Opinion of the European Economic and Social Committee on the ‘Communication from the Commission to the Council, the European Parliament, the European Economic and Social Committee and the Committee of the Regions and the social partners at Community level concerning the re-exam of Directive 93/104/EC concerning certain aspects of the organisation of working time’

(COM(2003) 843 final)

(2004/C 302/16)

On 5 January 2004, the Commission decided to consult the European Economic and Social Committee, under Article 262 of the Treaty establishing the European Community, on the abovementioned proposal. The Section for Employment, Social Affairs and Citizenship, which was responsible for preparing the Committee’s work on the subject, adopted its opinion on 14 June 2004. The rapporteur was Mr Hahr.

At its 410th plenary session of 30 June - 1 July 2004 (meeting of 30 June 2004), the European Economic and Social Committee adopted the following opinion by 154 votes in favour, 71 against and 13 abstentions.

1. Gist of the Commission document

1.1 The subject of this communication is Directive 93/104/EC of 23 November 1993, as amended by Directive 2000/34/EC, laying down minimum requirements with regard to the organisation of working time in order to ensure a better level of safety and health protection for workers.

1.2 The aim of the communication is threefold:

1.2.1 Firstly, it aims to evaluate the application of two of the directive’s provisions subject to review prior to the expiry of a seven-year period, calculated from the deadline for transposal by the Member States, i.e. prior to 23 November 2003, namely the derogations in Article 17(4) from the reference periods for the application of Article 6 concerning the maximum working week and the option in Article 18(1)(b)(i) for Member States not to apply Article 6, provided that measures are taken to ensure that individual workers consent to working in excess of 48 hours per week (generally known as opt-out).

1.2.2 Secondly, the communication aims to analyse the impact of the case law of the Court concerning the definition of working time and the qualification of time on call, as well as new developments aimed at improving compatibility between working and family life.

1.2.3 Finally, the aim of the communication is to consult the European Parliament and the Council, but also the European Economic and Social Committee, the Committee of the Regions and the social partners, on a possible revision of the text.

1.2.4 It should be noted that the European Parliament on 11 February 2004 adopted a report that called for the opt-out provisions to be phased out altogether. The Commission released a second consultation paper on 19 May. According to the Commission the purpose of that document is to call upon the social partners to negotiate and, failing that, to give broad indications as to the direction of any legislation that might later be proposed by the Commission.

2. General comments

2.1 The EESC considers the method of consultation used by the Commission to be inadequate, given that this matter is subject to collective bargaining at national level. The Commission should first have consulted the social partners before launching the consultation procedure with the European institutions, the EESC and the Committee of the Regions.

2.2 The Commission is not making any concrete proposals for amending the directive. The consultation asks for responses on five main issues with a view to a future revision of the directive:

— the length of reference periods – currently four months, with certain provisions allowing for six months or a year;

— the definition of working time following recent European Court of Justice rulings on time on call;

— the conditions for the application of the opt-out;

— measures to improve balance between work and family life;

— how to achieve the best possible balance between these measures.
2.2.1 In order to provide detailed answers to the Commission's five questions, respondents not only need a thorough knowledge of the general Working Time Directive 93/104/EC, but also an analysis of the way it has been implemented in Member State legislation and of the impact this has had compared to previous national working time legislation and of national collective bargaining agreements. The Committee notes that the report (1) published by the Commission and the content of the current Communication provide only a limited analysis of this impact. The Committee's comments will therefore necessarily be more wide-ranging.

2.2.2 In order to ensure better protection of workers' health and safety in accordance with the social provisions of the Treaty establishing the European Community (Article 136 et seq.), and Directive 89/391/EEC, the general Working Time Directive 93/104/EC lays down in particular:

— maximum weekly working hours of 48 hours on average, including overtime;

— a minimum rest period of 11 consecutive hours for each 24-hour period;

— a rest break where the working day is longer than six hours;

— a minimum rest period of one day per week;

— four weeks of paid annual leave;

— an average of no more than eight hours of work at night in any 24-hour period.

2.2.3 It also establishes the conditions under which the Member States, via legislation, and the national social partners, via collective agreements, may derogate from the rules contained in the directive. Derogations can only be allowed where the general principles of worker health and safety are complied with.

2.2.4 Unfortunately no comprehensive assessment has been made of whether implementation of the directive in the Member States has brought the intended improvements in living and working conditions for workers in the EU, but the Committee assumes this to be the case, at any rate in the long run. Any amendments to the content of the directive must therefore be considered carefully and be well substantiated, particularly from the point of view of the social partners.

2.2.5 At the same time, it should be remembered that the directive builds on discussions and comments dating back more than fourteen years. European Court of Justice interpretations of 'working time' and 'compensatory rest' have created acute problems for many Member States. Consequently, the Committee notes with interest, whilst highlighting the limitations already pointed out, the consultation procedure launched by the Commission, which makes it possible to collate useful viewpoints from various quarters with regard to how the directive and subsequent legislation has worked in the Member States, thus closing the information gap highlighted above. Naturally, under the provisions of the EC Treaty, the social partners in particular have a very important role to play.

2.2.6 Working time and the organisation of working time are crucial to relations between employers' organisations and trade unions as well as to everyday employer-employee relations. Consequently, the way working time rules are framed in collective agreements is of vital importance to the social partners, which have a wealth of expertise and experience in these matters.

2.2.7 National legislation on working time is generally based on employers and employees taking joint responsibility for ensuring that working time is organised satisfactorily. It is up to the social partners at various levels in the Member States to resolve any working time issues that emerge in the workplace, basing their decisions on working time rules and as part of collective agreements.

2.2.8 A purely legal analysis of the Working Time Directive's rules on daily rest periods, breaks, weekly rest periods and weekly working time shows that, when compared to the permitted derogation provisions under Article 17, and without taking into account the impact of Court of Justice rulings on time on call, the directive should be regarded as providing a certain degree of negotiating flexibility. However, it should be noted that the Working Time Directive is a relatively complex area of Community law. The Committee therefore suggests that, in conjunction with a proposal to review the directive, the Commission should also take on board the conditions in which it might be simplified. Simplification must not, however, be allowed to sideline basic employee health and safety requirements.

3. Specific comments

3.1 Reference periods

3.1.1 Annual working time issues were already being discussed in Europe when the directive was launched. 'Annual Working time' can best be defined as a system in which the reference period for the average working week covers a year or 365 days.

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3.1.2 Article 6 of the Working Time Directive contains a rule on an average working week of 48 hours. This can be spread over four months or, under the provisions of Article 17, over six or twelve months. Directive thus provides a certain amount of freedom to stagger working hours over the reference period. Organisation of working time must, of course, comply with the provisions governing daily rest periods, weekly rest, night work, etc., and respect general worker health and safety principles.

3.1.3 The Commission communication notes that it is not always easy to analyse national legislation with regard to the transposal of Articles 6 and 16 (which deal respectively with maximum weekly working time and the reference period, and that In general, there appears to be a tendency towards expressing working time as an annual figure.

3.1.4 The question is the extent to which the reference period affects an employee’s health and safety. The Commission does not address this problem. It might, of course, be inconvenient to have to concentrate a lot of work into a relatively short time span, but given that yearly reference periods are, in fact, used by many collective agreements – it can be surmised that any negative impact of a longer reference period in terms of health and safety is offset by the parties to collective agreements, if equivalent rest periods are provided.

3.1.5 One of the arguments used for extending the reference period is that it would give firms more flexibility to manage working time. This flexibility already exists in many countries, thanks to collective agreements, and the problem of poor flexibility tends to affect countries where collective agreements have traditionally played a less significant role. It would be worthwhile to seek to strengthen collective agreements on the issue of working time, particularly in those countries where such agreements are not especially strong.

3.1.6 The EESC notes that the EC Treaty Article 137, which underpins the Working Time Directive, provides that directives adopted on the basis of that article ‘are to avoid imposing administrative, financial and legal constraints in a way which would hold back the creation and development of small and medium-sized undertakings.’

3.1.7 As a 12-month reference period is already used in many Member States by virtue of collective agreements, the EESC feels, given the current provisions, which allow for the option of extending the reference period through collective agreements, that the social partners have the necessary flexibility to adjust working time to deal with different situations in Member States, sectors, and companies. Therefore, these provisions should be retained.

3.1.8 Considering the special working time arrangements for managerial staff, the Committee is in favour of involving the organisations representing this occupational category directly in the procedures and negotiations laying down conditions regarding working time. This would require special provisions.

3.2 Definition of working time

3.2.1 Article 2 of the Working Time Directive defines ‘working time’ as ‘any period during 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’. Conversely, Article 2(2) defines ‘any period which is not working time’ as a rest period.

3.2.2 The Court of Justice has had to interpret the directive’s definition of working time on two occasions. In the first judgment (1) on the time spent on call by doctors in a healthcare establishment, the Court of Justice ruled that the time a doctor spends on call should be regarded as working time within the meaning of Article 2(1) of the directive if the doctor has to be physically present in the healthcare establishment. But this time spent on call includes a duty to be physically present at the place designated by the employer and to be available for duty when called upon by the employer. When ruling on the Jaeger case (2), the Court of Justice confirmed its previous interpretation and concluded that a doctor’s periods of actual inactivity when on call must be regarded as work within the meaning of the directive. It also ruled that compensatory rest should be taken immediately.

3.2.3 The EESC notes that the judgments – particularly, but not exclusively, with regard to health sector staff – may have far-reaching consequences for work organisation. Several Member States have national legislation that contains rules on time spent on call. These rules are framed in different ways but what they have in common is that time spent on call counts either not at all or only partly as working time. However, it is also not counted as time spent resting.

3.2.4 It is remarkable that the scope of the definition of working time in Article 2(1) of the directive seems neither to have been analysed nor discussed satisfactorily before the directive was adopted. There is no other explanation for the surprise the judgments caused both within the EU institutions and in the Member States, particularly since most Member States already have rules on time spent on call in their national working time legislation.

3.2.5 The Committee shares the Commission's view that there are several potential solutions. Under the current circumstances, the Committee would not wish to recommend any of the particular solutions put forward. The one selected should aim, first and foremost, to:

— provide greater protection for workers' health and safety in relation to working time;

— provide firms and the Member States with more flexibility in organising working time;

— make it easier to combine work and family life;

— avoid obstacles being created, especially for SMEs.

3.3 Implementation of the opt-out in accordance with Article 18(1)(b)(i)

3.3.1 The directive's Article 18 gives the Member States the right to legislate to derogate from Article 6 of the directive, which limits the average weekly working time to 48 hours. Implementation of the opt-out is subject to a number of conditions:

a) workers must have agreed to work a greater number of hours;

b) workers who refuse must not be subject to reprisals;

c) employers are obliged to keep up-to-date records of all workers who do this work;

d) the records must be made available to the competent authorities.

It should also be noted that even workers who are working according to the opt-out under Article 18 are entitled to daily rest of 11 consecutive hours and a rest break after six hours.

3.3.2 The Working Time Directive builds on some vague, unformulated assumptions of what might be called a 'healthy working time culture'. According to Article 137 of the Treaty establishing the European Community, 'the Community shall support and complement the activities of the Member States to improve working conditions and to protect workers' health and safety'. The very existence of the Working Time Directive and the fact that it has been implemented in most of the Member States are, in any case, evidence of a general desire to reduce the scope for an unhealthy working time culture to develop. The opt-out provided for in Article 18(1)(b)(i) can thus only be applied if the Member State respects 'the general principles of the protection of health and safety of workers'.

3.3.3 An assessment of the legitimacy of an opt-out will necessarily depend on whether a link can be shown between a working week of more than 48 hours and the health and safety of workers. In its communication, the Commission states that an analysis of the impact of the opt-out on the health and safety of workers 'appears not to be possible owing to the lack of reliable data'. Nevertheless, the Commission mentions a recent study according to which there could be a link between long working days and physical health, particularly when working time exceeds 48 to 50 hours per week. In its opinion on the 1990 proposal for a directive, the EESC had already stated that it had emerged from numerous studies that working for too long without rest could damage workers' health, lead to occupational diseases and wear workers down.

3.3.4 It is important that the opt-out should be undertaken voluntarily. According to the rules laid down in the directive, a worker must always be free to choose not to work more than an average 48 hours per week. The rules have been criticised because this freedom is not always possible: it is difficult for an employee to refuse to sign an agreement in a recruitment situation.

3.3.5 According to the Commission communication, an employer survey carried out in Great Britain shows that 48% of employees in the construction industry work more than 48 hours per week. This is a surprisingly high figure, particularly since many of them are probably in jobs that require both physical resistance and precision. For the employer, the benefit of these extra working hours (during which – because of overtime pay – the worker is also very expensive labour) must be relatively small. One might therefore wonder whether the general long working hours' culture in Great Britain is not linked to other structural problems.

3.3.6 An important question is the impact long hours have on the family. How do parents who both work more than 48 hours per week manage to hold things together? Is the long hours culture a factor in keeping one of the partners – usually the woman – partially or wholly outside the labour market? If so, the opt-out could be at odds with the Lisbon Strategy objective of getting 60% of the EU’s female population in work by 2010. It is somewhat surprising to note that the difference in male and female participation in the labour market in Great Britain is actually slightly below the European Union average, but, on the other hand, Great Britain is, after the Netherlands, the EU country where relatively most women (about half) work part-time (1). According to the Commission communication, 26.2% of British men work more than 48 hours per week, whereas for women, the proportion is 11.5% (2). A study published in the British Medical Journal found that no control of overtime is a health risk for female workers, especially manual workers with families (3). The opt-out would thus seem to have a negative effect on equal opportunities between women and men. This aspect needs to be analysed in greater depth.

3.3.7 The EESC does not intend to take a stance towards the opt-out at this stage. A more thorough analysis of the situation involving the social partners is required before a stance can be taken.

3.4 Measures to provide a better balance between work and family life

3.4.1 What does a better balance between work and family life mean for workers? What does family life mean? If we put the question to the parents of small children, we will get one answer. If we put the same question to a couple without children, we will most surely get a different one. A single father will give yet another. Consequently, it is not possible to give a straightforward answer to how the balance between work and family life should improve.

3.4.2 However, it can be said generally that for most people the option to influence or direct their working situation is a positive factor that makes for a good working environment. This is particularly true of parents with small children. The European Parliament Resolution on the organisation of working time particularly emphasises the fact that:

— women are more likely to suffer negative effects on their health and well-being if they have to take on the double burden of working life and family responsibilities;

— attention must be drawn to the worrying trend of women working two part-time jobs, often with a combined working week that exceeds the legal limit, in order to earn enough money to live;

— that the long hours culture in higher professions and managerial jobs is an obstacle for the upward mobility of women and sustains gender segregation in the workplace (4).

The EESC strongly supports this opinion, but would add that the problems in question do not only apply to women, but to parents in general who find it difficult to combine working life with family responsibilities. This also implies a health risk.

3.4.3 The EESC would point out that an important aspect of any working time policy should be to enable everyone to set aside some time from work and family to make a contribution towards society and democratic life.

3.4.4 Both Community and national law currently include a number of rules that take account of the need to reconcile family life and childcare with paid employment. There are, for example, provisions on parental leave, part-time work, teleworking, flexible working time, etc. The EESC would welcome a survey involving Social Partners of the existing provisions in this area before any new measures are proposed and debated. The EESC suggests that the European Foundation for the Improvement of Living and Working Conditions should be asked to carry out this survey. The Foundation has already published a report that addresses these problems to some extent (5).


The President
of the European Economic and Social Committee
Roger BRIEŠCH

APPENDIX

to the European Economic and Social Committee opinion

The following amendments attracted more than 25% of the votes cast, but were rejected during the course of the deliberations:

**Point 3.1.7**

Replace this paragraph by the following text:

‘In its communication of 19 May, the Commission suggests that the reference period should be extended without citing already a concrete proposal. Therefore the EESC does not intend to take a stand in the matter at this stage. The EESC will do so when consulted on a draft directive.’

**Reason**

On the two other issues (definition of working time, point 3.2.5, and the opt-out, point 3.3.7) the EESC does not take a stand awaiting more concrete proposals. Therefore it is justified to take a parallel attitude in relation with the reference period.

**Result of the vote**

For: 84
Against: 135
Abstentions: 7