POSITION PAPER

UNICE

THE VOICE OF BUSINESS IN EUROPE

POSITION PAPER

4 March 2004

COMMISSION COMMUNICATION CONCERNING THE RE-EXAMINATION OF DIRECTIVE 93/104/EC CONCERNING CERTAIN ASPECTS OF THE ORGANISATION OF WORKING TIME

UNICE POSITION

Executive Summary

Legislation on working time has a strong influence on how production can be organised in companies. Since its adoption in 1993, economic and societal circumstances have evolved, due to globalisation on the one hand and to individualisation of life styles on the other hand. Flexibility in working time has become even more crucial for companies' competitiveness. Moreover, as stated in the report of the employment task force chaired by Wim Kok, "flexibility is not just in the interest of employers, it also serves the interests of workers". Last but not least, flexibility of working time is also crucial to fulfil the Lisbon agenda of turning Europe into the most competitive knowledge-based economy in the world.

The working time directive is different from most other directives in the social field. It does not set general goals or principles but contains detailed definitions and rules regarding minimum rest periods, rest breaks, maximum weekly hours, annual leave, night work, etc. This directive does not take sufficient account of the fact that concrete arrangements that benefit both companies and employees are best found at company level and does not leave enough room for manoeuvre to devise tailor-made solutions. Moreover, these detailed rules have been superimposed on existing national rules and reduced the degree of flexibility that existed. In some countries, the possibility for social partners to derogate from working time legislation through collective agreements was significantly restricted.

UNICE insists that, when drawing conclusions from the debate launched by its communication, the Commission should aim to make it easier for companies to comply and improve working time flexibility across the enlarged European Union. The Commission should resist any calls to introduce new rigidities, which would be particularly damaging for the economic development of new Member States.

European employers believe that:

- averaging the reference period for calculating weekly working time over 12 month should be the general rule (with a possibility to extend it beyond 12 months by collective agreement or other agreements) and the reference period for the weekly rest period should be extended from 7 to 14 days;
- the right for individuals to opt out from the 48-hour rule should be retained and the Directive should be amended to foresee explicitly that opt-outs can also be agreed by means of collective agreements;
- it is essential to distinguish between the time when a worker is resting at the workplace and the time when he/she is actually working by considering only time actually worked as working time and rest periods as rest even if this rest occurs at the workplace.

UNICE would therefore support a revision of the directive, provided that it meets the conditions identified above and offers solutions along the lines proposed in this paper. It insists that any revision should not result in expanding the directive beyond the area of health and safety of the workers as all the other aspects of working time management are best dealt with in Member States.

Union of Industrial and Employers' Confederations of Europe – Union des Confédérations de l'Industrie et des Employeurs d'Europe AISBL
Av. de Cortenbergh 168 - B-1000 Brussels -VAT BE 536.059.612 -Tel. +32(0)2 237.65.11 - Fax +32(0)2 231.14.45 - E-mail: main@unice.be -Website: //www.unice.org

POSITION PAPER

UNICE

THE VOICE OF BUSINESS IN EUROPE

POSITION PAPER

Permanent.1/as from 2002/Working time

4 March 2004

COMMISSION COMMUNICATION CONCERNING THE RE-EXAMINATION OF DIRECTIVE 93/104/EC CONCERNING CERTAIN ASPECTS OF THE ORGANISATION OF WORKING TIME

UNICE POSITION

Introduction

1. On 30 December 2003, the European Commission published a Communication concerning the review of directive 93/104/EC concerning certain aspects of the organisation of working time. The aim of this document is

   - to evaluate the implementation of the working time directive, and
   - to launch a wide consultation on working time.

   It is also intended as an official first-stage consultation of the social partners.

2. The Commission asks the opinion of social partners on the need to revise the current text or introduce other initiatives, not necessarily legislative, on the following issues:

   - the reference period for calculating the maximum working week (48 hours);
   - the impact of the European Court of Justice's case law concerning the definition of working time and the qualification of time on call in the SIMAP and JAEGER cases;
   - the conditions of application of the opt-out from the 48.00 hours rule;
   - measures aimed at improving reconciliation between work and family life;
   - an interrelated approach to these issues that would allow for a balanced solution capable of meeting the following criteria:
     - give workers a high level of health and safety protection in respect of working time;
     - give firms and Member States more flexibility in the way they manage working time;
     - make it easier to reconcile work and family life;
     - avoid imposing unreasonable constraints on firms, particularly small and medium-sized businesses.

General comment on the need to improve working time flexibility

3. Legislation on working time has a strong influence on how production can be organised in companies. Since its adoption in 1993, economic and societal circumstances have evolved, due to globalisation on the one hand and to individualisation of life styles on the other hand. Flexibility in working time has become even more crucial for companies' competitiveness. Moreover, as stated in the report of the employment task force chaired by Wim Kok, "flexibility is not just in

the interest of employers, it also serves the interests of workers". Last but not least, flexibility of working time is also crucial to fulfil the Lisbon agenda of turning Europe into the most competitive knowledge-based economy in the world.

4. The working time directive is different from most other directives in the social field. It does not set general goals or principles but contains detailed definitions and rules regarding minimum rest periods, rest breaks, maximum weekly hours, annual leave, night work, etc., and sets the conditions under which Member States and social partners may deviate from them. This directive does not take sufficient account of the fact that the concrete arrangements that benefit both companies and employees are best found at company level and does not leave enough room for manoeuvre to devise tailor-made solutions.

5. The first main difficulty that faces companies, especially SMEs, when seeking to comply with the national legislation implementing the directive stems from the complexity of the European text, which makes it

   - very difficult to understand,
   - unnecessarily burdensome to fulfil the purely administrative tasks that form an integral part of managing working time.

6. The second main difficulty signalled by companies is that, in practice, these detailed rules have been superimposed on existing national rules, often without sufficient changes because of the "non-regression" clause, thereby reducing the degree of flexibility that existed. For example, countries that previously had a possibility for social partners to totally derogate from working time legislation through collective agreements saw the freedom of social partners to organise the protection of workers differently from what was prescribed by law significantly restricted. In UNICE's view, the analysis of the Commission is too narrowly focused on the application of the directive in the United Kingdom and does not sufficiently analyse the effects on other countries.

7. UNICE insists that, when drawing conclusions from the debate launched by its communication, the Commission should aim to make it easier for companies to comply and improve working time flexibility. In the perspective of enlargement, it is also essential that the Commission facilitates real compliance with EU rules across Europe and resists any calls to introduce new rigidities, which would be particularly damaging for the economic development of new Member States.

On the reference periods

8. According to the directive, the reference period for calculating the maximum working week should be no longer than four months. It may be extended to up to 6 months by law or to up to 12 months by collective agreement or agreements concluded between the two sides of industry. The Communication finds that in general there is a trend towards expressing working time as an annual figure in the Member States.

9. Averaging the reference period over 12 month has become the dominant pattern in practice. Having a reference period for calculation of the weekly working time of 12 months as a general rule and not as a derogation would reflect this trend and:

   - respond to the needs of a growing number of companies in various sectors, which are faced with important business-related fluctuations of activity such as seasonal variations,
   - reduce the burden of administration of working in companies, especially SMEs,

- make it easier for companies and workers to agree on individualised working time arrangements, for example to reconcile work and family life whether or not this is covered collective agreement;
- support employment in periods of fluctuating demand.

10. Moreover, it would be useful to open possibilities to extend the reference periods beyond 12 months by collective agreement or other agreements.

11. Finally, short cyclical working time schedules (for example two days during the morning, two days during the afternoon and two days during the night) are introduced to better protect the health and safety of the workers concerned. The directive only allows these schedules where a Member State has made use of the possibility of article 16 to extend the reference period for the weekly rest period from 7 to 14 days. UNICE believes that, for the weekly rest period (article 5), a reference period of 14 days should be the general rule.

On the definition of autonomous workers

12. The directive foresees derogations for autonomous workers i.e. those with autonomous decision-taking powers.

13. UNICE wishes to point out that, in some countries, when the directive has been transposed, the definition of this category of persons has been too narrow to deal with the specificities of management functions.

On the use of the opt-out

14. According to the directive, a Member State has the option to introduce provisions, in its legislation, allowing a worker to work more than 48 hours per week, provided that the worker agrees (opt-out clause). The directive also stipulates that this clause should be re-examined seven years after the transposition of the directive into national law.

15. The Communication assesses the practical implementation of this provision of the directive in the Member States. The analysis almost exclusively focuses on the use of this derogation clause in the UK. The Commission acknowledges that some Member States decided recently to apply the opt-out, but that it is not yet possible to evaluate how the opt-out clause is being applied in these countries. Furthermore, the Communication states “it would be useful to be able to evaluate the extent to which the opt-out, or rather working time excess of the limit laid down in the directive, has had negative repercussions on the health and safety of workers”.

16. Despite this lack of pan-European evidence, and despite the fact that the Commission itself recognises that the percentage of people working more than 48.00 hours in the UK has been decreasing since 1999 (and use of the opt-out is probably significantly lower than the number of individual agreement signed), the Commission seems to conclude the conditions for application of the opt-out should be revised.

17. The flexibility allowed by the opt-out is essential for companies. Basing any decision on the UK experience only would be wrong as it would ignore the fact that opt-out solutions have taken different forms in different Member States. Some Member States have chosen to permit individual opt-outs and others have sanctioned opt-outs by means of collective agreements. UNICE believes that both of these options must be available. Some activities could not function without the opt-out (for example

catering, care and other public or private services to people). Finally, the flexibility allowed by the opt-out is also essential to help companies in the new Member States to absorb the shock of compliance with the legal acquis on working time.

18. UNICE fully agrees that abuses of the opt-out should be dealt with where they exist, but insists that the issue should be treated by compliance measures operating at member state level and not by removing the opt-out.

19. In this context UNICE believes that the argument in the SIMAP case according to which the decision not to be covered by maximum weekly working time should be taken by the worker himself and that "the consent given by trade-union representatives in the context of a collective or other agreement is not equivalent to that given by the worker himself", is unjustified and could undermine the very notion of collective defence of workers interests, which is at the heart of industrial relations systems in most Member States. For example, the Spanish legislation allows overtime when there is an agreement with worker representatives and this is not considered incompatible with the required voluntary nature of overtime. The possibility to opt out by collective agreements should be explicitly provided for in the directive to limit the damaging effects of the ECJ jurisprudence.

On the definition of the working time

20. The directive defines working time and rest period as two mutually exclusive concepts.

21. In the SIMAP case, the European Court of Justice (ECJ) ruled that the time spent on-call duty by doctors in a primary health care team should be considered as working time if their physical presence is required. In the Jaeger case, the Court decided that the period of duty spent by a doctor on call in a hospital, where physical presence is required, must be regarded as working time even though the person concerned is allowed to rest at his place of work during the periods when his/her services are not required.

22. The Communication explains that in most Member States, periods spent not working during on-call duty were excluded from working time, either because the concept of working time was generally interpreted to mean that periods of inactivity during time spent on call should not be defined as working time or because legislation made provision for intermediate periods (during which employees were not working but had to be ready to work, if necessary). The ECJ case law has a major impact on Member States which did not define time spent on call requiring physical presence at the workplace as being working time. However, the Commission's assessment focuses exclusively on public health care.

23. UNICE would like to add that the jurisprudence of the Jaeger case not only has implications for public hospitals. Including time spent on on-call duty in the working time even though the worker is not effectively working could raise costs in the private care sector and on off-shore oil rigs or for industrial activities where in-company fire brigades exist, such as chemical plants, nuclear plants and other power stations. Moreover some sectors such as the transport, civil aviation and seafarers have devised different solutions from those given in the Court decisions. For instance, directive 2000/79/EC on working time in the civil aviation sector and directive 1999/63/EC on working time in the seafaring sector, which implement the agreement of the social partners concerned at EU level, specifies that the time spent on call at the workplace is not considered to be working time.

24. A distinction should be made between the time when a worker is resting at the workplace and the time when he/she is actually working. In UNICE's view, only time actually worked should be considered as working time. The definitions in article 2.1 and 2.2 of the directive should be amended accordingly. Creating a new category of time "at the disposal of the employer" is not necessarily the only or the best approach for all sectors to do this. In a horizontal directive aiming to protect the health and safety of workers, it is important to make clear that rest periods should be considered as rest even if this rest occurs at the workplace.

On ensuring compatibility between work and family life

25. The Commission is of the view that the revision of the working time directive could provide an opportunity to encourage the Member States to take steps to improve the compatibility of work and family life.

26. In UNICE's view, the aim of reconciling of work and family is best achieved through non-legislative measures and should not be tackled in the context of the working time directive whose legal basis is article 137a (former article 118a) of the Treaty of European Union (i.e. the protection of the health and safety of workers).

Conclusion

27. Flexibility in working time is essential both for the competitiveness of companies and to accommodate increasingly diversified individual workers' needs. UNICE believes that:
    - averaging the reference period for calculating weekly working time over 12 month should be the general rule and the reference period for the weekly rest period should be extended from 7 to 14 days;
    - the right for individuals to opt out from the 48-hour rule should be retained and the directive should be amended to explicitly foresee that opt-outs can also be made by means of collective agreements;
    - it is essential to distinguish between the time when a worker is resting at the workplace and the time when he/she is actually working by considering only time actually worked as working time and rest periods as rest even if this rest occurs at the workplace.

28. It would therefore support a revision of the directive, provided that it meets the conditions identified above and offers solutions along the lines proposed in this paper. UNICE insists that any revision should not result in expanding the directive beyond the area of health and safety of the workers as all the other aspects of working time management are best dealt with in Member States.

****