

EUROCADRES COMMENTS ON THE EUROPEAN COMMISSION'S COMMUNICATION CONCERNING THE RE-EXAM OF THE WORKING TIME DIRECTIVE

Directive 93/104/EC

The directive 93/104/EC establishes important principles and requirements concerning certain aspects of the organisation of working time. This directive defines elements, which are essential for safety, hygiene and health at work, which should be guaranteed to all workers irrespective of the nature of their work. It is a key contribution towards creating the social dimension of the internal market.

Professional and managerial staff (who EUROCADRES represents) are interested by the whole content of the directive and in addition they have some specific concerns.

From the origin, a number of exceptions and derogations allow to exclude some groups of workers from the provisions of the directive. Since the adoption of the directive some of these exclusions have been overcome through various kind of negotiations with the social partners. However some remain. In particular the article 18.1 leads to exclude people from the provisions of article 6 (maximum weekly working time) and the article 17.1 allows to derogate from the majority of the directive's provisions: articles 3 (daily rest), 4 (breaks), 5 (weekly rest period), 6 (maximum weekly working time), 8 (length of night work) and 16 (reference periods) for a very broad and too vaguely defined group including managing executives or other persons with autonomous decision-taking powers.

EUROCADRES considers that it is time to solve the remaining problems and to guarantee that there will be no more large groups of people excluded from the directive. To this end a revision of the directive is necessary including a strict definition of the possible derogations. It is necessary to have a new and more precise wording of functions, which should be considered under the article 17.1, and to end the individual opt out process allowed by the article 18.1.

The Commission's communication is dealing with some of the related issues. We regret that the whole aspects have not been taken into account and that derogations under article 17.1. are neglected. In the following pages we present more in details EUROCADRES comments and proposals covering the various areas in which changes are necessary.

1. Reference periods (article 16)

Article 16 lays down reference periods for weekly rest period, for maximum working week and for length of night work. There is no major difficulty in this area and therefore there is no need to change the wording of this article. In particular it is important that the possibility to derogate continues in the future to only be possible by collective agreements. The different coverage of collective bargaining according to countries is not a reason to change this rule, because collective agreements are the best way to suit to the various working situations and remain possible in all European countries.

2. Definition of working time (article 2)

In the Directive, there is no interim category between working time and rest periods: the two concepts being mutually exclusive¹. The case law from the Court of Justice has further developed this idea as can be seen in cases SIMAP and Jaeger. In particular, it should be noted that the Court of Justice clearly indicates "the fact that the definition of the concept of working time refers to "national laws and/or practice" does not mean that the member states may unilaterally determine the scope of that concept. Thus, those states may not make subject to any condition the right of employees to have working periods and corresponding rest periods duly taken into account since that right stems directly from the provisions of the directive". This clear basis should not be changed.

The situation of the on call working time has been clarified by the Court. However some concern remains in some member states. A more precise evaluation of the consequences of the Court of Justice cases should be carried out urgently in close cooperation with the social partners in the relevant sectors. The use of individual opt-out is not an acceptable solution (see below point 3) because those situations are not related to individuals but to a sector, to a profession or to a group of people. That is why these specific situations should be discussed through social dialogue processes at all the relevant levels. It is the case in the health sector, where it is necessary to improve the working conditions and to solve the remaining difficulties related in particular to junior doctors.

In addition it should be noted that the actual working time consists nowadays of many different parts. Work is increasingly carried out as mobile telework when travelling, and takes place in various locations outside the usual or normal work place. More often professional and managerial staff are required to be available outside the normal working hours. These aspects should also be taken into account by collective agreements at national and/or European levels.

3. Opt-out (article 18.1.)

The option not to apply Article 6 (maximum weekly working time) is open by the article 18.1.b.i. The only country to use this possibility is the United Kingdom as it is described by the Commission's communication. This abuse of individual opt-out severely compromises the protection of working time and of workers' health and

¹ According to the article 2 of the directive: "working time shall mean any period during which the worker is working, at the employer's disposal and carrying out his activity or duties, in accordance with national laws and/or practice".

safety.

For this reason, the possibility to individual opt-outs should be abolished from the directive. The specific sectoral or professional situations, if they need some additional flexibility, should be dealt through collective bargaining at national and/or European levels, with due regard for the general principles of the protection of the health and safety of workers.

4. Derogation from articles 3, 4, 5, 6, 8 or 16 (article 17.1.a)

The article 17.1.a. allows to derogate from the majority of the directive's provisions: articles 3 (daily rest), 4 (breaks), 5 (weekly rest period), 6 (maximum weekly working time), 8 (length of night work) and 16 (reference periods) for a very broad and too vaguely defined group including "managing executives or other persons with autonomous decision-taking powers".

The Commission should not have neglected this issue and should have invited the social partners to express their views on the consequences of this possible derogation and their proposals for a clearer definition of its scope. This remains necessary.

The Commission's communication is only dealing with this derogation in an indirect way regarding the use of opt-out in the United Kingdom. However the Commission sees this derogation as "unclear" and leading to "uncertainty".

In fact, this derogation has led to a situation where large groups of workers are totally left outside working time protection and at the same time outside health and safety protection. It is a matter of growing concern.

It should be noted that the organisation of working time has changed considerably over the last years. Firstly, telework, mobile work, travelling etc has increased and continues to do so: EUROCADRES surveys² show the average work outside the usual work place corresponds from 10% to more than 20% of the total work. Secondly, the nature of work has changed and autonomous professional work has increased. Very often, it is not done under precisely predetermined time schedule. In addition, managing cultures have changed accordingly and recognise more autonomy and responsibility to the individuals.

These changes should not lead to weaken the working time protection. The scope of this derogation in article 17.1.a. broadens in the same time as working life changes. It leads to extensive interpretations and to exclude a growing number of professional and managerial staff from the provisions of the directive. This must not continue. This derogation clause in the directive is too inaccurate and vague.

This derogation leads to long excessive workload among these occupations. The recent surveys conducted by EUROCADRES member organisations in six countries show that between 73% and 95% of professional and managerial staff consider

² See "European synthesis of surveys on working time & work load of professional and managerial staff", EUROCADRES, November 2003. These surveys were conducted in Finland, France, Italy, Portugal, Sweden and the United Kingdom from late 2001 until spring 2003. A total of more than 10000 answers from professional and managerial staff were taken into account.

their workload as heavy or very excessive².

Moreover, it is an indirect discrimination. It reinforces the traditional management methods and the organisation of working time that makes it difficult for women to gain managerial positions. Long work hours, overtime and excessive workload do not facilitate reconciliation between work and family life. This is particularly highlighted by the recent resolution of the European Parliament that "emphasises that the culture of long hours in higher professions and managerial jobs is an obstacle to the upward mobility of women and sustains gender segregation in the work place"³

For these reasons, EUROCADRES thinks that the wording of possible similar derogation should be limited to those persons who are in position of CEOs (or comparable) and senior managers directly subordinate to him/her i.e. the executive team and/or to those who have a general delegated authority to take decision on behalf of the employer, or who are directly appointed by the board of directors.

In the December 2000 report from the Commission on the implementation of the directive, there was some information on workers excluded from the scope of the directive, some of them falling under article 17.1.a. However, it was only a very brief description of the situation in some member States. It is important to have a better knowledge on if and how member States, which use this derogation, implement the principle of the protection of health and safety for the excluded workers. The Commission should conduct an evaluation to this end.

5. Reconciliation between work and social/family life

The Commission's communication raises a very important issue when addressing the working time from the point of view of reconciliation of work and family life. Working time is a major factor that either makes the reconciliation easier or in other cases makes it difficult. The question relates to social and family life, not only to partner and children but also to parents from whom people increasingly have to take care of.

Reducing working hours and workload is an important way to make reconciliation easier. This area for collective bargaining has to remain open in order to reach solutions suited to the various working situations.

The issue of overtime is unfortunately not addressed in the Commission's communication. It has however impact on health and safety and on reconciliation between work and family life. The EUROCADRES surveys² show that a large number of professional and managers get no compensation for overtime: sometimes it is because legislation or collective agreements do not apply to them, sometimes it is because the legislation or the collective agreements are not observed in practice. In fact Professional and managerial staff express a clear preference for compensation in leisure time or partially time and money. Possibilities of compensation, for leisure, social and family life, play an helpful role for reconciliation of work and family life. "Time credit systems", as it is referred in the Commission's communication, are

³ See point 22 of the European Parliament Resolution on the organisation of working time (amendment of directive 93/104/EC) (2003/2165(INI))

helpful tools in order to collect overtime hours and other elements and later use them as longer free periods. They might be defined in the directive and should be further developed through collective agreements.

6. For solutions suited to the various situations

Professional and managerial staff should no longer be simply excluded from the provisions of the directive by the use of the present derogations allowed by articles 17.1.a. and 18.1. as it is explained on points 3 and 4. The nature of their work requires solutions suited to their actual situation.

Various possibilities can be discussed on the basis of the directive's provisions. For example, they might include, within precise limits, possible reference to annual basis and to compensation of overtime by days off or other appropriate ways. Workload as well as employment and development of competences and qualifications should be taken into account. It should lead to establish through collective bargaining, at all appropriate national and European levels, solutions suited to the various professional situations. They have to fully protect health and safety and to correspond to the flexible needs of companies and of individuals, within a coherent European framework.