

Opinion of the Economic and Social Committee on the 'White Paper on sectors and activities excluded from the Working Time Directive'

(98/C 157/18)

On 17 July 1997 the Commission decided to consult the Economic and Social Committee, under Article 198 of the Treaty establishing the European Community, on the 'White Paper on sectors and activities excluded from the Working Time Directive'.

The Section for Social, Family, Educational and Cultural Affairs, which was responsible for preparing the Committee's work on the subject, adopted its opinion on 12 March 1998. The rapporteur was Mr Konz.

At its 353rd plenary session (meeting of 26 March 1998) the Economic and Social Committee adopted the following opinion by 101 votes to 6, with 7 abstentions.

1. Introduction

1.1. The aim of this white paper is to find the best ways of ensuring the protection of health and safety, with regard to working time, of workers currently excluded from the scope of Council Directive 93/104/EC concerning certain aspects of the organization of working time. In the light of sectoral analysis and evaluation, and following a request from the European Parliament, the Commission has concluded that there is a problem to be solved, i.e. that in all the excluded sectors and activities there are some workers who have no protection against working long hours or no guarantee of adequate rest. Moreover, the lack of adequate measures could lead to distortions of competition within the single market and between competing modes of transport. Four broad policy approaches to the problem can be considered:

- 1) a non-binding approach;
- 2) a purely sectoral approach;
- 3) a differentiated approach;
- 4) a purely horizontal approach.

Subject to consideration of the views expressed on the white paper, the Commission proposes to proceed on the basis of Option 3, i.e. a differentiated approach. Under this option a distinction would be made between those activities which can be accommodated under the Working Time Directive (93/104/EC) and those which require specific measures.

This would entail:

- extending the full provisions of the directive to all non-mobile workers. Appropriate adjustment of the existing derogations would be made to take account inter alia of the need for continuity of service and other operational requirements;

- extending to all 'mobile' workers and those engaged in 'other work at sea' the provisions of the directive regarding:

- four weeks' paid annual leave
- health assessments for night workers
- a guarantee of adequate rest;
- a maximum number of hours to be worked annually.

- introducing or modifying specific legislation for each sector or activity concerning the working time and rest periods of 'mobile' workers and those engaged in 'other work at sea'.

With regard to such sectoral measures, the Commission hopes that it will be possible to proceed on the basis of agreement between the social partners.

1.2. Directive 93/104/EC, on certain aspects of the organization of working time, was only adopted by the Council on 23 November 1993, although the Commission proposal⁽¹⁾ dated back to 20 September 1990. The Social Affairs Council was only able to reach an agreement after much political prevarication, which ended in a conditional UK opt-out on the length of the working week, an across-the-board extension to 'managing executives' of the excessively broad derogations provided for under Article 17, and the exclusion of a large number of sectors and activities.

1.3. Finally, in a Judgement of 12 November 1996, the European Court of Justice dismissed an appeal lodged by the UK against the Council, finding that the directive did no more than was needed to achieve the objective of protecting the health and safety of workers. Directive 93/104/EC is thus legally binding in all Member States, which were required to implement it by 23 November 1996 at the latest.

⁽¹⁾ OJ C 254, 9.10.1990.

1.4. The directive is based on Article 118a of the Treaty establishing the European Community, which stipulates that Member States 'shall pay particular attention to encouraging improvements, especially in the working environment, as regards the health and safety of workers ...'. The fourth and fifth recitals respectively refer to the key points (Nos 7, 8 and 19) of the Community Charter of the fundamental social rights of workers⁽¹⁾, and to the principle that 'the improvement of workers' safety, hygiene and health at work is an objective which should not be subordinated to purely economic considerations'.

1.5. If the single market is to operate properly, it is vital that minimum regulations on the protection of workers' health and safety be introduced.

2. General comments

2.1. On 18 December 1990, the Economic and Social Committee (ESC) adopted, by a large majority, an opinion⁽²⁾ on the proposal for the directive⁽³⁾. The proposal did not at that stage contain the exclusions which have prompted the white paper under discussion.

Whilst the ESC endorsed the Commission proposals, it hoped to strengthen them by referring on several occasions to ILO (International Labour Organization, Geneva) standards in this sphere. Nowhere did it call for the exclusion of any sector or activity, since the proposal aimed only to regulate certain limited aspects of the organization of working time, and derogation options — subject to certain conditions — were provided for in the body of the text.

At the time, the ESC did not feel that the proposal:

- in any way restricted flexibility in working time or in plant operating hours;
- would reduce overall working time;
- sought to harmonize shift and night work throughout the Community.

2.2. Three years later, however, the Council saw fit to ignore the Commission and ESC line. It decided, on its own initiative, to exclude a large number of sectors and activities from the scope of the directive. This is particularly perplexing in relation to work-related issues, as the proposal included a number of provisions for the flexible application — in specific situations — of the principles which it sets out. For example, the directive provides for derogations from all the main provisions, except for annual leave, in a wide range of circumstances, including 'in the case of activities where the worker's

place of work and his place of residence are distant from one another or where the worker's different places of work are distant from one another.'

2.3. The ESC noted that when the Council took its decision, it reasoned that the exclusions were warranted by the specific nature of certain activities; it did not contest the need for social protection of the workers concerned. The 16th recital of the directive reflects this thinking, and is evidence of the political will to use other methods to tackle the problem:

'Whereas, given the specific nature of the work concerned, it may be necessary to adopt separate measures with regard to the organization of working time in certain sectors or activities which are excluded from the scope of this directive;'

2.4. The ESC also noted the following Commission declaration, on the day the directive was adopted: 'The Commission reserves the right to put forward, as soon as possible, specific proposals on the various sectors and activities which have been excluded, bearing in mind the individual features of each sector and activity' (Translator's note: unofficial translation — reference document not available).

2.5. Subsequently, the ESC followed with interest the progress of the various Commission and European Parliament initiatives. During the debate on the Common Transport Policy Action Programme (1995-2000), for example, the European Parliament: 'endorsed the need to submit legislative proposals on working time in transport, in particular in areas where the social partners did not reach agreement.'

2.6. On this basis, the ESC agrees with the Commission white paper that:

- there is no objective justification for totally excluding any sector;
- there is no justification for treating 'non mobile' workers differently from other workers covered by the directive;
- in order to ensure minimum levels of protection of health and safety, the basic principles of the directive should apply to all workers;
- workers should be adequately protected from the harmful effects of disruptive working patterns and night work;
- agreements between the social partners would provide the best solution.

3. Sectoral comments

3.1. Transport

3.1.1. The ESC agrees with the Commission when it states openly that a large number of workers, particularly

⁽¹⁾ European Council of 9.12.1989, Strasbourg.

⁽²⁾ OJ C 60, 8.3.1991, p. 26.

⁽³⁾ OJ C 254, 9.10.1990.

'non mobile' workers in the road, rail, inland waterway, sea and air-transport sectors, were excluded for no objective reason in 1993 and should be covered by Directive 93/104/EC.

These workers are engaged in occupations which can be equated with work in other industries currently covered by the directive. This is extremely important, as these workers make up the vast majority of those excluded.

3.1.2. In this respect, the ESC regrets that the white paper — published four years after these workers were excluded — is not accompanied by a proposal for an ad hoc directive.

3.1.3. The ESC is obliged to note that the absence of a directive for 'mobile' workers in the surface transport sector has already led to major changes in the various modes of transport, and that, owing to the legislative delay which has arisen for a variety of reasons, an often conflictual situation has worsened considerably. If such a directive had been provided in the first place, this downward spiral could have been avoided, or at least nipped in the bud.

3.1.4. The ESC believes that outstanding problems in the road transport sector must be addressed rapidly, in order to avoid an increase in distortions of competition both within this particular mode and between different modes of transport, and to avoid a rapid decline in the working conditions of commercial drivers, of which there are currently 1,2 million employed in the passenger transport sector and 2,1 million in the road haulage sector.

There is a real risk that this unhealthy situation could lead to serious social conflict and unacceptable social dumping in the road haulage sector, which is a vital sector of the European economy.

The European Community has to protect itself from the unfair competition resulting from the social dumping practised by road-transport firms from less socially advanced third countries.

In this context, it should also be stressed that Directive 93/104/EC already applies automatically to own-account road transport (mainly chemical and petrol products, agrifoodstuffs, construction industry, and wholesale and retail trading). This sector provides employment for 3 to 3,5 million lorry drivers.

The ESC would point out that the existing Regulation (EEC) No 3820/85 fixes maximum driving time and minimum rest periods even for self-employed drivers, but does not cover working time outside the driving period.

3.1.5. The ESC welcomes the fact that, in the rail transport sector, the social partners in the Joint Committee on Railways reached an agreement on 18 September 1996.

This agreement could easily serve as a blueprint for the other sectors, and for the Commission in the draft directives which it is to submit to the Council.

3.1.6. The ESC is particularly pleased that, in the sea shipping sector, the social partners in the Joint Committee have also reached an agreement, which should be finalized shortly.

Like the Commission, the ESC hopes the Member States will move quickly to ratify ILO Convention No 180 (1996) on working time in the sea shipping sector, adopted by the International Labour Organization in Geneva in October 1996.

According to a recent statement by the Transport Council, a political platform exists for speedy ratification. This is a *sine qua non* for the social partners in the sector, which is open to global competition.

3.1.7. Conversely, the ESC is disappointed that, in the inland waterway and lake transport sector, the Joint Committee on Inland Waterways has been unable to reach an agreement, owing to the fact that some employers felt that they did not have a mandate to do this.

3.1.8. The ESC is keen to see an agreement in the air transport sector, where the ad hoc working party has only to establish Flying Time Limitations.

3.2. *Sea fishing*

3.2.1. With regard to sea fishing, the ESC is the first to acknowledge that the conditions and the nature of the work are very specific and diverse, particularly as regards fishing methods and type of catch, ship tonnage and the large number of self employed workers in the sector. However, the Committee would point out that failure to deal promptly with the question of working time in the sea fishing sector — currently undergoing major changes — has had serious implications for the implementation of EU sea fisheries programmes, the importance of which is plain to all.

3.2.2. The ESC therefore believes that this industry, in which there are more occupational deaths and accidents than in any other, should be covered — even

more than other sectors — by adequate worker health and safety-protection arrangements, since the link between fatigue and accidents has been established clearly. This principle cannot be brought into question, neither for the sake of entrenched practices whose justification would be worth exploring, nor for economic reasons, as indicated clearly by the European Court of Justice's judgement ⁽¹⁾.

3.2.3. In view of the above, the ESC would call on the social partners to return to the 'Joint Committee' negotiating table and reach an agreement.

Should no agreement be forthcoming, the partners should submit proposals to the Commission so that it can, on the basis of the general principles enshrined in Directive 93/104/EC, present the Council with a draft which reflects an industrial view of the sector.

3.3. *Other work at sea*

3.3.1. The ESC would note its concern that the white paper does not contain any proposals referring to the mutual interests of the economic and social partners involved in this sector. The reason for this situation is apparently the refusal of one of the parties to make its calls public. The ESC suggests that the Commission set up a 'joint ad hoc group' to decide what working time legislation is required in this area.

3.3.2. This 'joint ad hoc group' should discuss the existing legislation and collective agreements that apply in virtually all the countries involved in offshore operations.

Since the future could bring new developments in such activities, the ESC believes it is important to have appropriate legislation in this sector.

3.4. *Doctors in training*

3.4.1. The ESC would hasten to point out that there is no valid reason to exclude doctors in initial or specialist training, as a) they are not 'mobile' workers and b) their work does not differ from that of their salaried colleagues who are 'not in training', and who, by definition, are covered by the scope of Council Directive 93/104/EC.

In this respect, the ESC regrets that the Commission white paper is not accompanied by a proposal for an ad hoc directive.

3.4.2. Here, the ESC would also point out that the considerable discrepancies in the working hours of trainee doctors (even within the same country) threaten not only the physical and mental health of the doctors themselves in the short and medium term, but also — due to overwork and insufficient rest periods — the quality of the treatment which they provide for the community as a whole.

3.4.3. Whilst the Commission feels (point 66 of the white paper) that the 'on call' issue for doctors in training should be dealt with at national level, the ESC would remind the Commission that specific on-call and standby periods — which vary widely in their characteristics — should be limited in compliance with the general principles — and in particular with the provisions for consecutive rest periods — of Council Directive 93/104/EC.

Preventive measures should be implemented forthwith in the hospitals in question, in order to prevent any deterioration in the quality of patient care.

4. Conclusions

4.1. The ESC endorses the Commission's pragmatic approach in seeking to ensure at EU level the protection of the health and safety, with regard to working time, of workers in the sectors and activities currently excluded from Council Directive 93/104/EC.

4.2. The ESC also favours Option 3, which advocates a differentiated, three-pronged approach:

- 1) extension of the full provisions of the Working Time Directive (93/104/EC) to all 'non-mobile' workers;
- 2) extension to all 'mobile' workers (including sea-going fishermen) and to those engaged in 'other work at sea' of the provisions of the Working Time Directive on:
 - four weeks' paid annual leave,
 - health assessments for night workers,
 - guarantee of adequate rest,
 - ceiling on the number of hours to be worked annually;
- 3) adoption, for each sector or activity, of specific legislation concerning the working time and rest periods of 'mobile' workers and *mutatis mutandis* those engaged in sea fishing and 'other work at sea'.

⁽¹⁾ Judgement of 12 November 1996 in the appeal lodged by the UK against the Council.

4.3. The Committee joins the Commission in continuing to hope that it will be possible to proceed on the basis of agreement between the social partners in the transport and sea fishing sectors.

The ESC therefore urges the Commission to keep up its action and to give the social partners responsibility in this area, while making it clear that the new rules must:

- be given the binding force of a directive;
- apply to all the workers concerned;
- not be used to justify deterioration of existing working conditions (cf. Article 18(3) of Directive 93/104/EC);
- incorporate the provisions for possible and necessary derogations provided for in Directive 93/104/EC;
- comply with the subsidiarity principle, so that such derogations may be negotiated within the same bodies and through the same channels already used in the respective Member States;
- be implemented simultaneously in order to avoid disastrous intermodal competition resulting from

the application of different rules on protecting the health and safety of workers; and

- mention the advantages for the general public, in the knowledge that tiredness caused by excessive working hours poses a real, direct risk for other people's safety and well-being.

4.4. Agreements between the social partners in the 'Joint Committees' on the application to their industry of the points listed in 4.2(2) must obviously be incorporated in the sectoral legislation envisaged in point 4.2(3).

4.5. Lastly, the ESC calls for a reasonable deadline for the conclusion of negotiations between the social partners, following which the Commission should waste no time in presenting the Council with concrete proposals to ensure effective protection, with regard to working time, of the health and safety of workers in the excluded sectors and activities, whilst providing for sufficient flexibility to allow firms adequate room for manoeuvre.

The ESC feels it must emphasize its prerogative to be consulted on any such steps.

Brussels, 26 March 1998.

The President
of the Economic and Social Committee
Tom JENKINS
