



Brussels, 15 July 2004  
JM/CP

**ETUC's Position  
in the Second Phase of Consultation  
of the Social Partners at Community level  
on the Revision of Directive 93/104/EC concerning certain  
aspects of the organization of working time  
(Working Time Directive)**

*(approved by the ETUC Executive Committee, 9-10 June 2004, Brussels)*

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## **1. Introduction**

On March 24, 2004 ETUC has sent its position on the Communication of the Commission of 30-12-2003, concerning the re-examination of the Working Time Directive, to Commissioner Stavros Dimas.

The Commission had announced to consider this document as the first phase of consultation of the Social Partners, as provided for in article 138 (2) of the Treaty.

On the 19-th of May, the Commission issued its document for the second phase of the consultation. In the press release, accompanying the publicizing of the document, the Commission is calling upon the social partners at the European level "to play their role in bringing key aspects of the Working Time Directive up to date."

In the document, the Commission stressed the importance of negotiations between the social partners to make progress in the field of modernisation and management of change. The Commission therefore encouraged the social partners to initiate the process, provided for under Article 139 of the EC Treaty. However, if the social partners would not consider initiating the process provided for under Article 139 EC, the Commission announced to propose amendments to the Directive based on **one or more** different approaches.

Before giving comments on these options, the ETUC wants to make some general remarks.

The ETUC is very concerned about the developments with regard to the revision of the Working Time Directive, and wants to refer to its position in the first phase of consultation in which an elaborate overview of its concerns was given.

In this stage, the ETUC wants to express its regret about the fact that the employers organisations at the European level, and notably UNICE, have refused to even explore possible avenues for starting negotiations on the main issues at stake. ETUC has stressed on many occasions, that sustainable solutions for problems regarding the Working Time Directive should and could be envisaged to be negotiated by the social partners, taking into account that working time is one of the core issues for collective bargaining in all Member States.

In many Member States modern and up-to-date working time patterns have been introduced on the basis of collective bargaining that are providing for flexibility for employers and workers, while also providing for the necessary safeguards to protect the health and safety of workers, addressing the issue on the basis of a win-win approach.

However, the ETUC must admit that apparently on the European level no common ground for such approach can be found, taking into account the persistent demands from the European employers side for a revision of the Working Time Directive that would widen the scope of application of the opt-out, as well as exclude on-call working time from the definition of working time, and also delete the precondition of collective bargaining for the use of long reference periods for the calculation of the average 48-hour working week.

In the view of the ETUC, employers organisations 'want the moon on a golden plate', and are not ready to settle for anything less.....

It is therefore to be seen as an ironic understatement, when the Commission says in its Second phase consultation document "that there is a consensus as to whether the Directive should be amended."

The European social partners do clearly have totally opposite views with regard to why and how the Working Time Directive should be amended.

In its response to the first round of consultation, the ETUC called for:

- taking action on the long and bad practice, notably in the UK, with regard to the use of the individual opt-out, and putting an end as soon as possible to the 'opt-out'
- recognition of on-call hours as working time, in line with rulings of the European Court of Justice, while allowing social partners to negotiate balanced and adequate solutions to problems faced in certain sectors or professions
- keeping in place the existing mechanisms and safeguards for extending reference periods for calculating the average working week, notably the pre-condition of collective bargaining
- providing workers with real options to better reconcile work and family life.

ETUC also expressed its great concerns with regard to the pressure from some Member States to dilute the general principles of the Directive, because of problems of an economic or financial nature that might arise from the implementation of recent ECJ-judgements on on-call working time, and called on the Commission to provide for a proper assessment of these problems, which would fully take into account the experiences and views of the social partners in the relevant sectors, before deciding what action to take.

ETUC is very disappointed, that the Second phase document of the Commission does not deal with most of the concerns and arguments raised by the ETUC in its previous position. However, the ETUC regards as positive that the phasing out of the opt-out is still on the table, and that the key-role of the social partners in shaping working time arrangements at all levels is recognized.

ETUC considers the next stage in this process to be crucial, to prevent that the Working Time Directive, which is an essential part of the social architecture of Europe, will be watered down for purely ideological or economic reasons, against the interests of health and safety and work-life balance of male and female workers everywhere in the EU-25.

## **2. Summary of conclusions**

ETUC has several fundamental points of criticism about the Second phase consultation document:

- a) the Commission seems to ignore compelling legal obligations and arguments, and its proposals risk to run counter to the fundamental objective of the Directive, which is to protect workers' health and safety;
- b) the Commission comes up with proposals that are either not taking into account solid evidence (in the case of the abuses of the opt-out), or are not themselves based on any solid evidence (in the case of the reference periods), or are not based on a proper assessment of the problems at stake (on-call work);
- c) the Commission follows a contradictory path, on the one hand stressing the importance of social dialogue for solving problems with regard to working time, on the other hand proposing to delete the very mechanism that promotes social dialogue, i.e. the precondition of collective bargaining for extending reference periods;
- d) the Commission seems too easily convinced by mainly ideological arguments, in which the need for flexibility is mistakenly confused with the need for longer working hours;
- e) the Commission fails to argue, why several issues that are strongly related to the issues at hand, such as the existing exemption for autonomous and managerial staff, cannot or should not be discussed in the current revision-process of the Directive;
- f) the Commission fails to provide for coherence with other areas of EU-policy, notably the Lisbon agenda, and the need to raise the employment rate of women and older workers, and does not take account of the contradictory and counterproductive effects of its proposals.

With regard to the proposals presented by the Commission in its Second phase consultation document, the ETUC has some very clear messages:

First of all, ETUC sees it as unacceptable if the Commission would proceed on the basis of a cumulative approach, proposing some form of continuation of the opt-out, as well as the revision of the definition of working time, as also the relaxation of the provisions on reference periods.

A future draft proposal should properly identify which problems exist in practice with regard to the two derogations that need to be reviewed, as well as with regard to the implementation of the two on-call judgements by the ECJ, give a proper assessment and appraisal of these problems, and clearly indicate which solution is presented to deal with which problem, thereby also acknowledging the interrelationship between the various elements at stake.

Secondly, on the basis of legal, economic and demographic arguments, and taking into account the fundamental objective of the Working Time Directive, which is the protection of the safety and health of workers, the ETUC

- 1) with regard to the opt-out: considers as the only acceptable option the phasing out of the opt-out as soon as possible;

- 2) with regard to the definition of working time: considers the proposal to introduce a third category of time as in clear violation with the fundamental objectives of the Directive as interpreted by the ECJ in the Simap- and Jaeger cases, and as a disproportionate measure for the problems experienced by Member States. If and in so far as these problems cannot reasonably be solved within the existing legal framework, less far-reaching and harmful solutions can be envisaged, in the framework of article 17 of the Directive;
- 3) with regard to the derogations from the reference periods: considers the proposal to extend the basic reference period that can be established by law or regulation (essentially meaning: extending the 4-month reference period without the precondition of collective bargaining) as unacceptable and counterproductive to the coming about of modern working time arrangements;
- 4) with regard to reconciliation of work and family life: ETUC agrees with the Commission that "more could no doubt be done to encourage this objective in the text of the Directive", and invites the Commission to take on board several suggestions as made in this position paper.

### **3. Need for coherence on EU-level: legal, economic and demographic context**

#### ***3.1. The legal context: reduction instead of extension of working hours!***

The review of the Directive is taking place because of the explicit obligation in the Directive to review two very far reaching derogations (opt-out and reference periods), that were considered by many in the period that the Directive was adopted as too far reaching and potentially harmful for the health and safety of workers.

From the history of the Directive it is very clear, that the review was meant to put an end to both derogations.

The ETUC is therefore very alarmed about the fact that the Commission seems to consider, not to delete or limit these derogations, but to actually extend their scope, with a view to allow employers even more flexibility in the scheduling of long working weeks, without providing for any convincing evidence that such drastic steps are necessary, nor that they are compatible with the protection of the health and safety of workers.

The ETUC wants to recall the broader legal framework (as explained in its previous position paper), in which the Directive should be considered: on the basis of various EU-Treaties there is the obligation to **limit** the working time of every worker, to **progressively reduce** working hours, to **harmonize upwards**, and to **promote dialogue** between management and labour.

#### ***3.2. Modernisation of working time arrangements: flexibility yes, long hours no!***

The Commission calls on the social partners to bring the working time legislation 'up to date'. However, no clarification is given which forms of 'modernisation' are envisaged, and no assessment is presented which shows that the desirable developments cannot be reached within the existing legal framework.

It seems that simplistic demands by employer organisations and some Member States that 'more flexibility' is needed are rewarded, without even asking from them to argue a compelling business- or economic case. Moreover, the demand for more flexibility is very narrowly interpreted as a need for longer working hours.

The ETUC has the strong impression that the debate on the need to 'update' the Working Time Directive is very ideologically driven by some, who create a picture of the Working Time Directive as being an obstacle to modernisation of working time arrangements.

To bring back this debate to more rational proportions, ETUC has made a short overview of the existing scope and possibilities within the framework of the Directive for flexibility in the arrangement of working hours (see annex).

According to this overview, working days can be extended up to 13 hours, and working weeks up to 78 hours, without further conditions, as long as the average working time limit of 48 hours per week is maintained over a reference period of 4 months. On this basis already a considerable flexibility-space is available, including the possibility to organise hours on an annual basis, as long as the maximum-limit of 816 hours per 4 months is maintained.

Only when companies or sectors want to have even longer periods of continuous long hour-working weeks or even more overtime hours, or want to introduce systems with great differences between the amount of hours worked in one part of the year versus other parts of the year, they need to negotiate these models in collective bargaining.

For the ETUC, this safeguard is a very essential one, providing for flexibility on the one hand, while allowing for a bargaining result that also takes account of the legitimate interests of workers (in terms of health and safety, work-life balance, etc).

A recent study by the EIRO on 'Annualised hours in Europe' (2003) shows a rich experience and high variety of national, sectoral and company level practices with annualised hours (AH). The conclusion of this study is, that *"it is inappropriate to adopt an ideological approach to the issue, regarding it either as a panacea or part of an employer-driven attack on employees' terms and conditions. The **key issue** is the nature of the AH scheme, and the way that it is implemented at a particular workplace, especially in terms of **trade-offs** between employers' and workers' interests (...)."*

So, the debate is not so much about the pro's and con's of annualisation or other forms of working time flexibility, but about more and less acceptable working time patterns from the perspective of health and safety (and work-life balance!), and about the conditions under which this flexibility can come about.

Win-win situations only appear, when economic demands are counterbalanced by social demands.

The fact that existing practices of annualisation in several countries seem to lead to acceptable working time patterns does not mean that one could do without the major condition for annualisation, especially in situations of strong fluctuations in working hours, which is collective bargaining.

Deleting the condition of collective bargaining for long reference periods for the counting of the maximum average working week, means that one thinks a river will not overflow in spring when one takes away the dykes because in summer it is such a nice little stream.....

The existing Working Time Directive is only providing for minimum regulations, setting boundaries to protect the health and safety workers. Within these boundaries, a great variety of modern working time arrangements are possible, and in practice explored.

It is a gross mistake to think, that changes in the Directive are necessary, to allow for acceptable forms of annualised hours or other flexible arrangements.

The ETUC is of the opinion that the Commission, rather than advocating the relaxation of these boundaries and safeguards, should develop more activities to draw attention to the good practice examples that have flourished in the last decade!

### ***3.3. Increasing employment rates of women and older workers by reduced and flexible working time patterns for all !***

More women and older workers on the labour market, as well as longer working hours, days, weeks, months, lives: these things are not all possible at the same time!

Women are expected to increasingly participate on the labour market, and at the same time called upon to increase the fertility rates. While several recent EU-reports (Kok-report on employment, and report High Level Group on the future of social policy in an enlarged EU) address the urgency of these matters by recommending among other things part time working and flexible working time arrangements for women, as well as care facilities for children and other dependents, both reports fail to make the connection with the issue of working time in general.

As long as working time practices in Member States are continuing to demand from 'normal' (=male) workers to make long hours, and do not allow them to share family duties with their partners, women will continue to juggle and struggle with the combination of work and family life, will continue to be excluded from adequate career-perspectives, and will either leave the labour market for long periods in their lives, or refrain from having children. The current situation in many Member States, in which there is increasing pressure on families to ensure that both parents have a paid job without providing for the necessary supportive framework in terms of childcare facilities and working conditions, leads to increased stress for men and women both at home and in the workplace.

The same issue is at stake with regard to the objective of increasing the employment rate of older workers. Active ageing is only possible if workers are not exhausted by long working hours many years before the actual pension date. Reduced and flexible working hours throughout working life are important preconditions for an extension of working life.

With regard to the future of social policy, the EU is at a cross roads here: either to fight the battle for competitiveness and growth with a limited work force making long and exhausting working hours, or with a broad workforce making reduced and healthy working hours.

Modern workers are increasingly men and women that combine paid work with other activities in life. Modern workers are increasingly demanding that policymakers take account of this reality in drafting their policies.

Modern workers are ready to offer flexibility to their employers, if their employers also take account of their interests in the scheduling of working time.

The Working Time Directive already does allow for very long and flexible hours. Coherence with other EU-policies requires that its minimum regulations are consistent with modern insights with regard to the effects of long working hours on the health and safety of workers.

As mentioned by the ECJ in the Jaeger-case, the concept of health and safety should be interpreted in a wide sense, as embracing all factors, physical or otherwise, capable of affecting the health and safety of the worker in his working environment, including mental and social well-being.

Coherence also demands that a more open and transparent debate should take place on the relation between productivity and long or short working hours. Many official statistics show remarkable differences in productivity per hour worked, with the countries having the longest working hours (such as the UK) ranking lowest on the productivity scale. Advocating more possibilities for long working hours is therefore also from an economic point of view not viable, and contradictory to EU-policies.

The paragraphs above show, that, in addition to arguments of health and safety, there is a legal, an economic, and a demographic case for a win-win approach, in which there is a combined effort to put limitations to long working hours in the framework of offering more flexibility to employers and workers.

The ETUC wants the Commission to take all this into account while drafting its proposals on the revision of the Working Time Directive.

## **4. ETUC's comments on the options, presented by the Commission**

### ***4.1. Summary of the options, presented by the Commission***

If the social partners would not consider initiating the process provided for under Article 139 EC, the Commission announced to propose amendments to the Directive based on **one or more** of the following approaches:

#### ***Opt-out under Article 18.1(b)(i):***

- tighten the conditions for application of the individual opt-out under Article 18.1 (b) (i) with a view to strengthening its voluntary nature and preventing abuses in practice.
- stipulate that derogations from the provisions on maximum weekly working hours are only possible through collective agreements or agreements between the social partners.
- provide that derogation from Article 6(2) would only be possible when authorised by means of collective agreements or agreements among social partners. In undertakings without such applicable agreement and no representation of the employees, the individual opt out under tighter conditions would remain applicable.
- revise the individual opt-out with a view to its phasing out as soon as possible. In the meantime, tighten the conditions for application of the individual opt-out under Article 18.1 (b) (i) with a view to strengthening its voluntary nature and preventing abuses in practice.

#### ***Definition of working time:***

Introduce in the text of the Directive the definition of a third category of time, i.e. "inactive part of on-call time", and clarifications regarding the arrangements for taking compensatory rest.

#### ***Derogations from the reference periods (Article 17.4):***

Extension of the reference period for the purpose of calculating the maximum weekly working hours that may be established by law or regulation.

#### ***Compatibility between work and family life:***

Encourage the social partners to negotiate measures to improve compatibility between work and family life.

The Commission requested the social partners:

- to forward an opinion or, where appropriate, a recommendation on the objectives and content of the envisaged proposal in accordance with Article 138 (3) of the EC Treaty;
- to notify the Commission, where applicable, of their intention to initiate the negotiation process on the basis of the proposals put forward in this document, in accordance with Article 138(4) and Article 139 of the EC Treaty.

Finally, the Commission asked the social partners to include with their opinions or recommendations, where appropriate, an assessment of the impact of the above measures and of any alternative put forward.

#### **4.2. With regard to the opt-out under Article 18.1(b)(i):**

With regard to the revision of the opt-out, the Commission has come up with four different options.

The ETUC has argued quite extensively in its previous position paper, why the first option presented by the Commission, which is to continue to allow for individual opt-out but to tighten the conditions for application, is unacceptable.

It is not realistic to expect real improvements in the level of protection of workers against abuses by for instance separating the moment of consent from the moment of the signature of an employment contract, or an obligation to review regularly the individual consent given by the employee. Also with under these conditions, it would be very easy to make renewal of a fixed term contract, or a next step in one's career, dependent on agreeing to the opt-out.

Moreover, if the previous very limited conditions were already not implemented and enforced properly in the only Member State that made extensive use of it, why would one expect any better performance with regard to additional conditions?

The ETUC sees the fourth option as the only acceptable one, namely the phasing out as soon as possible of the individual opt-out (as also proposed by the European Parliament) while in the meantime tightening the conditions for its application, and while also increasing the actions on national and European level to enforce these conditions.

The Commission has presented in its second phase consultation document two additional options, in which derogation from the average maximum weekly working hours would (also) be possible by collective agreement.

Although the ETUC in general is in favour of providing for flexibility in the **application** of working time regulations by collective bargaining, plain opt-outs of maximum working time regulations are unacceptable to the ETUC, as they contradict the fundamental right enshrined in European law, that each and every worker has a right to limitation of his working hours. Also the social partners in their role as collective bargaining partners will have to respect this obligation.

If the possibility of derogation of article 6 of the Directive (regarding the average 48 hour working week) by collective bargaining would fully replace the individual opt-out (the second option, presented by the Commission), the ETUC could imagine that under certain well defined conditions, guaranteeing limitation of working hours and appropriate compensatory mechanisms, such an option could be seriously debated (provided that this approach would not be contradicted by allowing for longer reference periods **without** collective bargaining, see below).

However, the Commission has not come up with any evidence or convincing material that there is a real need for taking on board such a far reaching derogation, taking into account that the existing Directive already allows for a wide range of flexibility-options on the basis of the existing provisions on reference periods, as is shown in Annex 1.

Furthermore the ETUC is very concerned, that this option, if introduced without sufficient conditions and safeguards, could even threaten existing good practice with regard to collective bargaining on flexible working time patterns and annualised working hours, because it could be seen by employers and their organisations as an easy way out of working time limitations.

The third option, presented by the Commission, in which derogation from the maximum working week would be possible by collective agreement, but at the same time the individual opt-out would remain applicable "in undertakings without such agreement and no representation of employees", must in the view of the ETUC be denounced by all means. This option would in practice pervert all discussions between social partners on working time. Employers and their organisations in this option would always have the best of two worlds: whenever they would like to have the advantages of collective scheduling of long working hours, but would not want to compromise on sustainable working time arrangements, they would pressurize the unions to accept such derogations, threatening them that if they would not agree, they would proceed on the basis of individual opt-outs. Where they would not see the need for collective bargaining at all, they would continue using individual opt-outs anyway. Instead of limiting the use of the opt-out, this option would very likely lead to an enormous increase in the use of various forms of opt-out.

Finally, the ETUC is very disappointed that the Commission in its Second phase document has not taken on board the issue of the general 'opt-out-like' derogation for managing executives and other persons with autonomous decision making powers (article 17,1). This derogation is increasingly applied to growing groups of workers, which are thus excluded from every protection against health and safety hazards of long working hours. This is in clear contradiction to the basic obligation in EU-law to provide every worker with a limitation of his or her working hours. This issue has a direct link to the debate about the individual opt-out of article 18,1 and can therefore not be left aside in the current debate on the revision of the Working Time Directive.

#### ***4.3. With regard to the definition of working time:***

Contrary to the issue of the opt-out, the Commission has only presented one option: to introduce in the text of the Directive a third category of time namely "inactive part of on-call time" and to present some clarifications regarding the arrangements for compensatory rest, without explaining what she exactly has in mind

It is positive, that the Commission acknowledges that such an essential issue as the definition of working time must be regulated at Community level, instead of leaving the definition of working time with regard to on-call work to the Member States, as has been proposed by several employer organisations and Member States. Nevertheless, the proposal on the table is very worrying.

The ETUC wants to reiterate, that the Simap and Jaeger judgements by the European Court of Justice have been welcomed by the trade union movement, because they confirm the basic principle of labour law that hours in which the worker is at the disposal of the employer should be considered as working time.

The ETUC therefore strongly disagrees with the Commission with regard to the question "whether it is not the binary system itself (defining time in either working time or rest) which is at the root of the problem".

The ETUC has in its previous position paper strongly opposed a general revision of the definition of working time, with a view to exclude on-call working time from the definition.

The ETUC wants to draw attention to the fact that the European Court of Justice, in both judgements on on-call work that are at stake, not only gave an interpretation of specific elements of the Directive, but also came up with some very compelling interpretations of the objectives and wider legal context of the Directive. These interpretations cannot easily be ignored or pushed aside.

In the Simap-case, the ECJ stated that

*(49) "the objective of the Directive is to ensure the safety and health of workers by granting them minimum periods of rest and adequate breaks. (...) to exclude duty on-call from working time if physical presence is required would seriously undermine that objective."*

In the Jaeger-case (points 69 and 70), the ECJ explicitly stated that

*(69) "Directive 93/104 precludes national legislation (...) which treats as periods of rest periods of on-call duty during which the doctor is not actually required to perform any professional task and may rest but must be present and remain available at the place determined by the employer with a view to performance of those services if need be or when he is requested to intervene.*

*(70) In fact that is the **only interpretation which accords with the objective of Directive 93/104** which is to secure effective protection of the safety and health of employees by allowing them to enjoy minimum periods of rest.*

*That interpretation is all the more cogent in the case of doctors performing on-call duties in health centres, given that the periods during which their services are not required in order to cope with emergencies may, depending on the case, be of short duration and/or subject to frequent interruptions and where, moreover, it cannot be ruled out that the persons concerned may be prompted to intervene, apart from in emergencies, to monitor the conditions of patients placed under their care or to perform tasks of an administrative nature."*

The Commission apparently has not taken these views into account, and thereby **risks to propose an amendment in regard of the definition of working time, that would be – according to the ECJ - in clear contradiction to the fundamental objectives of the Directive.**

The ETUC also is very much concerned about the inconsistencies that would occur if the Directive would be amended in line with the proposal of the Commission. The Directive is explicitly placed in the wider context of international law on working time, notably the various conventions of the ILO. These conventions are based on the dichotomy between working time and rest, and use definitions of working time and rest that are mutually exclusive.

The ETUC foresees great legal and implementation problems if the Directive would step outside this framework.

Furthermore, as already mentioned in ETUC's previous position paper, a general revision of the definition of working time would have a far-reaching and detrimental effect on all existing regulations and agreements on all levels with regard to working time, and especially those in which on-call working time is already included.

The ETUC also wants to draw attention to Directive 2002/15/EC on the organisation of working time of persons performing **mobile road transport** activities, where the **definition of working time includes** explicitly (in Article 3 under a) **on-call working time**, defined as "time during which the worker cannot dispose freely of his time and is required to be at his workstation, ready to take up normal work".

In line with the Simap-judgement, the Directive also defines in Article 3 under b) 'periods of availability', in which the worker is "not required to remain at his workstation, but must be available to answer any calls to start or resume driving or to carry out other work", which are not included in the definition of working time, but for which there are some specific regulations.

The ETUC does not understand why on the one hand it has been apparently possible to follow the line of the ECJ with regard to on call working time in the case of road transport, where flexibility of working time is more rule than exception, and why on the other hand it would be so much unreasonable and impossible to implement the ECJ-judgements in for instance the health sector.

The ETUC wants to draw attention to the fact that in mobile road transport as well as in healthcare and other sectors concerned (ambulance workers, fire fighters etc.) not only the health and safety of the workers is at stake, but also the health and safety of third persons (such as patients).

Until now, the Commission has not come up with reliable and convincing material or evidence, that the ECJ-judgements cannot be implemented in practice without causing major and insurmountable problems in Member States.

On the contrary, the ETUC has received several signals that some Member States that have cried out loud about the urgent need for revision of the Directive in the meantime have found out that their problems can be solved within the existing framework of Directive and ECJ-decisions!

On the occasion of the third Working Time Summit in Berlin in March 2004, where a study was presented by the German Hospital Institute about an evaluation of existing working time models, Mrs. Ulla Schmidt, German Federal Minister of Health, declared: <sup>1</sup>

*" The introduction of flexible working hours, **in conformity with ECJ requirements**, for hospital doctors is **feasible. It can be achieved** by optimizing working time and work process organization in most hospitals – **contrary to all the calculations that have been presented – with the available financial and human resources**. Such working time models also have the effect of raising labour productivity. (...) It is now up to the collective bargaining partners to make use of the frameworks provided by working time law and to introduce in hospitals working time models that are in conformity with ECJ requirements. This will also have the effect of making the profession of doctor more attractive."*

As expressed in its previous position, the ETUC is of the opinion that the Commission needs to come up as soon as possible with an impact assessment of the ECJ-cases, which fully takes into account the experiences and views of the social partners in the relevant sectors. Also, the Commission should urge the Member States to refrain from introducing or extending the individual opt out as a solution for their short term problems in the health sector, offering them instead guidance on how to implement the ECJ-judgements, and providing them with a perspective of a long term and sustainable response that fully respects the basic principles and objectives of the Directive.

<sup>1</sup> Bundesministerium für Gesundheit und Soziale Sicherung, Pressestelle, Berlin, den 01.03.2004. Study by Deutsche Krankenhausinstitut DKI to be found on the Internet under [www.bmgs.bund.de](http://www.bmgs.bund.de)

The ETUC does not accept a simplistic revision of the definition of working time, as a viable solution. Introduction of a 'third category of time', i.e. the inactive part of on-call working time, would create in the view of the ETUC major legal problems, and does not take due account of working time realities and health and safety needs of workers in the relevant sectors.

Instead, the Commission should promote social dialogue as a major means to provide for long term and sustainable solutions, as well on the national, on the sectoral as on the interprofessional level, including the European level.

If an impact assessment in the most relevant Member States, accompanied by an appraisal by the most relevant social partners in the sectors concerned, would show the need for adaptations of the legal framework of the Directive to allow for these long term and sustainable solutions, the ETUC could envisage adaptation of the Directive under certain well defined conditions. The scope of these adaptations should preferably be limited to and in proportionality to the problems as identified, for instance allowing for an additional derogation for specific situations or branches of activity, within the framework of article 17 of the Directive – on the basis of agreements between the social partners at the European or national level.

Such derogations could for instance provide for modalities of dealing with compensatory rest, that might currently be in violation of the text of the Directive as interpreted by the ECJ, but could be envisaged in a way that fully respects the health and safety needs of workers such as certain forms of working time saving accounts etc. These may be experienced by the workers concerned as beneficial, if they allow them for longer periods of continuous free time for rest and recovery, and if they allow them some time sovereignty.

To safeguard that these systems come about with the full consultation of the workers concerned, and protect and respect their basic health and safety needs, the possibility for such derogations should be only open on the basis of collective bargaining.

#### ***4.4. With regard to the derogations from the reference periods (Article 17.4):***

According to the Directive, the long reference periods of article 17,4 (6 months and 12 months) need to be re-examined by the Commission "on the basis of a Commission proposal, accompanied by an appraisal report".

**The ETUC has not been able to find in both communications of the Commission any proper 'appraisal report' that would give sufficient ground for the proposal that is now presented.**

The Commission announces as a further option the "extension of the reference period for the purpose of calculating the maximum weekly working hours that may be established by law or regulation", without even explaining why such extension is deemed necessary!

Also in its previous Communication, the case for extension of these reference periods has not been very well motivated by the Commission. It must be stressed, that the issue is **not** about allowing for extension in itself (which is already possible!), but about the possibility to extend reference periods **without collective bargaining as a precondition**.

Employers' organisations have time and again stressed their wish for such extension. However, until now without even arguing a 'business-case', thereby showing the ideological nature of the debate.

Unfortunately, the research done on the issue, on the demand of the Commission, had a very narrow scope. It does not go into any detail about existing practices and realities with regard to reference periods, but only lists the opinions of governments, employers and trade unions on existing provisions, the possible effects on the health and safety of workers in cases where longer reference periods were used, and the wishes for changes with regard to the legal framework.<sup>2</sup>

The Commission argues the case, by referring to "the existing trend, discernable in legislation and agreements at national level, towards extending the reference period for the calculation of maximum weekly working time."

In the presentation of this proposal, however, the Commission contradicts itself in three ways:

First, by pointing at an existing trend towards annualisation of working hours, the Commission forgets to mention that this trend, if at all taking place, **can only take place within the framework of the Directive**. In other words, if the trend is there, it shows that the existing framework of extension on the basis of collective bargaining is effective, sufficient, and provides for balanced outcomes. In a previous paragraph, ETUC has already drawn attention to the recent EIRO-study on "Annualisation of working hours" (2003), and to the Annex showing the existing scope and possibilities for flexibility within the existing legal framework.

Second, by proposing that extension should be possible without the safeguards of collective bargaining, the Commission proposes to delete a mechanism that was provided for as a matter of principle in the Directive, namely that flexibility could be provided whilst ensuring compliance with the principles of protecting the safety and health of workers, by allowing for far-reaching flexibility only by way of collective bargaining. An approach that the Commission itself refers to in paragraph 3.1. as showing "the tension between the main consideration in this debate (flexibility and safety) and the awareness of the legislator that flexibility cannot be developed to the detriment of the protection of workers' health and safety". If and how an extension of the reference period without the safeguard of collective bargaining would be compatible with the necessary protection of the health and safety of workers is not even discussed in the document.

Third, while the Commission in the Second phase document on the one hand stresses the essential role of the social partners, stating that "negotiations between the social partners are one of the best ways of making progress in the field of modernisation and management of change", on the other hand it is proposed to delete the very stimulus for such negotiations by deleting the condition of collective bargaining from the extension of reference periods. By doing so, the Commission makes its own commitment to the role of the Social Partners at least look very ambiguous!

Fourth, it must be mentioned that the Commission, as guardian of the European Treaties, has the obligation, according to Article 136 of the EU-Treaty, to promote among other things the dialogue between management and labour. It cannot be very well understood on which basis the Commission envisages to question or even delete the very mechanism in the Working Time Directive that promotes dialogue between management and labour on working time!

<sup>2</sup> Final report by Coshape Limited, february 2004 .  
Questioned about the need for amending par. 17,4 of the Directive (total of 45 responses), 5 governments (of 10), and 8 employer organisations (of 14) wanted to see a relaxation of the rules; 9 trade union organisations (of 22) wanted a tightening of the rules: 22 respondents (4 governments, 6 employers' organisations and 12 trade unions) considered that article 17,4 did not need to be amended.

Finally, it is very disappointing that the Commission does not take on board, with regard to the issue of long reference periods, the concerns as expressed by several trade unions in the Coshape study on the application of reference periods, with regard to the lack of safeguards to protect workers against irregular and short-notice scheduling of working hours, as well as long and often unpaid and unmonitored overtime working hours especially by higher staff, having adverse consequences for the health and safety of workers.

Especially in combination with long reference periods, there is an increasing need to put boundaries for reasons of health and safety to these burdensome schedules.

The Directive could be improved, for instance by introducing regulations on minimum announcement periods for working time schedules, and providing for an individual right – under certain conditions, and taking into account organizational and business needs - for the worker to ask for adaptation of a working time pattern to his or her individual circumstances, as already existing in several national working time regulations. These would help to bring about working time patterns – in the framework of increasingly flexible scheduling - that also take account of legitimate worker's needs, increase workers' choice, and reduce stress and its detrimental effects on the health and safety of workers.

#### ***4.5. With regard to the compatibility between work and family life:***

The proposal of the Commission, to encourage the social partners to negotiate measures to improve compatibility between work and family life, does not sound very genuine, and lacks every detail and concrete suggestions.

Although the ETUC agrees, that the Working Time Directive is based on the legal basis of Article 118A (protection of health and safety), it was already argued in the previous position paper that the reconciliation of work and family life has direct and indirect links with the health and safety of all workers with family-responsibilities. So, the Commission too easily agrees with the employers-organisations that discussing the issue in the framework of the Working Time Directive would be out of order. The ETUC could very well envisage several measures that would help to strike a better balance between protection of health and safety and flexibility in the organisation of working time that could benefit both employers and workers. Measures to allow workers a more flexible scheduling of their working hours, or adapt the amount of hours to their needs during 'rush-hours/periods' in their life as working parents, as well as obligations to announce changes in schedules a certain minimum period ahead of time, would bring working time regulation on the European level truly 'up to date'.

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## Annex

### Working time directive

#### Maximum 'average' weekly working time in relation to reference periods and annualisation of working hours

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#### Summary of regulations in the Directive:

- An average working week of 48 hours
- A seven day reference period as a rule
- An option for MS's to allow for a 4 month-reference period, without further conditions
- A derogation allowing for a reference period up to 6 months, on condition of equivalent compensatory rest:
  - i. by law or collective agreement for specific cases (including hospital care)
  - ii. by collective agreement in general
- A derogation allowing for a reference period up to 12 months, on the basis of collective agreements only, on condition of compliance with the general principles of health and safety protection.
- In cases in which the reference period for the maximum working week can be extended, it is also allowed to derogate from the minimum daily and weekly rest periods.

The normal provisions of the Directive, without using any derogations!, allow for a *working week that can be extended until 78 (or under certain conditions even 89) hours*. Without further conditions, this maximum, combined with the average weekly working time limit of 48 hours on the basis of a **reference period of 4 months**, means already a **considerable 'flexibility-space'**:

#### Flexibility-space in theory

**NB 1)** Within this framework it would already be very well possible to organize working time models on an annual basis (annualised hours<sup>3</sup>), as long as the model would not allow the worker to work more than 816 hours per 4 months!

Taking into account, that in most EU-countries the average working time per week is in practice far below 48 hours<sup>4</sup> (!), existing models where working time varies between 35 hours and 45 hours (although normally established by collective bargaining) can be organized without recourse to any specific regulation on reference periods.

Extending reference periods therefore does not create possibilities for annualised hours (which is already possible), but only allows for even bigger disparities between days/weeks/months with long working hours, and periods with shorter working hours, while at the same time allowing the scheduling of compensatory rest with longer intervals (see examples below).

**NB 2)** The Directive allows not only for derogations on reference periods, but also on daily and weekly rest periods. All these provisions together can lead to long periods of the year with extremely long working days and weeks (see examples below).

<sup>3</sup> "Annualisation of working hours", EIRO 2003

<sup>4</sup> "Working time developments – 2002", EIRO, refers to Eurostat data on 2001, showing that the **usual** hours worked per week by full time employees in the EU range from France on the lowest end of the scale with 38.3 hours, and UK on the highest end with 43,5 .

Moreover, no provision in the Directive protects the worker against the irregular scheduling of these hours, and against being under pressure to accept long hours and overtime working on very short notice.

The **only mechanism that protects workers** from these very burdensome schedules is the combination of a reference-period with the condition of collective bargaining and the obligation for social partners to provide for 'equivalent compensation'.

### **Annualisation and reference periods**

Annualisation of working hours (schemes whereby employees' working time – and pay – is calculated and scheduled over a period of one year) is already very well possible on the basis of a 4-month reference period. The difference with a longer reference period being, that less consecutive weeks with long hours are possible before compensation in terms of free time, or shorter working weeks, has to be scheduled.

For instance on the basis of a standard 38 hour working week, the following working patterns – exceeding the 38 hours up to an average maximum of 48 hours - would be possible, using a 4 month, 6 month or 12 month reference period:

38 hours x 17 weeks = 646 hours; maximum per 4 months is 816 hours, would allow for:

- max 4 consecutive weeks with overtime up to 78 hours
- max 8 consecutive weeks of 58 hours

38 hours x 26 weeks = 988 hours; maximum per 6 months is 1248 hours, would allow for:

- max 6 consecutive weeks with overtime up to 78 hours
- max 13 consecutive weeks of 58 hours

38 hours x 48 weeks (NB 52 weeks minus 4 weeks minimum annual holidays) = 1824 hours; maximum per 12 months is 2304, would allow for:

- max 12 consecutive weeks with overtime up to 78 hours
- max 24 consecutive weeks of 58 hours

Taking a zero working week as a basis (= maximum fluctuation between zero and 78 hours per week), the picture would be as follows:

Within 4 months reference period: 10 weeks 78 hours, 7 weeks zero

Within 6 months reference period: 16 weeks 78 hours, 10 weeks zero

Within 12 months reference period: 29 weeks 78 hours, 19 weeks zero

### **Flexibility-space in practice: EIRO study on Annualisation of working hours**

A recent study by the EIRO on 'Annualised hours in Europe' (2003) shows a rich experience and high variety of national, sectoral and company level practices with annualised hours (AH).

The term 'annualised hours' or 'annualisation' are terms used in the study to describe schemes whereby employees' working time (and pay) is calculated and scheduled over a period longer than a week, up to a year.

None of the countries examined (EU-15 and Norway) have specific legislation providing in explicit terms for the annualisation of working time, or providing a definition of such annualisation. However, almost all have a legislative framework for working time that allows daily or weekly limits on normal working time to be exceeded, as long as the normal limits are maintained on average over a certain reference period.

In the great majority of countries, the law provides for a role for collective bargaining in the implementation of the statutory AH-scheme; such arrangements can thus not be introduced on the basis of managerial prerogative.

The study characterises AH as a **negotiated** and decentralised type of labour and organisational flexibility, often connected with various other methods of planning working time in a less traditional way, such as the 'bandwidth' model, working time accounts or time banks.

The study mentions, that the basic approach of AH, to calculate working hours over a relatively long period, is implicitly promoted by the regulations in the Working Time Directive on reference periods, allowing for longer reference periods by collective bargaining. However, in many countries, some AH agreements have already been introduced, often by collective agreement, well before the introduction of legislation on the issue, and indeed such agreed arrangements are often considerably more innovative than the legislative provisions in some countries.

AH agreements are often put in place to allow for a more flexible scheduling of working hours, in exchange for a reduction of overall working time, potentially thereby also reducing the recourse to overtime.

The effects on the living and working conditions of workers can be both positive (reduction of working time, more predictability in schedules, more time sovereignty for the worker) and negative (big variations or short notice periods for alterations in working time affecting negatively work-life balance), very much depending on the particular conditions of the scheme.

The conclusion of this study is, that *"it is inappropriate to adopt an ideological approach to the issue, regarding it either as a panacea or part of an employer-driven attack on employees' terms and conditions. The **key issue** is the nature of the AH scheme, and the way that it is implemented at a particular workplace, especially in terms of **trade-offs** between employers' and workers' interests (...)."*

## Conclusion

Even a 4-month reference period allows already for considerable flexibility and 'annualisation' of working hours.

Without any additional safeguards, both the 6 month and the 12-month reference periods could lead to a very irregular scheduling of overtime and long working hours, or allow for seasonal workers with very long working weeks in one part of the year, and no work to do in the other part of the year. Or the 'abuse' of fixed term workers, engaged for a 6-month period but with a working time pattern based on a 12-month reference period.....

In the current situation, both long reference periods can only be established by law (in specific cases) or collective agreement, and taking into account the obligation to provide for equivalent compensatory rest etc.

This may lead to forms of flexibility in the scheduling of working hours, for instance by annualisation, which at the same time lead to working patterns and/or compensatory mechanisms (time saving banks, etc.) that are supported by workers.

If one would take away this protective mechanism, nothing would prevent employers to introduce very long and/or irregular working weeks without proper compensatory mechanisms, and without taking account of workers needs and interests.