Fédération Européenne des Médecins Salariés
European Federation of Salaried Doctors

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Title:	**Meeting FEMS/EPSU – DG Employment, 17 December 2018**		
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Venue: European Commission, DG Employment

Participants from DG EMPL:

- Marie Lagarrigue
- Andrea Grgic
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- Mathias Maucher
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- Bojan Popovič
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List of topics discussed:

1) **On-call time** and possibilities for **opt-out**

On-call duty should be fully regarded as working-time and overtime during on-call should be paid as any other type of over-time (at present, on-call can be paid less than overtime)

The need for a complete abolishment of opt-out without salary reductions (if the work is organised efficiently, opt-out is not needed to achieve the goals anymore, so even with a strict 48-hours weekly limit, the reductions of salaries should not happen)

- The Interpretative Communication elaborates on the possibilities to use the provisions of the WTD in a more flexible way.
- A study on working time arrangements in the health care sector showed the need for the opt-out in order to accommodate for the specific "production conditions" in the health care sector (staffing levels; 24h service 7 days/week; important share of public funding)
- The EC is open to national instruments/measures/regulation to strengthen the conditions for an opt-out - e.g. by using the criterion that an individual opt-out can only be signed if this is backed by a collective agreement setting the relevant conditions (including the maximum number of working hours per week), but also based on the insights from infringement procedures
- The EC clarified that the WTD is clear on the fact that any retaliation for a worker if not signing an

opt-out clause is not allowed and if this is not the case the worker should seek recourse with legal action against the employer
- The EC does not see any need for a revision of the existing rules on on-call time and on opt-out
- The EC "admitted" that is difficult if not impossible for the EC to monitor the effective enforcement of opt-out arrangements

2) Matzak case and **stand-by time** (even though this is a non-defined concept in the WTD)

Implementation of Matzak-case in healthcare

- We discussed on the challenges for commuters and those workers living (relatively) far from the health care institution/service they are working at/employed by to arrive there within a certain time period
- The Matzak judgement refers to a particular situation of a voluntary firefighter that had claimed compensation for the absence of remuneration by his "regular" employer of the time spent on "stand-by", namely (as written here https://ec.europa.eu/social/main.jsp?catId=706&intPageId=5115&langId=en;
- Stand-by time, which the worker spends at home with the duty to respond to calls from his employer within 8 minutes and during which the worker's opportunities to carry out other activities are significantly restrictedentails geographical and temporal constraints that objectively limit the worker's opportunities to devote himself to personal and social interests.
- The aforementioned stand-by time is different from that in which a worker on stand-by must simply be at his employer's disposal inasmuch as it must be possible to contact him or her. In the case of latter stand-by time, only the time linked to the actual provision of services must be regarded as the 'working time'.
- We shared information with the DG EMPL colleagues on the actual arrangements in relation to stand-by from. In Germany, there is no prescribed time limit to arrive at the place of work. In France, commuting time if called to work from a stand-by arrangement is considered as working time. In Slovenia, there is less than 20% of the regular workload (compared to the workload during a regular shift) then this is considered as stand-by time We also informed them that stand-by time is normally used to work with general/non-specialised medical interventions to bridge the time until a specialist doctor (on stand-by) arrives.
- The EC colleagues confirmed that the Matzak ruling could be generalised for stand-by arrangements in the health care sector and that judgements from Finland could be used as "orientation" (one was on a arrangement that foresaw 5 minutes reaction time, another 15 minutes). But there is no generally "European-wide" time period defined/legally fixed yet up to which one could say that the logic of the Matzak judgement applies. This would also depend on the parametres of a particular case (urban area vs. rural area; availability of public transport, etc.)

3) Implementation of the immediate **compensatory rest** after a prolonged working time, with no exceptions

- DG EMPL colleagues confirmed that compensatory rest as a rule needs to be taken/offered immediately after the time worked and that to this would add the entitlement to rest "gained" from the last period of work. For every day, there is an entitlement of 11h of compensatory rest, this means after a 24h shift one should get 22h of compensatory rest.
- DG EMPL also confirmed that derogations from the length of consecutive compensatory rest are possible, but that still art. 17, 2 applies, demanding the guarantee of a general level of health and safety

- DG EMPL finally confirmed that taking the above into account that the (entitlement to) compensatory rest “gained” from working time periods needs to be added to the daily entitlement of 11h of compensatory rest, but that this does not need to happen necessarily consecutively, i.e. immediately after the last period worked. There are cases when, e.g., a healthcare worker is obliged to perform a normal shift form 8:00 till 16:00, then there is some kind of "rest period" till 20:00, then night shift at the emergency department till 8:00 and then another shift until 16:00 next day. All together, the rest period is respected (from 16:00 till 20:00 on the first day and from 16:00 till midnight next day), but it is not guaranteed not 12 hours consecutively. Therefore, there could be numerous interrputions of the working time which sum up 12 hours on average, but this cannot be regarded as a compensatory rest as it is meant to be.
- This “regulatory” situation should be compared to existing working time models and if they are infringed.

4) Secondary employments for healthcare workers who are already employed full-time somewhere. We would like to understand the Commission's position on this

- EC staff confirmed that there is no ECJ case law on this aspect, but that it is obvious that there are actual arrangements that use bogus self-employment of civil law contracts to circumvent provisions to protect the health and safety of health workers
- For the EC the “normal case” should be the calculation of WT on the basis of the individual worker and all her/his concurrent contracts, i.e. per person and not per contract. In about half of the EU MS this is also what is legally prescribed.
- For DG EMPL e.g. for a nurse having a full-time contract in a health institution A and doing agency work in the same health care institution A clearly constitutes an infringement of the WTD rules.
- The EC said it would be easier to control this in the public sector/for public institutions than in private institutions or for a worker with one employment in the public and another in the private sector.
- We gave evidence (and also the EC colleagues had anecdotal evidence) of work in a country A during the week and week-end work in a country B and about the use of “zero-hour” contracts, whcih define only the tasks to be done and ignore the time needed to accomplish this. By this way, the time is simply not counted and 48-hours limit cannot be established;
- The EC colleagues confirmed that if the second contract has a status of self-employed, then the WTD would not apply which in turn means that arrangements to circumvent WTD using self-employment could not be effectively prevented or forbidden by recourse to the WTD;
- As of today, labour law would also not fall into the scope of competences of the European Labour Authority which would in turn have no authority to investigate such time of arrangements.

5) **Four points relevant for EPSU’s work in social services**, in particular elderly and disability care on the one hand and child and youth welfare on the other

5a) Travel time in home-based care (cf. TYCO case)

- The DG EMPL staff confirmed that the TYCO ruling applies to workers who do not have a fixed place of work and are required by their employers to travel to service clients and that this could include – in addition to craftsmen, sales reps or tradesmen employed by companies – e.g. home care workers.
- As written in this article, https://employmentrightsireland.com/is-travelling-to-work-working-time-the-tyco-case/
- This could result in employers having to pay such workers for time spent travelling to and from work. The journey from home to their first work appointment, and the journey from their last

appointment to home in the evening, must be included when pay, working hours and rest breaks are being calculated, according to the CJEU decision.
- Employees may also be entitled to a reduction in hours actually spent working, as travelling time would also go towards the 48 hour maximum working week permitted under EU working time legislation.

5b) Sleep-over

- The DG EMPL staff confirmed that sleep-over time has to be treated as on-call time.
- In a mail sent after the meeting, they also confirmed that "infringement proceedings are currently underway in relation to the working conditions of those workers, particularly as regards "sleepover" hours (where the worker stays overnight at the client's home of residential centre)."

5c) Working time for personal assistants (and private households as employers)

- We evoked particular challenges related to the fact that the employer for care (and household services) provided at home and/or for personal assistants as a rule is a household or the person needing the care and to employment contracts for migrant workers in the care sector using the instruments of agency work and posting of workers
- The EC staff confirmed that it would not support proposals that advocate for a split between "medical/social care interventions" by professionals and time spent with those who are cared for to give social support, accompaniment of daily activities and leisure time activities, etc.

5d) Foster parents => recent cases on foster parents/relief parents from the child/youth welfare/protection sector, i.e. Sindicatul Familia Constanţa/Ustinia Cvas and Others v Direcția Generală de Asistență Socială și Protecția Copilului Constanța of 20.11.18 and Hannele Hälvä and Others v SOS-Lapsikylä ry of 26.07.17

6) Ruling Maio Marques da Rosa v Varzim Sol Turismo, Jogo et Animação (9 November 2017) relevant for healthcare and/or social services sector?

Source: https://ec.europa.eu/social/main.jsp?catId=706&intPageId=5115&langId=en
- During 2008 and 2009, Mr Maio Marques da Rosa, employed at a casino company in Portugal, sometimes worked for seven consecutive days.
- The Tribunal da Relação do Porto (Portugal) asked the CJEU whether the minimum uninterrupted weekly rest period of 24 hours, to which a worker is entitled 'per each seven-day period', must be provided no later than the day following a period of six consecutive working days
- The CJEU concluded that Directive 2003/88 does not require the minimum uninterrupted weekly rest period of 24 hours to be provided no later than the day following a period of six consecutive days. Nonetheless, that rest must be provided within each seven-day period
- The EC staff confirmed that it is possible, even though this might go against the idea of a high level of health and safety protection, that – taking into account this ruling – a day of rest could be provided only after 12 days of consecutive work. We all together wondered if working time arrangements of this type exist in the health care sector which does not seem to be the case, but if they did the ruling would also apply.

7) Improvement of the **employment terms for trainees** (incl. abolishment of the obligations of the trainee to "re-pay" his/her specialist training programme and specialist training done also outside university hospitals)

Improvement of the employment terms for trainees: abolishment of the obligations of the trainee to »re-pay« his/her specialist training programme which still exist in some EU states (re-payment meaning not having the possibility to choose his/her employer freely for a certain time after the specialist training); the possibility for the trainees to have their specialist training done also outside university hospitals (in some countries, notably in Italy, trainees cannot be employed in the private healthcare facilities)