BATTLES IN TIME

How the European Working Time Directive will be implemented across countries is yet to be fully resolved, as **Rory Watson** explains

European legislation on working time and the maximum 48 hour working week is currently languishing in a no man's land. The battle between supporters of the opt-out from its provisions, led by the United Kingdom, and opponents to such a move, championed by France, has resulted in a stalemate in efforts to update measures that were first introduced in 1998.

At the same time, national governments are having to take into account rulings from the Luxembourg based European Court of Justice, which interprets the legislation. The two most important are SIMAP (Sindicato de Médicos de Asistencia Pública) (2000) and Jaeger (2003). These held that on-call duty performed by a doctor when required to be physically present in the hospital must be regarded as working time.

These rulings are having a direct effect on countries such as France, Austria, Poland, Slovenia, and Hungary, which traditionally did not calculate all periods of on-call time towards the working week. The court has also ruled on the compensatory rest that employers must give their staff when they work longer hours than usual.

The European Commission has written to the governments of all 27 countries in the European Union, asking them what provisions they have put in place to comply with the Luxembourg judgments and the financial costs of doing this. In particular, it has highlighted four issues: the reference period (used to calculate the average 48 hour work week), resting period, on-call time, and multiple contracts.

Deadline

The deadline for replies was the end of March, but few will be surprised if this slips. On the basis of the information, the commission will have to decide whether national procedures are now in line with the judges' rulings. If it considers they are not, it would be under pressure to open legal proceedings against the offending countries.

One difficulty will lie in establishing which sectors the commission will investigate. Health services are obviously affected; so too are other emergency services such as fire, ambulance, and police. But the conditions also apply to residential establishments, as France discovered at the end of 2005 when judges ruled that the hours worked by a special needs teacher on night duty had to be counted in their entirety as working time.

Amending the rulings

In a bid to make it easier to implement the rulings and to give politicians, rather than judges, responsibility for shaping the legislation, the European Commission had proposed amendments to the original text. These were enthusiastically taken up by Finland, which, as EU president, tried to secure a breakthrough among employment ministers last November. The proposed amendments emphasised the need to ensure greater flexibility in organising working time, "particularly with regard to on-call time and, more specifically, inactive periods during on-call time," and to strike a new balance "between reconciling work and family life on the one hand and a more

flexible organisation of working time on the other."

The commission proposed inserting a new article to confirm that the inactive part of on-call time would not be considered working time "unless national law or, in accordance with national law and/or practice, a collective agreement between the social partners decides otherwise."

The inactive part of on-call time would be calculated as a percentage of on-call time, taking account of the practice of the sector concerned, collective agreements, and national legislation. It would not be taken into account when calculating daily or weekly rest periods, unless national collective agreements or legislation deemed otherwise.

When it came to compensatory rest, the proposal suggested that the current wording of "equivalent periods of compensatory rest" should be replaced by "equivalent periods of compensatory rest within a reasonable period, to be determined by national legislation or a collective agreement." This was designed to give countries a degree of flexibility in contrast to the European Court of Justice's view that this should take place immediately.

Opt-out causes talks to flounder

On both key issues, there was a large degree of consensus among government ministers, but the talks eventually floundered on use of the opt-out. The proposal had tried to bridge the gap between the two camps by emphasising that the opt-out was an exception to

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minority, the Finnish chairman brought the meeting to an early conclusion, admitting: "Even if we sat here till the early hours of the morning, we would not find a solution." Despite the deadlock, the outcome was a tactical success for the UK. Previously it had been in a minority in defending the opt-out; now the minority consisted only of those insisting it be phased out.

Are amendments possible?

The prospect of amendments to the original legislation being agreed by EU governments is now highly unlikely. Germany, as current EU president, has made clear it does not intend to consider the matter during its six month tenure. Its successor, Portugal, is unlikely to invest time and political capital in a venture that another small country, Finland, could not complete. The only possible gleam of light is a change of government in some of the five blocking countries (France is one possibility).

Some quarters have suggested that it should be possible to take out issues of importance to the health sector and emergency services, such as on-call time and rest periods, and treat them in a separate piece of legislation, but these suggestions have been quickly rejected. Vladimir Spidla, the employment commissioner, has said: "It is absolutely clear there is no particular interest on the part of member states for such an approach."

Other avenues

With the legislative route currently blocked, other avenues are being examined to comply with the European Court of Justice's rulings while keeping as low as possible the extra costs involved from the recruitment of more doctors and nurses. Some countries have amended their national legislation. This is the case of Germany, where the inactive period of on-call time had previously been classified as a rest period. The change was made in 2004. However, because of fears that 15 000 extra doctors would be required, a transitional clause allowed for exemptions, and it is only since January that German legislation has been in complete conformity.

The Czech Republic, which updated its legislation in January, estimates it will need a further 2000 doctors, and Poland has indicated it would require 15 000 more employees for the health and fire brigade

sectors. Sweden changed its legislation last year to ensure that any collective agreement that gave staff less than the European court stipulated would be invalid. The Netherlands introduced rules in 2005 providing for on-call time in the workplace to be considered as working time.

The rulings have led to changes in working patterns, notably in the UK, where rotas and on-call time have given way to shifts and a major reorganisation has taken place in the NHS. This has come at a cost of some £200m-300m (€295m-445m; \$395m-590m). Despite some suggestions otherwise, the UK government is confident that the changes in working fully implement the court judgments.

EU-wide snapshot

An analysis carried out for the European Parliament's employment and social affairs committee, based largely on earlier work by the European Commission, gives a general snapshot of the situation across the EU. This indicates that 18 countries do not comply with the provisions on on-call time and 21 contravene compensatory rest requirements. Four countries—Germany, Lithuania, Malta, and Poland—do not respect the reference period, and another four—Spain, France, Hungary, and the UK—contravene the individual opt-out. The analysis, which some experts insist should be treated with caution, suggests that only Italy and Luxembourg seem to be entirely in conformity, while France and Slovakia are in the process of amending their legislation.

The way ahead is unclear. Politically, it would be almost unthinkable for the European Commission to start court action against almost every EU country. "If Jose Manuel Barroso wants to be reappointed as commission president for another five years, then he would not want to upset so many governments," suggests one Brussels official.

Although legislation might be in place, whether it is implemented on the ground is another question. The likelihood is that the commission will play a long game while national authorities gradually bring their practices into line—and allocate the necessary resources—with the way the European court has interpreted the legislation.

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the general principle of a maximum 48-hour working week and that its use would have to be "subject to appropriate safeguards, to protect the safety and health of workers and the voluntary nature of this option." It would also have to be laid down by collective agreement or national legislation.

Finland tried to insert tougher individual guarantees. The amendments stated that no employee should be required to work more than 60 hours over a seven day period, calculated as an average over three months; that an employee's agreement to do so should be renewed every year; and that any consent they might have given when signing an individual employment contract or during the first four weeks of employment would be invalid.

Another refinement was that use of the opt-out should be monitored by the European Commission, which would liaise with trade union and employers' organisations and report its observations to national governments.

Talks collapse

But the talks collapsed when five countries—Italy, Spain, Greece, Cyprus, and France—insisted that the amended legislation had to contain a date by which the opt-out would no longer be possible, while the remaining 22 were content to leave its future open ended. Afterwards, Alistair Darling, the UK's trade and industry secretary, said: "We always made clear that our bottom line was to preserve the opt-out and we have done that."

Faced with the implacable blocking