

COMMISSION OPINION

within the framework of Article 17(5) of Directive 2003/88/EC of the European Parliament and of the Council concerning certain aspects of the organisation of working time ('The Working Time Directive')

Extension of transitional arrangements for the working time of doctors in training in the Netherlands

(2009/C 245/02)

1. Introduction

This Opinion is based on Article 17(5) of Directive 2003/88/EC of the European Parliament and of the Council ⁽¹⁾ concerning certain aspects of the organisation of working time ('The Working Time Directive'). It concerns a notification by the Netherlands, under this Article, of its wish to continue transitional arrangements until 31 July 2011 as concerns working time limits for doctors in training.

Doctors in training were excluded from the scope of the first Working Time Directive in 1993. This was changed in 2000 by an amending Directive, and doctors in training are now covered by the consolidated Working Time Directive, in the same way as other workers ⁽²⁾. Normally, Article 6 of the Directive limits working time to a maximum of 48 hours per week on average ⁽³⁾, including any overtime. However, Article 17(5) of the Working Time Directive allows transitional arrangements for applying these limits to weekly working time in the case of doctors in training.

The relevant parts of Article 17(5) are as follows:

'... With respect to Article 6 (limit of 48 hours to average weekly working time) derogations (regarding doctors in training) shall be permitted for a transitional period of five years from 1 August 2004.

Member States may have up to two more years (from 1 August 2009), if necessary, to take account of difficulties in meeting the working time provisions with respect to their responsibilities for the organisation and delivery of health services and medical care. At least six months before the end of the transitional period, the Member State concerned shall inform the Commission giving its reasons, so that the Commission can give an opinion, after appropriate consultations, within the three months following receipt of such information. If the Member State does not follow the opinion of the Commission, it will justify its decision. The notification and justification of the Member State and the opinion of the Commission shall be published in the *Official Journal of the European Union* and forwarded to the European Parliament.

Member States may have an additional period of one year, if necessary, to take account of special difficulties in meeting the responsibilities referred to in the (previous) subparagraph. They shall follow the procedure set out in that subparagraph.

Member States shall ensure that in no case will the number of weekly working hours exceed an average of 58 during the first three years of the transitional period, an average of 56 hours for the following two years, and an average of 52 for any remaining period...

With respect to Article 16(b) (reference period for calculating average weekly working time) derogations (regarding doctors in training) shall be permitted provided that the reference period does not exceed 12 months, during the first part of the transitional period (2004-2007), and six months thereafter.'

Article 17(5) also provides for consultation between employers and employees' representatives about the implementation of any transitional arrangements: 'the employer shall consult the representatives of the employees in good time with a view to reaching an agreement, wherever possible, on the arrangements applying to the transitional period.' Such an agreement must respect the limits set out in Article 17(5), but it may set out, in particular, the measures to be adopted to reduce weekly working hours to an average of 48 by the end of the transitional period.

⁽¹⁾ Directive 2003/88/EC of the European Parliament and of the Council of 4 November 2003 concerning certain aspects of the organisation of working time, OJ L 299, 18.11.2003, p. 9. The Directive consolidates and repeals two earlier Directives, 93/104/EC and 2000/34/EC.

⁽²⁾ Directive 2000/34/EC was to be transposed into national law, as regards doctors in training, by 1 August 2004.

⁽³⁾ Under Articles 16, 17, 18 and 19 of the Directive, the average may be calculated over a 'reference period' not exceeding four months (basic rule), six months (by legislation or collective bargaining, in specified activities which include the activities of doctors in training), or 12 months (by collective bargaining only).

These transitional arrangements are summarised in the table below.

Table: Summary of the transitional provisions for doctors in training, under Article 17(5)

| Period | Derogation possible | Conditions |
|----------------------------|--|--|
| 1 August 2004-31 July 2009 | Derogation from 48-hour limit to average weekly working time | Transitional limits will apply to average weekly working time: 1 August 2004-31 July 2007: May not exceed average 58 hours/week. The reference period (*) may not exceed 12 months. 1 August 2007-31 July 2009: May not exceed average 56 hours per week. The reference period may not exceed six months. |
| 1 August 2009-31 July 2011 | Extension of above derogation from 48-hour limit | If necessary to take account of difficulties in meeting the working time provisions, given the responsibilities for organising and delivering health services/medical care. A Member State wishing to use this derogation must notify Commission (with reasons) by 31 January 2009. The Commission gives an opinion on the notification. In any event, average weekly working time may not exceed 52 hours per week. The reference period may not exceed six months. |
| 1 August 2011-31 July 2012 | Possible further extension of above derogation | If necessary, to take account of special difficulties in meeting the above responsibilities. A Member State wishing to use this derogation must notify the Commission (with reasons) by 31 January 2011. The Commission gives an opinion on the notification. In any event, average weekly working time may not exceed 52 hours per week. The reference period may not exceed six months. |

(*) The reference period is the maximum period over which average weekly working time may be calculated.

2. The notification by the Member State

By letter dated 27 January 2009, and registered 29th January 2009, the national authorities of the Netherlands notified the Commission services that they wished to use the possibility under Article 17(5) of maintaining special transitional rules in the Netherlands as regards doctors in training, for the two-year period starting on 1 August 2009. The notification makes the following points:

- under national law ⁽¹⁾, the average weekly working time of doctors in training is already limited to 56 hours over a six-month reference period, for the period up to 31 July 2009, consistent with Article 17(5) of the Directive,
- in addition, on-call time is fully counted when calculating the maximum possible weekly working time for doctors in training,

⁽¹⁾ The Working Hours Decree (het Arbeidstijdenbesluit).

- however, organisations representing employers in the hospital sector⁽¹⁾ have informed the national authorities that it is not possible, in the short term, for them to make the necessary arrangements to organise the necessary on-call services in hospitals within a 48-hour average weekly working time. They consider that allowing a 52-hour limit for a further two years would be essential in order for them to guarantee the necessary quality and continuity of medical services,
- the national authorities consider that a phased introduction of a 48-hour working week will facilitate a change in culture — one which will take some time to become established — within this sector,
- the national authorities have agreed to the request of the hospital employers' organisations, subject to the non-negotiable condition that the employers' organisations, together with the workers' organisations, should draw up a workable plan by 1 August 2009 for reducing the average weekly working time to 48 hours by 1 August 2011,
- by mail of 22 July 2009, the Dutch authorities have informed the Commission that such an implementation plan was agreed by the relevant social partners on 22 July 2009, and that the Dutch authorities would confirm this information officially by the end of August 2009.

3. The outcome of consultations on the notification

When the present Article 17(5) was adopted, the Commission made a statement that it would interpret the expression 'after appropriate consultations', in the second paragraph of this provision, as intending that the Commission should 'consult management and labour at European level and representatives of the Member States...' before giving an Opinion regarding extended transitional arrangements for working time of doctors in training⁽²⁾.

The Commission services duly consulted all Member States and the European social partners about the notification received from the Netherlands.

Replies were received from seven Member States (Bulgaria, France, Greece, Lithuania, Luxembourg, Spain and Sweden). No Member State indicated any objection to the Netherlands availing of the extended transitional period.

BusinessEurope indicated that its member federation, the Confederation of Netherlands Industry and Employers (VNO-NCW), supports the Netherlands' notification. It confirmed that the decision of the Dutch national authorities to make use of the transitional provisions is based on a request by the hospital sector itself; and that the Netherlands Association of Hospitals, a member of VNO-NCW, fully agrees with this approach and endorses the contents of the notification letter sent to the European Commission by the national authorities.

The ETUC, in a preliminary reply, indicated that Dutch trade unions seemed to consider that the national authorities had not sufficiently consulted the national social partners on this issue; but no further details were provided.

4. Assessment of the notification in the context of the directive

The Working Time Directive was adopted by the European Parliament and the Council under Article 137(2) of the EC Treaty, which provides for Community measures to improve the working environment by protecting workers' health and safety. The Directive's main purpose is to lay down minimum safety and health requirements for the organisation of working time.

According to the information available to the Commission, the situation under national law is as follows:

- the generally applicable limit to average weekly working time is 48 hours, over a reference period not exceeding 16 weeks. Working hours are regulated within this framework by detailed collective agreements. However, under the Working Hours Act 1996, so-called 'inactive' periods of on-call time at the workplace were treated as rest time, and were not included in the calculation of weekly working time,

(1) The Netherlands Federation of University Medical Centres (Nederlandse Federatie van Universitair medische centra/NFU) and the Netherlands Association of Hospitals (Nederlandse Vereniging van ziekenhuizen/NVZ).

(2) Commission statement regarding implementation of Article 1(6) of Directive 2000/34/EC, OJ L 195, 1.8.2000, p. 45.

- after the Court of Justice ruled in the *Jaeger* case ⁽¹⁾ that such periods must be fully counted as working time for the purposes of the Directive, this ruling was applied by national courts in several cases relating to the Dutch health and emergency sectors. Consequently, the Working Hours Decree 605/2005 amended national law in the Netherlands to define inactive on-call time at the workplace as working time. According to national law, collective agreements which predated this amendment were now void, to the extent that they did not comply with the new definition,
- as the national authorities considered that this change had considerable implications for the health and care sectors, they also introduced in 2005, as a temporary measure, a limited opt-out under Article 22 of the Directive for sectors which made extensive use of on-call time,
- under this temporary measure, use of this opt-out is limited to situations where on-call time is required for continuity and quality of service provision, and where it cannot be avoided by organising work differently. It requires a collective agreement, as well as the individual consent of the worker concerned. It is only available where immediate compensatory rest is provided for any missed daily or weekly rests. Where these conditions are fulfilled, a worker may agree to work up to 60 hours per week, including the on-call time, averaged over a period of up to 26 weeks.

In the light of this information, the Commission is of the opinion that the protective conditions required by the Directive for the use of this derogation appear to have been correctly transposed.

In the Commission's view, it would (overall) be particularly desirable to provide flexibility for the national authorities to reorganise overall training and work systems, if that can reduce reliance on long hours by doctors who agree to use the opt-out.

In view of the responses received to the consultation, particularly from the social partners concerned, the Commission considers that the reasons put forward by the national authorities can be accepted as valid.

5. Conclusions

As a result of the above, the Commission is of the opinion that:

- it can be accepted that the Netherlands may require up to two more years from 1 August 2009, in accordance with Article 17(5) of Directive 2003/88/EC (the Working Time Directive), before it can apply the limit to working time contained in Article 6 of the Directive as regards doctors in training,
- it should be underlined that in any event, under Article 17(5) of the Directive, Member States in this situation shall ensure that weekly working hours do not in any case exceed 52 hours per week, averaged over a period not exceeding six months,
- it is noted that the notification depends on the condition, stipulated by the national authorities, that the relevant employers' and workers' organisations at national level will draw up by 1 August 2009 an agreed plan for achieving a 48-hour weekly working time in the hospital sector by 1 August 2011. It appears that such a plan was agreed on 22 July 2009,
- the employers at national level are encouraged to engage in information and consultation with representatives of doctors in training, in accordance with the sixth subparagraph of Article 17(5), with a view to reaching agreement, wherever possible, on the arrangements which will apply to the extended transitional period and on the measures to be adopted to reduce weekly working hours to an average of 48 hours generally by the end of the transitional period,
- the national authorities are requested to ensure the dissemination of this Opinion, so that it may be taken into account (where relevant) by the competent national authorities.

⁽¹⁾ *Jaeger* (Case C-151/02).