

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 Hungary**

(2009/C 245/03)

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 Hungary, 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 28 January 2009, and registered 3 February 2009, the Hungarian national authorities notified the Commission services that they wished to use the possibility under Article 17(5) of maintaining special transitional rules, in order to allow average weekly working time of up to 52 hours for doctors in training, for the two-year period starting on 1 August 2009.

The notification makes the following points:

- Under national law ⁽¹⁾, working time of doctors who start training for their first specialisation is already limited to 56 hours per week on average until 31 July 2009, in accordance with Article 17(5) of the Directive.
- However, Hungary is not yet in a position to reduce average weekly working time of doctors in training to 48 hours from 1 August 2009 onwards. The national authorities state that the organisation of on-call time in the health services has become more difficult, as a result of rulings of the Court of Justice ⁽²⁾, which held that all on-call duty at the workplace, and periods worked in response to a call during on-call duty away from the workplace, are to be considered working time. Hungary has transposed that requirement into national law.

⁽¹⁾ Article 28(6) of Act LXXXIV of 2003 on certain aspects of healthcare activities.

⁽²⁾ The reference is to the Court of Justice's rulings in *SIMAP* (Case C-303/98), *Jaeger* (Case C-151/02), and *Dellas* (Case C-14/04).

- There is also a need to change the system of specialist training for doctors to take account of these recent developments. On-call duty is considered an essential part of training and, at present, longer working hours than the 48-hour maximum would still be needed so that those in training can follow certain cases systematically, in order to acquire as soon as possible the knowledge and skills which allow them to work on their own. The necessary rest periods are ensured.
- A review of training is currently under way. However, a longer transitional period is needed in order to change the rules for those who have already started training during the transitional period, in particular in view of the requirements to be determined for human resources, financial aspects, the supply system and the professional content of the training.
- Hungary considers that the human resources problems of the health sector also justify the application of the two-year transitional period. During this period the health service providers can prepare for the application of the general rules as regards doctors in training.

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 ⁽¹⁾.

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

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

No reply was received regarding Hungary from European social partners representing management.

The ETUC replied to the consultation, indicating that the relevant Hungarian trade union representing doctors and doctors in training (the Hungarian Medical Association) accepted the need for transitional arrangements for a further two years, as requested by the national authorities. It also supported the need to allow time in order to make the necessary changes to the organisation of medical training. However, the union considered that the national authorities had not sufficiently informed or consulted it, or the Hungarian Medical Chamber, on the arrangements for the extended transitional period, or on the review of medical training.

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.

It appears from the information available to the Commission that the position under national law in Hungary is as follows:

- Hungary has already complied with the transitional limits required by Article 17(5) up to 31 July 2009, by transposing the required limit of 58 hours per week (on average) up to 1 August 2007, and 56 hours per week (on average) up to 1 August 2009. A ministerial decree sets out conditions for using these extra hours, which (the national authorities state) are aimed at ensuring sufficient numbers of doctors to staff emergency and on-call services.
- Formerly, in the health sector, on-call time at the workplace either was not counted, or was only partly counted, when calculating weekly working time. However, the national courts held in 2005 that on-call time must be treated as working time, in accordance with the relevant rulings of the European Court of Justice ⁽²⁾. Hungary amended its national law in 2007 ⁽³⁾, to provide that all on-call time at the workplace must be fully counted as working time, with effect from 1 January 2008.

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

⁽²⁾ SIMAP (Case C-303/98), Jaeger (Case C-151/02).

⁽³⁾ Act LXXII of 2007 amending the Health Care Act.

- Hungary uses the ‘opt-out’ (derogation under Article 22 of the Directive) for the health sector ⁽¹⁾ and, accordingly, doctors in training may work more than 48 hours per week if they give advance written consent to do so. The protective conditions required by the Directive for use of this derogation appear to have been correctly transposed. However, additional hours worked may be up to 12 hours per week of regular time, or up to 24 hours per week of on-call time (giving a maximum limit of up to an average of 72 hours per week).

In the Commission’s view, it would 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 by the social partners concerned, the Commission considers that the validity of the reasons put forward by the national authorities can be accepted.

5. Conclusions

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

- it can be accepted that Hungary needs up to two more years from 1 August 2009, in accordance with Article 17(5) of the Working Time Directive, before it can limit the working time of doctors in training to a maximum of 48 hours per week on average. This is required in order to take account of temporary difficulties in meeting the working time limit, having regard to Hungary’s responsibilities for the organisation and delivery of health services and medical care,
- 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,
- the national authorities 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⁾ Section 13 of the Health Care Act 2003, as amended in 2004 and 2007.