Safety & Health: The Implementation of the Working Time Directive in the Armed Forces

Date: Wednesday, 25 May 2022

Time: 09.30 – 17.00 CET

Venue: UIC-P Espaces Congrès, INTERNATIONAL UNION OF RAILWAYS,

16 rue Jean Rey - F-75015 Paris

About EUROMIL

The European Organisation of Military Associations and Trade Unions (EUROMIL) is an umbrella organisation composed of 33 military associations and trade unions from 20 countries. It is the main Europe-wide forum for cooperation among professional military associations on issues of common concern. EUROMIL strives to secure and advance the human rights, fundamental freedoms and socio-professional interests of military personnel of all ranks in Europe and promotes the concept of "Citizen in Uniform". As such, a soldier is entitled to the same rights and obligations as any other citizen. EUROMIL particularly calls for recognition of the right of servicemen and -women to form and join trade unions and independent associations and for their inclusion in a regular social dialogue by the authorities.

Background

Since its entry into force in 2004, Directive 2003/88/EC, or the Working Time Directive (WTD), has required Member States to guarantee rights to workers regarding limited working hours, daily and weekly rest periods, paid annual leave and extra protections in the case of night work. The WTD derives from principle 10 of the European Pillar of Social Rights (healthy, safe and well adapted work environment) and Article 31 of the Charter of Fundamental Rights of the European Union.

As is usual in employment legislation, derogations from these rights are provided for in certain circumstances and with due regard to the health and safety of the worker. The nature of the work carried out by members of the armed forces often leads to wide ranging exclusions from safeguards enshrined in legislation like the WTD. Although the purpose of such legislation is to protect employees from excessive and unnecessary dangers in the workplace, extensive limitations are often provided for with the justification that certain 'essential', often uniformed, workers are exempt from such protections on the basis that the kind of work they carry out should allow for the government to have full control over the functioning of the workplace and the terms and conditions of the employment.

Recent case law has shown however that a worker should not automatically be excluded from such protections purely based on the sector of employment they are engaged in. Whilst it is accepted that the armed forces is by nature a high risk environment to work within, it does not mean that military personnel are not

equally as entitled to basic protections like any other worker, as any major derogations from such rights can quickly result in avoidable and unnecessary physical and psychosocial illness and as well as lead to underperformance of duties.

Aim of the event

The daylong conference took place within the framework of four interactive sessions in which panel discussions focused on the WTD in the context of the military specifically; the political background of the legislation and how case law impacts decision-makers; the experiences of military personnel surrounding safety and health and the interaction of the WTD on these issues in a number of EU Member States; and the experiences of EUROMIL member associations.

The intention behind the event was to encourage further discussion surrounding trade union rights for members of the armed forces, particularly in the context of safety and health, and for participants to actively engage and learn from one another in the hope of identifying best practices as well as existing challenges. The conference brought together a wealth of experiences and views, not only from varying national positions, but also from an organisational, academic and legal perspective too.

The location of the event, Paris, France, was also relevant to the topic as the French government currently hold the Presidency at the European Council. Not only this, but the landscape regarding trade union rights for military personnel and to the Directive itself is one containing strong oppositional views to its application to public service workers.

Discussion

Legal interpretation

In the first session, participants heard from Stefaan van der Jeught, Press Officer at the Court of Justice of the European Union, speaking in a personal capacity. Mr van der Jeught's presence was an important perspective for the events' participants as he could set the scene regarding the Court's interpretation of the Directive and its application at national level. The case at the centre of the presentation, B.K v Ministrstvo za Obrambo Case C-742/19, is a Slovenian case concerning certain aspects of the organisation of working time. The facts of the case centred on BK, a former non-commissioned officer in the Slovenian army who carried out 24/7 'guard duty' shifts per month at the barracks where he was posted. It is important to note that interventions were made in this case from Slovenia, Germany, Spain and France, with Spain and France taking the position that everything connected to the military is excluded from the Working Time Directive and national security is to remain the sole responsibility of each member state.

The questions at the centre of the case focused on the following: do military activities fall under the scope of the Working Time Directive; and what exactly constitutes the concept of 'working time?' The French government argued that the

operational efficiency of the armed forces was dependent on exposing military personnel to situations that reproduce as accurately as possible the conditions, including the most extreme, in which actual military operations take place. The court ultimately decided that while the scope of the Directive is more limited when it comes to military personnel, it does not allow for an absolute exclusion and instead can only be limited in very specific circumstances relating to the nature and context of the activity, the skill and training involved, and the overall wider security context at that time.

Regarding the issue of 'working-time' and whether, in this case, the stand by time was considered to fall under this definition, the court found that it covers all stand-by periods that objectively and significantly impact the worker in question in the free management of their time during which professional services are not required and in which they can pursue their own interests. Furthermore, where the place of work is separate from the individual's residence, a requirement to be continuously present at the place of work should be regarded as a stand by period. Ultimately, however, the court found that the issue of remuneration is the responsibility of the member state and remains a national issue, meaning that stand-by periods of this nature could be remunerated differently to 'normal' working hours.

An interesting point touched upon by Mr van der Jeught relates to the opinion of the Advocate General in the case, in which the undeniable complexity regarding the application of the WTD and the specific security situation for certain member states in comparison to others was highlighted. In his opinion, the AG highlighted how the situation in France, for example, may in fact be different to that of other member states, on the basis that it is the only member state to have nuclear weapons as well as the recognition of the EU Treaties themselves for the special military situation of certain member states. However, what is a key aspect of the AG opinion was the point that such an exclusion can and should be periodically reviewed – in keeping with the decision that an outright exclusion of military personnel from the scope of the Directive is not legitimate. Furthermore, this point only emphasises the importance of regular communication between relevant parties (like between the military unions or associations and the government) as well as having access to collective bargaining tools.

The most important take away of this decision is that while it is not immediately the case that military personnel will be treated like all other workers regarding working time, they are nonetheless unequivocally **not** excluded from the scope of the Directive.

Implementation at national level – French derogations

Military rights lawyer Aida Moumni continued the discussion on the French position, highlighting how the Directive is yet to be transposed into French national law and drew attention to the tension for member states between national and EU law. Ms Moumni highlighted that France recognises a constitutional right of the availability of its armed forces and so looking at the constitution it shows that the armed forces are at the disposal of the government, and so according to them, it

is a national competence. Furthermore, the issue of the classification of certain workers was touched upon and the tendency to see more and more workers fall under the title of the military, allowing for more and more workers to be excluded, like the Gendarmes in France.

Trade Unions & the WTD

Providing yet another perspective on the matter was Deputy General Secretary of the European Trade Union Confederation (ETUC), Claes Mikael Stahl. The ETUC perspective is an important one for EUROMIL as it is an organisation at the heart of the Trade Union movement. Mr Stahl highlighted the flaws with the Directive, noting its controversy since its initial creation over thirty years ago. He pointed out that its implementation under a health and safety approach focuses too much only on long hours pertaining a risk to workers, and considers only rest and leave periods. However, what we now know is that occupational risks to health and safety more often than not arise from unpredictable and unsocial work, particularly where there is a lack of autonomy for the worker.

Despite this, Mr Stahl highlighted that for the ETUC point of view, the Directive should not be reopened, but rather the loopholes should be worked around as in his eyes, all attempts thus far to revise it have been fruitless.

This discussion opened up a crucial part of the issue for military personnel, which is the lack of collective bargaining mechanisms available to them and part of the reason as to why it can be so difficult to ensure that a collective ban for military personnel does not happen. As expressed by Mr Stahl, the work being done at the level of the ETUC cannot replace the work that is happening at national level and should instead be assistance in creating the best conditions at national level, so as to ensure that there is a strong framework in place.

National perspectives

The latter half of the conference dealt mainly with national perspectives on the matter. Conclusions arising out of this session were interesting and varying depending on the national perspective.

Speaking from the Belgian perspective was Lieutenant General Jean-Paul Claeys, Director General of Human Resources, who gave a technical overview of the situation in Belgium. The Directive was transposed into Belgian law in December 2000, allowing for the exclusion of military personnel from its scope as well as certain civilian workers engaging in particular military activity of a specific nature. However certain minimum standards, including those regarding nightwork, were provided for. An additional regulation was brought into place in 2007 requiring a minimum of 30 days leave for personnel. Soldiers in training however are not included in the scope of the additional benefits. Furthermore, while the working time regime for the military is mainly implemented via regulation, communication with relevant social partners, such as the military trade unions, takes place and allows for the Directive to be implemented in a somewhat flexible manner – yet another nod towards showing the importance of regular communication channels with social partners.

From the German point of view, Kathrin Geyer, Counselor for EU Law & Ulf Haeussler, Acting Head of Division of EU law, UN and NATO Law at the Directorate-General for Legal Affairs at the Ministry of Defence both gave an overview of the situation in Germany. Both speakers were present in a personal capacity but nonetheless gave valuable insight into the current legislative and practical context in Germany. Highlighted in their presentations was the fact that prior to 2011, the Directive was only implemented in the private sector and for civilian government workers. This changed when the national courts were confronted by a scenario in which a soldier and civilian were working side by side, engaging in essentially identical work, but were subject to a different working time regime. The court ruled that where there is no military or legal justification for the unequal treatment of workers doing the same job then Directive must apply.

Furthermore, the speakers highlighted a very important point in their presentation – the specific security situation happening in Germany at this time. By drawing attention to this the speakers show again the difficulties in addressing issues like working time, in the very particular context of the military and in which there is need for sensitivity towards the security situation. The German way around this was by taking a two pillar approach and created categories so that it became clearer which activities could fall under the exemption of the Directive. In the words of the speakers, these exceptions capture tasks that address situations genuine to military service and different to other emergency situations. A 2016 law then compiled a comprehensive list of exceptions however in reality, this was found to not be exclusive. The speakers also presented on the German intervention to the Slovenian case in regards to the concept of 'national security', of which it has had various and diverging interpretations. The court, however, honoured national perspectives in this respect and observed that the specific features nationally imposed on the functioning of the armed forces must be duly taken into consideration.

After the decision of the Slovenian case, the speakers observed that Germany is exploring associated options in order to move more fully in line with the court's findings. Giving a poignant summary then, they highlighted that there is a difference between legitimate hardship and inhuman drudgery and that being a soldier does not mean that ones' right to life should dissipate – a key point at the centre of the day's event.

Cyprus

The presentation from Cyprus gave an overview of the implementation of the Working Time Directive in the country, highlighting the positive steps in regulation of working time in the military over the years. Notably, the new regulations in Cyprus aim in regulating the workload of the **permanent** military personnel to 37.5 hours for a five day working week, with the possibility to extend this to a maximum of 48 hours per week, including night shifts, over a six month period. Prior to its implementation, working time for military personnel in Cyprus was unregulated and allowed for an uneven distribution of night duties. Nonetheless, the Cypriot associations highlighted the existence of gaps, in particular for contract soldiers who do not fall under the scope of the new regulations.

Ireland

The Directive was transposed into Irish law in 1997 but with the inclusion of a blanket exclusion for both the police and military forces in the country. Following advice form the Attorney General, the Government decides that a broad exclusion of all activities of the defence forces is not compatible with the Directive and requests the Minister for Jobs, Enterprise and Innovation (not defence) to draft new legislation however no amendments have been drafted to date. Notably, the personnel management system in place does not record the actual hours worked by individuals. There is a notable failure on behalf of management to engage with both PDFORRA and RACO in the efforts to introduce statutory based derogations from the Directive and until new legislation is imposed and there is a continued lack of consultation, further legal challenges will continue to emerge.

Denmark

The Danish situation depicts a largely different picture. The Danish labour market, including the armed forces, is already significantly regulated regarding working hours. Additionally, the time registration system ensures that working hours are registered for all employees, including the armed forces. While there are some exceptions for military personnel to be excluded from the scope of the Directive, notably actual military service in armed conflicts, generally speaking there are no major challenges associated with the implementation of the Directive in Defence.

Greece

Military personnel are identified as being the only category of employees in both the public and private sectors who are not paid for overtime and night work. Suggestions from PFEARFU include the introduction of a mechanism to calculate and record working time beyond the standard 40 hours per week and normalising compensation for overtime. While the Greek parliament legislated for and approved compensation for night work for military personnel, five years have now passed without it progressing to the necessary next steps.

Spain

Spain implemented the Directive in 2016, regulating the working hours at military establishments and ensuring set hours during the working day. Work-life balance was also recognised as a right and time off after 24 hour duty was guaranteed. However, training drills were not included in the annual calculation of working hours and periods of rest were not respected in drills, consequently increasing the risk of accidents, especially for drivers.

As highlighted in the presentation, the implementation of the Directive into national law improved technical training for personnel and reduced occupational risks, as well as fostering a positive evolution of knowledge and awareness of safety and health matters amongst both the Ministry of Defence and the Armed Forces. However, certain prominent issues remain, including the fact that a general clause of exclusion can still apply to certain operational activities, drills and training and that often measures still focus on security issues as opposed to

the protection of personnel involved in specific operational activities. Furthermore, the presentation highlighted that there is no independent oversight body monitoring the Ministry of Defence and so there is a major lack of independence and transparency, particularly in relation to the investigation and review of occupational incidences.

As highlighted by AUME, while the positive evolution in the field of health and safety in the military since the implementation of the Directive is appreciated, representatives of military workers must be entitled to participate in regular communication on occupational risk protections with the Ministry of Defence and the Armed Forces generally.

Although only a snapshot, these country presentations highlight the very varied experiences for EUROMIL members when it comes to regulation of working time, as well as the similarities and differences specific to the context of each country. What is clear however is that any solution must take into consideration the very real and specific context and culture of the national situation as what works for one country will not always work for another.

Conference Conclusions

The event stimulated a rich and varied discussion over the implementation of the Directive and its application to the armed forces in the context of safety and health.

Considering all of the presentations and interventions from both speakers and participants, there were both some key conclusions and questions that can help us to move the discussion forward on achieving better occupational safety and health for military personnel, over a range of different issues both directly and indirectly related to the Directive:

- In the case of harmonisation of European Defence, who takes responsibility for the individual soldier at EU level and how does national sovereignty play into this;
- Is there a way of getting the Commission to 'force' the hand of member states when it comes to its strict interpretation of working time in the military;
- We must continue to question how a soldier is asked to risk their life in order to protect democratic principles when they are not afforded the same respect and protection?;
- What do we understand to mean by 'worker' and how does this concept differ across countries but also at a national level;
- Recruitment and retention continue to be issues across armed forces in Europe and retention will not be solved by recruiting more troops. The armed forces will continue to compete with different public and private sector employment, becoming less attractive if no improvements are made;
- Every opportunity is taken to exclude the military from employee protection regulations, and as is seen in the Transparent and Predictable Working

Conditions Directive, more and more public sector workers will become impacted by this;
- Harmonisation is key to achieving our objectives;
- Associations and Trade Unions are absolutely crucial to improving conditions for workers and ensuring the highest protections, no matter how solid the current environment may appear to be (Denmark for instance);
- How can we get all ranks of the military to view themselves as employees; and
- Is it going to take the avoidable and unnecessary loss of life of a soldier at work before real change can ever happen?

Questions for EUROMIL Member Associations to reflect upon

Ger Guinan, PDFORRA representative and EUROMIL Board Member, moderated the final session and in his concluding remarks presented a series of six questions for participants to consider and answer on. The questions are outlined below.

1. Do members believe that the failure to have some degree of congruence between working conditions of normal workers and members of the armed forces will impact on retention and recruitment? In the event that this is agreed, who do we inform in order to effect change – national or European level?

2. Are there approaches that members believe EUROMIL should consider that have not been referenced?

3. Would members believe that National Bodies should advise EUROMIL of their intention to take any actions in their national jurisdictions in order to ensure that pitfalls are avoided at CJEU level if cases reach that level?

4. Should members consider greater used of the European Social Charter to attempt to determine how the CJEU might rule and attain findings, albeit that it is not binding?

5. Do members believe that a system of collaborated lobbying could be arranged in order to progress the matter at a European political level? M

6. Would member be comfortable feeding into an open database to show where they are on a spectrum of implementation of this Directive?

External Speakers

European Court of Justice:	Stefaan van der Jeught
Military Rights Lawyer, Paris:	Mme Aïda Moumni
European Trade Union Confederation:	Claes-Mikael Stahl
Belgian Ministry of Defence:	LtGen J-P Claeys (DGHR)
German Ministry of Defence:	Ulf Häußler/Kathrin Geyer

Please note that all presentations can be found on the EUROMIL event website page here