

EU Employment Law
Developments
Marianna Patané

Presented jointly by:

White & Case LLP

and

American Chamber of Commerce to the European Union

Introductory remarks

- Social policy is the joint responsibility of EC and the Member States under the EC Treaty (Article 136).
- In real terms this means that 25 very diverse labour systems co-exist and that EU employment legislation introduces “base standards”, allowing Member States to introduce more stringent national measures by choice.
- Four key areas of EU employment legislation:
 - i. anti-discrimination;
 - ii. free movement of workers;
 - iii. protection of health and safety of workers & regulation of working conditions; and
 - iv. information and consultation of workers.

Anti-Discrimination Legislation

- Article 13 of the EC Treaty provides the main ground for the EU to take action against discrimination on the basis of:
 - Sex;
 - Racial or ethnic origin;
 - Religion or belief;
 - Disability;
 - Age; and
 - Sexual orientation.

- Two major developments in the last year:
 - Proposal to recast the Equal Treatment Directives to one cohesive Directive.
 - National measures introducing age discrimination, implementing the *Equal Treatment Framework Directive (Directive 2000/78/EC)*.

Sex Discrimination & Gender Equality

- EU action on sex discrimination includes equal pay and equal treatment and covers both direct and indirect discrimination.
- **Equal Pay:** Member States must ensure that male and female workers receive equal pay for equal work or work of equal value (Article 141 EC Treaty). *Directive 75/117/EEC* first set out the principle of equal pay for work of equal value. Equal pay means that:
 - (a) pay for the same work at piece rates is calculated on the basis of the same unit of measurement; and
 - (b) pay for work at time rates is the same for the same job.
- **Equal Treatment:** The principle of equal treatment means the absence of any discrimination, direct or indirect, based on sex. It includes the areas of:
 - Access to employment, vocational training and promotion, and working conditions (*Directive 76/207/EEC* as amended by *Directive 2002/73/EC*);
 - Activities, including agriculture, in a self-employed capacity, and on the protection of self-employed women during pregnancy and motherhood (*Directive 86/613/EEC*); and
 - Pregnancy or recent birth or breastfeeding (*Directive 92/85/EEC*).

Proposal for a recast of Equal Treatment Directives

- Proposal for a recast of six Directives on the equal treatment of men and women in the field of employment into a single comprehensive Directive which consolidates:
 - The Equal Pay Directive (*Directive 75/117/EEC*);
 - The Directive on equal treatment as regards access to employment, vocational training and promotion, and working conditions (*Directive 76/207/EEC* as amended by *Directive 2002/73/EC*);
 - The Directive on equal treatment in occupational security schemes (*Directive 86/378/EEC* as amended by *Directive 96/97/EC*); and
 - The Directive on the burden of proof in cases of discrimination based on sex (*Directive 97/80/EC*).
- Note: In addition to consolidation some substantive amendments have also been introduced.
- Latest Position: The Council approved text, adopted in December 2005, was passed by the European Parliament on 1 June 2006 without amendments. The proposal now returns to the Council for formal signature.

Other forms of discrimination

Religion or belief, disability, age or sexual orientation

- In 2000 the EU passed what is known as the *Equal Treatment Framework Directive (Directive 2000/78/EC)*. This sets down a general framework for combating discrimination on the grounds of religion or belief, disability, age or sexual orientation in relation to: (i) employment, (ii) training and (iii) membership and involvement in organisations of workers and employers,
 - The *Equal Treatment Framework Directive* is narrower in scope than the *Race and Ethnic Origin Directive (Directive 2000/43/EC)* passed in the same period as it does not extend the principle of non-discrimination to the services or housing sectors.
 - Member States had until 2 December 2003 to implement *Directive 2000/78*. However, the Directive allowed Member States to opt for an additional 3 years to implement measures relating to *age* or *disability* (Article 18).
- **While most EU countries already had disability discrimination legislation in place, age discrimination is a novel concept for the majority. Companies need to review their recruitment and employment practices & train staff at all levels.

Free Movement of Workers: EU nationals

- *Directive 2004/38/EC on the right of citizens of the EU and their family members to move and reside freely within the territory of the Member States:* 30 April 06 the deadline expired for Member States to pass national measures.
- What does it do?
 - Codifies previous legislation i.e. 9 Directives, 1 Regulation and principles set out in European Court of Justice case law.
 - Extends family reunification rights of EU citizens to registered partners under set conditions.
 - Grants family members an autonomous right of residence in case of death of EU citizen, dissolution of marriage or registered partnership.
 - Reduces administrative formalities.
 - Right of permanent residence after five years of residence in a host Member State.
 - Increases protection against expulsion for EU citizens and their families.

Free Movement: Third Country Nationals

- Increased rights to Third Country Nationals: on 23 January 2006 the deadline expired for Member States to implement *Directive 2003/109/EC*.
- The aim of this Directive is to ensure third-country nationals, legally resident for a long period of time in a Member State, be granted a legal status comparable to that of Member State nationals.
- Those covered by the Directive will have protection against expulsion, guaranteed equal treatment with nationals of the EU in a wide range of economic and social matters and the right to reside in another Member State for employment, study or other purposes set out in the Directive.
- To acquire long-term resident status, third-country nationals have to prove they:
 - Have continuously and legally resided in a Member State for at least five years; and
 - Have adequate resources and sickness insurance; and
 - In addition, Member States *may* require third-country nationals to comply with integration conditions, set out in their national laws.

Impact of the Directive

- The Directive does not apply to Denmark, UK and Ireland.
- Member States to whom it does apply have been slow to transpose the Directive into national law.
- By mid-January 06: only 5 Member States (Austria, Lithuania, Poland, Slovenia and the Slovak Republic) had notified their implementing measures to the Commission.
- The Commission stated that it would launch infringement proceedings, under Article 226 of the EC Treaty, should the remaining countries not comply in the coming months:
 - In January Letters of Formal Notice were sent to the 17 Member States which had not yet notified their implementing measures.
 - Estonia and the Czech Republic have since notified their measures.
 - Commission to decide if it will move to the next step to bring other Member States into line, i.e. whether it will issue Reasoned Opinions.

Protection of workers: revision of the Working Time Directive

- **Background:** the *Working Time Directive (Directive 93/104/EEC)* was adopted back in 1993 as a **health and safety measure**. Amended substantially over the years and recently replaced by *Directive 2003/88/EC*.
- **Scope of the WT Directive:**
 - 1993 Directive originally excluded air, rail, road, sea, inland waterway and lake transport, sea fishing, other work at sea and doctors in training.
 - *Council Directive 2000/34/EC* increased the scope of the Directive to cover a number of areas previously excluded. European case law developments also impacted these "excluded" areas e.g. doctors in training.
 - *Directive 2003/88/EC* provides for a maximum 48 hour working week, rest periods and breaks and a minimum of four weeks paid leave per year.
- The 1993 Directive expressly provided for **re-examination** of the Directive to take place by the Commission by 23 November 2004. In December 2004 the Commission launched a formal consultation process.
- Clear divisions arose between the Social Partners in April and May 2004 on all key revision areas. The Social Partners refused to take part in a second stage consultation in Summer 2004. As a result, the Commission published a proposal in September 2004.

Working Time Directive revision

- The Commission proposal in September 2004 covered five main areas:
 - i. The length of the reference period i.e. the period used to calculate the average working week (currently the reference period is four months, with the possibility of this being extended up to one year by way of agreement between the Social Partners);
 - ii. The addition of a further category of time to be added to the definitions of “working time” and “rest time”, namely “on-call time”: sub-divided into “active” and “inactive” periods of on-call time (in response to problems created by the European Court of Justice rulings relating to “on call” time in the health care sector, *SIMAP* and *Jaeger*);
 - iii. The conditions for application of the “opt-out” (the possibility to derogate from Article 6 of the Directive which limits the average weekly working time to 48 hrs);
 - iv. Time limits for compensatory rest; and
 - v. Measures to improve the balance between work and family life.

Working Time: latest developments

- The WT proposal is one of the most controversial proposals before the Council:
 - December 2005 Employment Council meeting - despite lengthy discussions, the 25 EU Employment Ministers failed to reach an agreement on the WT Directive proposal.
 - June 2006 – EU Ministers still unable to agree by qualified majority on the proposal.
- Unresolved issues: the Council remains divided between those wanting a phase out of the **opt-out** provision (most notably France and Sweden) and those wanting to ensure a full continuation of the opt-out (most notably the UK and Poland). Another issue, still to be resolved, is whether the maximum weekly working time should be calculated **per contract or per worker**.
- Agreement reached on one key element: the Council has agreed with the Commission's proposal to reverse the case-law of the European Court of Justice and differentiate between "**active**" and "**inactive**" on-call time.
- Next steps: The Finnish will take over the EU Presidency in July and will seek to broker a compromise between the national positions. Even if agreement is achieved in the Council, any agreed text is likely to be undergo substantial further amendment by the European Parliament which has the opportunity to vote on the text a second time under the EU's co-decision procedure.

Other developments

- **Services Directive proposal**
 - Aims to promote freedom of services and freedom of establishment, i.e. to improve cross-border EU trade, by removing red-tape.
 - Controversy over “social dumping”. Spring 2006: re-drafting of key enforcement provision, Article 16, by European Parliament and the Commission along with provisions excluding labour law and temporary workers from the Directive’s scope.
 - On 29 May EU Ministers reached political agreement on a text, adopting in the main the amendments put forward by EP and Commission. N.B. the text states that the Directive does not affect labour law or social security legislation.
- **Portability of pensions proposal**
 - Aims to increase the portability of occupational pensions in the EU.
 - Has proven to be another controversial proposal – subject to very heated debate in Council.
- **Agency Workers Directive proposal**
 - Forever on-and-off the Council agenda- blocked in the Council since 2002.

Worldwide. For Our Clients.

www.whitecase.com