours



# Latest Developments



# The EP's Reaction - 2005

- **On-call time**:- the entire period, including the inactive part, should be regarded as working time. EP's disagreement to legislating against the case law of the ECJ
- **Opt-out**:- this is to be repealed thirty six (36) months after the revised Directive comes into force. As long as it remains in force, the agreement with the employee cannot exceed a period of six (6) months, which period can be renewed.
- **Compensatory rest**:- this is to be taken immediately, in accordance with the relevant law, collective agreement or other agreement between the two sides of industry
- **Reference Periods**:- Member States shall be allowed to extend such periods to twelve (12) months

# Commission's Revised Proposal (31.05.2005) – Main Features

- (a) On call-time:- Took account of the EP's concern and included a provision aiming to ensure that inactive periods of on-call time are not taken into account in calculating the rest periods
- (b) Individual Opt-Out clause:- the EP's proposal for the repeal of the opt out clause within 36 months after the entry into force of the Directive, was declared as being unacceptable.
- (c) Acceptance of the aggregation of hours in cases involving several employment contracts for the purpose of calculation of working times;
- (d) Reference period - Commission deleted its original proposal for possible extension by MS of the reference period to twelve month following consultation with the social partners

# Conclusions



- Two views evident within the Council - some countries support the retention of the opt-out and others that consider it unjustifiable
- Before a compromise is reached on the opt-out issue, two specific problems have to be solved:-
  - problems in the healthcare sector resulting from the Simap/Jaeger judgements;
  - the tradition in certain countries permitting individuals to have more than one work contract at a given time.
- Evident that Commission's proposal is not definitive but a basis for future discussions.

It is evident that this proposal has a long way to go prior to final adoption, where intense debate and lobbying will surely take place

*Thank you for your attention*

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