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REPORT

on the organisation of working time (Amendment of Directive 93/104/EC)
(2003/2165(INI))

Committee on Employment and Social Affairs

Rapporteur: Alejandro Cercas

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PROCEDURAL PAGE

At the sitting of 4 September 2003 the President of Parliament announced that the Committee on Employment and Social Affairs had been authorised to draw up an own-initiative report under Rule 163 on the organisation of working time (Amendment of Directive 93/104/EEC) and that the Committee on Women's Rights and Equal Opportunities had been asked for its opinion.

At the sitting of 11 June 2003 the Committee on Employment and Social Affairs had appointed Alejandro Cercas rapporteur.

The committee considered the draft report at its meetings of 27 November 2003, 16 December 2003 and 22 January 2004.

At the last meeting it adopted the draft resolution by 19 votes to 15, with 3 abstentions.

The following were present for the vote: Theodorus J.J. Bouwman (chairman), Marie-Hélène Gillig (vice-chairman), Winfried Menrad (vice-chairman), Alejandro Cercas (rapporteur), Jan Andersson, Anne André-Léonard, Elspeth Attwooll, Regina Bastos, Philip Bushill-Matthews, Luigi Cocilovo, Brian Crowley (for Nello Musumeci), Proinsias De Rossa, Nirj Deva (for Mario Clemente Mastella, pursuant to Rule 153(2)), Den Dover (for Rodi Kratsa-Tsagaropoulou, pursuant to Rule 153(2)), Harald Ettl, Jillian Evans, Carlo Fatuzzo, Ilda Figueiredo, Roger Helmer, Stephen Hughes, Anne Elisabet Jensen (for Marco Formentini), Karin Jöns, Jean Lambert, Elizabeth Lynne, Thomas Mann, Mario Mantovani, Minerva Melpomeni Malliori (for Anne E.M. Van Lancker, pursuant to Rule 153(2)), Claude Moraes, Manuel Pérez Álvarez, Bartho Pronk, Lennart Sacrédeus, Herman Schmid, Elisabeth Schroedter (for Hélène Flautre), Miet Smet, Helle Thorning-Schmidt, Ieke van den Burg and Barbara Weiler.

The opinion of the Committee on Committee on Women's Rights and Equal Opportunities is attached.

The report was tabled on 29 January 2004.

DRAFT EUROPEAN PARLIAMENT RESOLUTION

on the organisation of working time (Amendment of Directive 93/104/EC (2003/2165(INI))

The European Parliament,

– having regard to Directive 93/104/EC[1] as amended by Directive 2000/34/EC[2],

– having regard to having regard to its resolution of 7 February 2002[3] on the Commission report: 'State of implementation of Council Directive 93/104/EC' OF 23 November 1993 concerning certain aspects of the organisation of working time ('Working Time Directive') (COM(2000) 787),

– having regard to the Commission communication adopted on 30 December 2003 'concerning the re-exam (*sic*) of Directive 93/104/EC concerning certain aspects of the organization of working time' (COM(2003) 843),

– having regard to the Community Charter of the Fundamental Social Rights of Workers,

– having regard to the Charter of Fundamental Rights of the European Union[4]

– having regard to the ILO Convention C001 dating back to 1919 establishing the 48-hour working week and the 8-hour working day,

– having regard to the recommendation of the Council of 22 July 1975 on the principle of the 40-hour week and the principle of four weeks' annual paid holiday (75/457/EEC),

– having regard to Rule 163 of its Rules of Procedure,

– having regard to the report of the Committee on Employment and Social Affairs and the opinion of the Committee on Women's Rights and Equal Opportunities (A5-0026/2004),

A. whereas the Community Charter of the Fundamental Social Rights of Workers states that the completion of the internal market must lead to an improvement in the living and working conditions of workers in the European Community,

B. whereas Article 136 of the Treaty establishes social provisions and Article 137 stipulates that, with a view to achieving the objectives of Article 136, the Community must support and complement the activities of the Member States as regards the protection of workers' health and safety,

C. whereas Directive 93/104/EC states that the objective of workers' health and safety cannot be subordinated to purely economic considerations and that this objective also makes it

[1] OJ L 307, 13.12.1993, p. 18.
[2] OJ L 195, 1.8.2000, p. 41.
[3] OJ C 284 E, 21.11.2002, p. 362.
[4] OJ C 364, 18.12.2000, p. 1.

necessary to place a maximum limit on weekly working hours,

D. whereas Directive 93/104/EC stipulates that the provisions laid down in Article 17(4) and in Article 18(1)(b)(i) concerning the reference periods for the maximum weekly working time and derogation from these provisions via individual opt-outs should be reviewed before the expiry of a seven-year period from the deadline for transposing the directive by the Member States, in other words, by 23 November 2003,

E. whereas by that date, the Commission should have forwarded to Parliament and the Council a communication with an assessment report on these matters and a proposal for re-examining the provisions concerned,

F. whereas in its recent communication of 30 December 2003 the Commission does not put forward specific proposals on either of the above two matters,

G. whereas according to the above-mentioned communication, the Commission is planning to consult Parliament, the Council, the Economic and Social Committee, the Committee of the Regions, and the social partners on possible revision of the text of the directive in order to allow for the impact of recent Court of Justice rulings on the concept of working time and for new developments making for a better balance between working and family life,

H. whereas one of the Union's objectives set out in the draft Treaty establishing a Constitution for Europe is to work for a social market economy that is highly competitive, while aiming at full employment and social progress,

I. whereas Article 31 of the Charter of Fundamental Rights of the European Union stipulates that every worker has the right to working conditions which respect his or her health, safety and dignity, to the limitation of maximum working hours and to daily and weekly rest periods, while Article 33 speaks of the reconciliation of family and professional life,

J. whereas some Member States have extended or wish to extend the reference periods for calculating the maximum weekly working time,

K. whereas one of the Union's objectives set out at the Lisbon Council is to make the EU the most dynamic and competitive knowledge-based market in the world by 2010; and whereas the report of the Employment Task Force has emphasised that the Lisbon employment targets will not be met unless Member States take more positive action to promote flexibility (especially for SMEs),

L. whereas Directive 93/104/EC enables the working week to be regulated more flexibly, and gives a special role to negotiated flexibility arranged via collective agreements between social partners,

M. whereas the technique of using long reference periods means that the limitations imposed by Directive 93/104/EC now apply to the maximum, quarterly, half-yearly or annual working time,

N. whereas the study carried out for the Commission by Barnard, Deakin and Hobbs of

Cambridge University shows that the use of the individual opt-out allowed by the United Kingdom has led to an extension of the working week, which may have serious consequences for the health and safety of more than four million workers, together with a method of implementing the directive where it is impossible to ensure that free and voluntary choices can be made under the efficient and effective control of the authorities, and the Commission's communication clearly states that the number of workers working more than 55 hours a week in the UK has increased substantially over the last decade,

O. whereas other countries have introduced or announced the introduction of opt-outs to deal with questions relating to specific categories of worker, such as the health professions in France, Germany, the Netherlands and Spain, or the hotel and catering industry in Luxembourg, which is contradictory to the intentions of this directive, taking also into account that the opt-out procedure was only intended for the UK in order to reach an agreement in Council,

P. whereas sufficient evidence has been built up over the seven-year period to prompt the conclusion that the opt-out mechanism is not the way to achieve flexibility in the working week, but rather a certain means of distorting the objective of improving health and safety at the workplace and reconciling family and professional life for millions of European workers,

Q. whereas if the use of opt-outs is extended in the current Member States and the applicant countries, the aims of Directive 93/104/EC could become weakened,

R. whereas serious impact studies are needed on the effects of new interpretations of working time for health workers who are on call at their workplace, and solutions other than the use of individual opt-outs must be found,

S. whereas restricting working hours, with the flexibility provided by Directive 93/104/EC, can be an important health and safety benefit for workers and an opportunity to improve productivity and to rationalise and modernise the organisation of work,

T. whereas the Lisbon objectives to aim for a higher labour market participation of women and older workers in particular are not served by a long working hours practice, but instead by extending the possibilities for genuine free choice for workers to adapt working time to their needs,

U. whereas the duration and organisation of working time must allow for the sociological changes in European society and the need for greater equality of opportunity for men and women as well as for the increased presence of women on the labour market; and considering that women, as primarily responsible for childcare, are disadvantaged in their own career progression; it is therefore necessary to remove the obstacles making it difficult to reconcile family and working life and promote the advantageous flexibility needed to enable working time to fit in with workers' family responsibilities,

V. whereas the Lisbon Agenda sets a goal for a 60% employment rate for women by 2010, which will not be achieved if longer working hours persist,

1. Deplores the fact that the Commission has submitted the required assessment report after

the seven-year deadline for review laid down in Article 17(4) and Article 18(1)(b)(i) of Directive 93/104/EC and that the report does not set out clear options for resolving the problems identified; and calls on the Council to ask the Commission to consider an amended directive as soon as possible; welcomes the conclusion in the recent Commission communication that the approved approach should give workers a high level of health and safety protection, make it easier to reconcile work and family life, and give firms and Member States flexibility in the way they manage working time;

2. Highlights the specific importance of addressing the problems relating to availability and financing in the health sector arising from the Court of Justice of the European Communities' interpretation of the concept of working time in the SIMAP and Jaeger cases[1] ; however, regrets that it cannot examine, for each working sector, the effects on economy and society, without any official comparative studies; the Commission's communication only mentions some rough indications of possible consequences in a few Member States;

3. Acknowledges the fact that the Commission on different occasions has expressed its concern about the reactions of the Member States to the judgments of the ECJ but deplores the fact that the Commission did not manage to carry out, in the three years after the SIMAP ruling, an in-depth study on the consequences of these judgments for the Member States or to find transitional remedies, thus avoiding a situation in which a substantial number of Member States and new Member States other then the UK use the 'opt-out', which in fact undermines the essence of the directive;

4. Regrets the reluctant attitude of the Commission following the SIMAP ruling, which has led to unclearness regarding the consequences of the ruling in a number of Member States and even, for example in the Netherlands, to government plans to abolish all working time rules above the minimum standards required by European law and international conventions;

5. Draws attention to the requests it made in its resolution of 7 February 2002 on the state of implementation of Directive 93/104/EC[2], which calls for a thorough review to make the provisions of the directive clearer and more consistent;

6. Insists that the health and safety of workers and the reconciliation of family and professional life must not be subordinated to considerations of an economic nature, as is stated in Directive 93/104/EC;

7. Looks to the Commission to refrain from taking any initiatives serving to 'renationalise' the European Working Time Directive;

8. Calls for an EU-wide Member State comparison study on the familial and health repercussions of working long hours and the effect on both sexes;

9. Stresses that the way in which the working week is regulated in the directive takes due

[1] Case C-303/98 *Simap* [2000] ECR I-7963 and Case C-151/02 *Jaeger* [2002] ECR I-0000
[2] JO C 284 E, 21.11.2002, p. 362.

account of the requirements of European firms and their need for flexibility;

10. Points out that the application of the directive in the Member States takes reasonable account of the maximum and average working time with reference periods of four or more months, but needs to be supplemented in these Member States by rules on shorter reference periods;

11. Stresses that the existence of standards and regulatory protection in such sensitive areas is vital for as long as the two sides of industry have no universally binding rules to govern them;

12. Calls for the abolition, as soon as possible and at the latest on 1 January 2007, of the individual opt-out provided for in Article 18(1)(b)(i);

13. Calls on the Member States to await a revised version of the directive and not to proliferate the use of the derogation option provided for in Article 18(1)(b)(i) and not to misuse it to cater for the apparent problems caused by the Court of Justice's interpretation of working time for on-call stand-by hours at the workplace in the health care sector and others; suggests that they exchange information about already existing models and schedules that deal with stand-by service without conflicting with the normal rules of the directive; and urges them, together with the social partners in the relevant sectors, to seriously look for alternative solutions within the scope of the directive, which provides for other flexibility options that do not completely do away with any limitation of working hours and continue to provide for adequate protection; calls, in the meantime, on the Member States and employers to endeavour to ensure that workers subject to the derogation in Article 18(1)(b)(i) are not working excessively long hours and particularly not over prolonged periods;

14. Given the recognition in the Commission communication of a widespread and systematic abuse of the directive, and in particular of Article 18(1)(b)(i), insists that the Commission immediately institute an infringement procedure against the UK Government;

15. Is of the opinion that although the use of the opt-out by the Member States following the judgments of the ECJ is in line with the text of the directive, it is fully against the intentions of the directive and therefore undesirable and inappropriate;

16. Calls on the Commission to provide Member States with a clear perspective for structural solutions including possible adaptation of the directive, for this particular issue of the definition and calculation of on-call stand-by hours at the workplace that are not actually spent working; to thoroughly study and distribute information about the impact of the ECJ’s interpretation on work schedules and the methods for redress; and to investigate together with the social partners whether it might be necessary and appropriate to come up with a temporary measure in the very short term that gives Member States additional room for manoeuvre that does not prejudice the basic principle of protection and limitation of maximum working time and that prevents them from seeking recourse to the use of Article 18(1)(b)(i);

17. Calls on the Commission to produce an additional communication containing a specific and reasoned statement of its attitude regarding all the provisions of the directive that may

need to be revised, to examine solutions to re-establish clear obligations of proper working time measurement for employers in the framework of a revision of the directive, and to submit its views to Parliament for consultation in the shortest possible term;

18. Stresses 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;

19. Draws attention 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;

20. Emphasises 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;

21. Instructs its President to forward this resolution to the Council and Commission and the parliaments of the Member States and applicant countries.

EXPLANATORY STATEMENT

I. GENERAL REMARKS

1.1 This report concerns the review of two articles of Directive 93/104/EC, which lays down minimum conditions governing the organisation of working time with a view to ensuring a high level of health and safety protection for workers, as amended by Directive 2000/34/EC. However, it does not foresee any review of the sectoral directives on working time.

1.2 The legal basis for Directive 93/104/EC is Article 137 of the EC Treaty; it is also linked to the extension of Directive 89/391/EEC with regard to the application of measures to encourage improvements in the safety and health of workers at work. One of its objectives was also the implementation of the Charter of the Fundamental Social Rights of Workers, which stipulates that the establishment of the internal market should lead to an improvement in the living and working conditions of workers through a progressive approach to them and the adjustment of working time for all forms of labour contracts.

1.3 The directive contains two provisions which were intended to be re-examined before the expiry of a seven-year period following the deadline for transposing the Directive by the Member States, in other words by 23 November 2003. These provisions (Article 17(4) and 18(1)(b)(i)) refer to derogations from the reference periods for the application of Article 6 (maximum weekly working time) and the option of not applying Article 6 if the worker concerned agrees (generally known and hereinafter referred to as the 'opt-out').

1.4 In addition, the interpretation of the directive's provisions by the Court of Justice in various preliminary rulings relating to Article 234 of the Treaty, in particular the judgements in the SIMAP and Jäger cases, is having a profound impact on the concept of 'working time', since periods where doctors are present and physically on call at a health centre are classified as working time.

II. DEROGATIONS FROM THE REFERENCE PERIODS

2.1 The legal provisions

The reference periods for the application of Article 6 (maximum weekly working time) are laid down in Article 16 of the directive. As regards calculating the length of the maximum working week (48 hours), Article 16(2) sets a reference period that should not exceed four months. However, derogations from Article 16 are possible in the cases provided for in the three paragraphs of Article 17 and the reference periods can be extended to up to six months, or 12 months if this is done through collective agreements or agreements between the two sides of industry.

2.2 Current situation in the Member States

It is impossible to give a definitive opinion on the national laws transposing Articles 6

and 16. The Commission is undertaking a survey, but the results have not yet been published. It seems that in only four Member States do the laws exactly reproduce the provisions of the directive. Other Member States have different reference periods, in some cases of one year, but in relation to work periods that are usually shorter than the 48 hours provided for in the directive.

Nevertheless, it is possible to distinguish a trend towards the annualisation of working time, which means that the maximum duration of 48 hours for the working week provided for in the directive is strictly speaking more of an average duration over long periods, with the practice of using the whole year as a reference period having become widespread.

Extending reference periods is having the positive effect of increasing the flexibility enjoyed by companies in the organisation of working time, which ultimately is restricted only by the daily rest period of 11 hours provided for in Article 3 and the 24-hour weekly rest period provided for in Article 5. All this prompts the conclusion that, with the use of this legislative technique, the only aspect regulated by the directive is the maximum duration of quarterly, half-yearly or annual working time, according to individual cases.

There is therefore a very broad margin of flexibility for the organisation of work, and the option of exemption from the average working week through the use of the opt-out technique that will be analysed below cannot continue to be justified as providing flexibility, when it is more akin to a philosophy merely designed to eliminate any attempt to regulate working time.

III. USE OF THE OPT-OUT PROVIDED FOR IN ARTICLE 18(1)(b)(i) - THE SPECIFIC CASE OF THE UNITED KINGDOM

3.1 Legal framework for the opt-out in the directive

Generally speaking, this article enables the Member States not to apply Article 6 in their territory (average working week of 48 hours) if the worker concerned gives his consent, provided that:

- no worker is subject to any detriment because he is not willing to give his agreement,
- the employer keeps up-to-date records of all workers who carry out such work,
- the records concerned are placed at the disposal of the competent authorities.

As the Court has pointed out, in relation to the objective of workers' health and safety, the directive seeks to ensure that such agreement is not obtained by subterfuge or intimidation and therefore makes sure that any refusal is covered by guarantees to ensure that the worker's agreement is freely given and subject to the protection of the authorities.

3.2 Use of the opt-out in the Member States. The specific case of the United Kingdom

Initially, only the United Kingdom made use of this option, employing it across the board for all types of workers. Recently, other countries have begun to use this option to enable doctors to exceed the average 48 hour week and thus overcome the problems raised by the Court of Justice's judgment in the SIMAP and Jäger cases. France has adopted degrees to this effect, which came into force on 1 January 2003. Germany, the Netherlands and Spain are currently drawing up specific legislation on this matter. For its part, Luxembourg has made provision for an opt-out for the hotel and catering industries.

Wide-ranging and detailed studies have been drawn up on the effects of the use of the opt-out in the United Kingdom. The most thoroughgoing is the study undertaken on behalf of the Commission by Barnard, Deakin and Hobbs of Cambridge University. Their main conclusions are that:

- there are currently more than four million workers whose working week is longer than 48 hours, almost one million more than before the introduction of the directive. There has also been an increase in the number of those working more than 55 hours, which is now over 1.55 million. Around 1% of workers in the United Kingdom have a working week longer than 70 hours;
- the number of those who have signed the opt-out is far greater than the number of those who actually work a working week longer than 48 hours. Some studies show that more than 33% of United Kingdom workers have signed such an agreement, more than double the number of those who actually work under such an arrangement.

It can therefore be said that use of the opt-out has been general rather than specific, under subjective rather than objective conditions and to an extent that exceeds practical requirements.

Furthermore, the legal guarantees have been undermined to the point where the provisions of the directive are not observed, since it is common for these agreements to be signed at the same time as an individual contract, so that it can hardly be said that these are free and voluntary choices in most cases.

There is therefore evidence of widespread abuse of this option, to the detriment of the health and safety of millions of workers, who have little or no freedom to decide whether to accept or refuse it in a situation where the administrative authorities have effectively ruled out any real possibility of control and verification. It seems difficult to deny that this option is being used as a means of sidestepping any limit, rather than a technique to operate flexibly or with strict regard for the free will of the workers concerned, as was intended.

IV. DEFINITION OF WORKING TIME FOR DOCTORS ON CALL

The Court has had to establish its case law on the definition of working time (Article 2) in the case of time spent by doctors on call. In an initial judgment (SIMAP case), the Court ruled that, if they are required to be present, ‘time spent on call by doctors

(…) must be regarded in its entirety as working time'. However, if they are on call away from their place of work, only time linked to the provision of health care services counts as working time.

The Jäger case raised the question of cases where doctors are resting or sleeping while on call at their place of work. The Court ruled that these periods should also be considered as working time, since the decisive factor is the fact that they are legally 'required to be present at the place determined by the employer' and that this obligation, making it impossible for them to choose the place where they stay during waiting periods, even when resting, must be regarded as part of the performance of their duties.

As yet there has been no rigorous and objective assessment of the impact of these rulings. Nevertheless, some Member States had laws with interpretations more favourable to the position of health centres, with the result that there will be serious implications from the financial point of view and in some countries it may even be difficult to recruit the additional health workers needed to comply with these new interpretations of working time. In those countries where there is a significant number of doctors who are unemployed or working part-time, the impact will not be so great.

Although it is likely that the effects will be substantial, no reliable studies have been carried out and there is no firm basis for developing a solution. In all of the Member States, there is an absence of any kind of serious studies on new models for the organisation of services which could help reduce the impact and which would be a more lasting option than simply looking for legislative solutions to ensure that on-call medical services remain the same as in the past.

Whatever solution is found, anything would be preferable to the use of the opt-out provided for in Article 18(1)(b)(i), given the devastating effects its indiscriminate use is having on the objective of workers' health and safety which this directive should be upholding.

20 January 2004

OPINION OF THE COMMITTEE ON WOMEN'S RIGHTS AND EQUAL OPPORTUNITIES

for the Committee on Employment and Social Affairs

on organisation of working time (revision of Directive 93/104/EC)
(2003/2165(INI))

Draftsperson: Jillian Evans

PROCEDURE

The Committee on Women's Rights and Equal Opportunities appointed Jillian Evans draftsperson at its meeting of 2 October 2003.

It considered the draft opinion at its meetings of 2 December 2003 and 20 January 2004.

At the latter meeting it adopted the following suggestions by 16 votes to 0 with 2 abstentions.

The following were present for the vote: Anna Karamanou (chairperson), Marianne Eriksson (vice-chairperson), Ulla Maija Aaltonen, Regina Bastos, Lone Dybkjær, Lissy Gröner, Mary Honeyball, Christa Klaß, Rodi Kratsa-Tsagaropoulou, Astrid Lulling, Thomas Mann, Maria Martens, Christa Prets, Amalia Sartori, Olle Schmidt (for Johanna L.A. Boogerd-Quaak), Patsy Sörensen, Joke Swiebel and Elena Valenciano Martínez-Orozco.

SUGGESTIONS

The Committee on Women's Rights and Equal Opportunities calls on the Committee on Employment and Social Affairs, as the committee responsible, to incorporate the following suggestions in its motion for a resolution:

A. whereas the Lisbon Agenda sets a goal for a 60% employment rate for women by 2010, which will not be achieved if longer working hours persist;

B. whereas Directive 93/104/EC states that there should be a review of the derogations from the maximum working week within a seven-year period from the deadline for transposing the directive, which was 23 November 2003;

C. whereas Article 33 of the Charter of Fundamental Rights is concerned with the reconciliation of family and professional life and the EU's social legislation and aims are contrary to working long hours which can have a negative impact on personal and family life;

D. whereas working long and often anti-social hours disrupts care for children and the elderly which women are predominantly responsible for;

1. Criticises the Commission for failing to meet the seven-year deadline for review;

2. Calls for an EU-wide Member State comparison study on the familial and health repercussions of working long hours and the effect on both sexes;

3. Stresses that women in the health and care sectors are particularly affected by the rulings on the 'on call' issue and calls for a proper assessment of the situation to see how the working hour provisions can be adhered to without continuing the individual opt-out system;

4. Points out that a better division of household and caring tasks between couples should be encouraged;

5. Stresses 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;

6. Draws attention 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;

7. Emphasises 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;

8. Calls on the Commission to submit to the Council an amended directive which will phase out the individual opt-out provided for in Article 18 (1)(b)(i) and provide an alternative solution for Member States to adapt to the consequences of the SIMAP and Jeager cases, taking full account of gender mainstreaming.