

**SECOND PHASE OF CONSULTATION OF THE SOCIAL PARTNERS AT
COMMUNITY LEVEL**
**concerning the revision of Directive 93/104/EC concerning certain aspects of the
organization of working time**

1. INTRODUCTION

On 30 December 2003, the Commission adopted a Communication concerning the review of the working time Directive (hereinafter referred to as "the Communication").¹

With regard to the social partners at Community level, the Communication should be considered the first phase of consultation, under the terms of Article 138(2) of the EC Treaty.

Directive 93/104/EC² contains two provisions with a clause providing for their review before the expiry of a seven-year period reckoned from the deadline for transposal by the Member States, i.e. prior to 23 November 2003.

The provisions in question are Article 17(4),³ concerning derogations from the reference period for calculating the average maximum weekly working time, and Article 18(1)(b)(i),⁴ concerning the option not to apply the maximum weekly

¹ Communication from the Commission to the Council, the European Parliament, the European Economic and Social Committee and the Committee of the Regions concerning the re-exam of Directive 93/104/EC concerning certain aspects of the organization of working time, Document COM(2003) 843 final.

² Council Directive 93/104/EC of 23 November 1993 concerning certain aspects of the organization of working time, OJ L 307, 13.12.1993, p. 18.

³ *The option to derogate from point 2 of Article 16, provided in paragraph 2, points 2.1. and 2.2. and in paragraph 3 of this Article, may not result in the establishment of a reference period exceeding six months.*

However, Member States shall have the option, subject to compliance with the general principles relating to the protection of the safety and health of workers, of allowing, for objective or technical reasons or reasons concerning the organization of work, collective agreements or agreements concluded between the two sides of industry to set reference periods in no event exceeding 12 months. Before the expiry of a period of seven years from the date referred to in Article 18 (1) (a), the Council shall, on the basis of a Commission proposal accompanied by an appraisal report, re-examine the provisions of this paragraph and decide what action to take.

⁴ *However, a Member State shall have the option not to apply Article 6, while respecting the general principles of the protection of the safety and health of workers, and provided it takes the necessary measures to ensure that:*

- no employer requires a worker to work more than 48 hours over a seven-day period, calculated as an average for the reference period referred to in point 2 of Article 16, unless he has first obtained the worker's agreement to perform such work,*
- no worker is subjected to any detriment by his employer because he is not willing to give his agreement to perform such work,*
- the employer keeps up-to-date records of all workers who carry out such work,*
- the records are placed at the disposal of the competent authorities, which may, for reasons connected*

working time if the worker gives his individual agreement to carry out such work (hereinafter referred to as the "opt-out").

In addition to these two clauses subject to review, the Communication also dealt with two other points: the consequences of the judgments of the Court of Justice in the SIMAP⁵ and Jaeger⁶ cases and the measures to improve compatibility between work and family life.

The Commission therefore asked the social partners to give their views on the need to review the current text of the Directive, or adopt other initiatives, not necessarily legislative.

The Communication analysed in detail the above points and there is no need to repeat this analysis in the present document.

The Commission considers it essential to adopt a global approach to the four areas identified in the Communication, in order to find a balanced solution and to ensure that the criteria set out are met.

The four areas are as follows:

- reference periods;
- the interpretation by the Court of Justice of the concept of working time in the SIMAP and Jaeger cases;
- the conditions for implementing Article 18(1)(b)(i) (the opt-out);
- and finally, the measures intended to improve compatibility between work and family life.

with the safety and/or health of workers, prohibit or restrict the possibility of exceeding the maximum weekly working hours,

- the employer provides the competent authorities at their request with information on cases in which agreement has been given by workers to perform work exceeding 48 hours over a period of seven days, calculated as an average for the reference period referred to in point 2 of Article 16.

Before the expiry of a period of seven years from the date referred to in (a), the Council shall, on the basis of a Commission proposal accompanied by an appraisal report, re-examine the provisions of this point (i) and decide on what action to take.

⁵ Judgment of the Court of 3 October 2000 in case C-303/98, Sindicato de Medicos de Asistencia Pública (Simap) v Conselleria de Sanidad y Consumo de la Generalidad Valenciana, European Court reports 2000, p. I-07963.

⁶ Judgment of the Court of 9 September 2003 in case C-151/02, Landeshauptstadt Kiel v Norbert Jaeger, not yet published.

2. REPLIES TO THE CONSULTATION

2.1. Replies of the social partners at Community level within the framework of the first consultation

The Commission has closely examined the views expressed by the social partners at Community level within the framework of the first consultation, which has just ended.

Firstly, there is a consensus on the question as to whether the Directive should be amended. The organisations representing the employers, as well as those representing the workers, wish to see the current text of the Directive amended.

As to the content of any amendments and, more specifically, the five points on which the Commission asked for opinions, the organisations representing workers and employers have differing points of view.

The opinion of the social partners on the five points in question may be summarised as follows:

General cross-industry organisations

Organisations representing workers

The **European Trade Union Confederation** (ETUC) maintains that extending the reference period to 12 months should continue to be possible only through collective bargaining, considers that the opt-out is in flagrant contradiction to the objectives and provisions of the Directive, and with the fundamental principles of the protection of health and safety, and, with regard to the impact of the SIMAP/Jaeger rulings, maintains that the Commission should provide a lasting and long-term response which is fully in line with the fundamental principles of the Directive. The ETUC calls for a more elaborate framework for discussing the introduction of provisions to improve flexibility and choice for workers with regard to adapting working time to their needs. According to the ETUC, the Commission should promote the social dialogue as the main means of providing lasting and long-term solutions at national, sectoral and cross-industry level.

Organisations representing employers

The **Union of Industrial and Employers' Confederations of Europe** (UNICE) calls for a general reference period of 12 months, with the possibility of extending it beyond 12 months by collective agreement. With regard to the opt-out, UNICE wishes to maintain it and would like the amended Directive to enable the opt-out to be agreed collectively. With regard to the definition of the concept of working time following the SIMAP and Jaeger judgments, UNICE considers that only periods of actual work during time spent on call should qualify as working time. With regard to reconciling work and family, UNICE considers that this objective would be better met through non-legislative measures and that it should not be dealt with in the framework of this "health and safety" directive.

The **European Centre of Enterprises with Public Participation (CEEP)**, supports the extension of the reference period to 12 months through legislation, with the possibility for the social partners to set a longer period.

With regard to the opt-out, the CEEP believes that the prevention and abolition of abuses should take precedence over the deletion of the opt-out clause.

On the definition of working time following the SIMAP/Jaeger judgments, the CEEP calls on the Commission to introduce urgent measures to amend the working time Directive in order to define the concept of working time in such a way as to enable the inclusion of a concept of "inactive period" in place of the binary "work/non-work" concept introduced by the SIMAP/Jaeger judgments.

Finally, with regard to the question of compatibility between work and family life, the CEEP stresses that flexibility of working time is an important element in the problem of reconciling work and family life, but is not related, strictly speaking, to the review of the working time Directive.

Specific organisations

Eurochambres is asking for the reference period to be extended to one year, in order to be able to meet the needs of a large number of companies subject to heavy fluctuating demand.

With regard to the definition of working time, Eurochambres asks that time spent on call should not be taken into account when calculating the 48-hour maximum weekly limit, which would have the advantage of not calling the Court's judgments into question.

On the opt-out, Eurochambres notes the importance of keeping it and stresses that any abuse in a Member State should not lead to its abolition.

Cross-industry organisations representing certain categories of workers or undertakings

The **Council of European Professional and Managerial Staff** (Eurocadres) considers that current regulations governing reference periods should remain unchanged. With regard to the effects of the SIMAP/Jaeger rulings, Eurocadres favours an in-depth evaluation carried out with the social partners, with specific situations, such as the health sector, being discussed at social partner level. With regard to the opt-out, Eurocadres calls for its abolition, and for amending the Directive to introduce a system of "time credit" in case the time limits are exceeded. Finally, Eurocadres regrets the fact that consultation does not cover the derogation laid down in Article 17(1), which, in their views, lead to excessive workloads for managerial staff.

The **European Managers' Confederation (CEC)** suggests introducing a more flexible definition of the concept of "working time", so as to take account of the diversity of occupational situations. In particular, managerial staff is increasingly called upon to be available outside normal working hours. With regard to the opt-out, the CEC considers that this provision should not be applied excessively with a view to avoiding application of the rules of the Directive. It maintains that use of the opt-

out should be determined by collective bargaining at national, sectoral or undertaking level. With regard to compatibility between working and family life, the CEC considers that collective bargaining should be responsible for finding solutions adapted to different situations. In its opinion, the Commission should encourage the social partners to negotiate on this question.

The **European Association of Craft, Small and Medium-sized Enterprises (UEAPME)** considers that the reference period should be set at 12 months as a general rule, with the possibility of extension by collective agreement. With regard to the definition of working time, UEAPME notes that the effects of the SIMAP/Jaeger rulings are felt in many other sectors apart from the health sector, and maintains that time spent on call should not be included in the 48-hour weekly limit. With regard to the opt-out, UEAPME considers that it should be maintained and supplemented by the possibility of derogation by collective agreement. Finally, with regard to reconciling working and family life, UEAPME considers that this has no place in a directive whose legal basis is the protection of the health and safety of workers.

Sectoral employers' organisations

The **Comité Européen des Fabricants de Sucre (CEFS)** would like to see the introduction of a general reference period, equivalent to 12 months, for the calculation of weekly working time, as this would enable an optimal balance to be struck between periods in season and periods out of season. The CEFS takes the view that the opt-out must be maintained and contends that only "time actually worked" (as opposed to "possible rest period in the workplace" should be considered as working time.

The **European Construction Industry Federation (FIEC)** is of the opinion that the individual opt-out is absolutely essential for the sector. However, the FIEC takes the view that the application of the opt-out must be strictly limited so that it remains an exception to the rule. Concerning the reference period, the FIEC considers that, notwithstanding the solution found in respect of the opt-out, this should be set at one year, with the possibility of extending this by collective agreement. Finally, the FIEC considers new provisions concerning the reconciliation of work and family life to be out of place in this text, given its legal basis.

The **Groupe Employeurs des Organisations Professionnelles Agricoles de la CE (GEOPA)** calls for keeping the provisions of the Directive concerning reference periods which give the Member States the possibility to authorise the social partners to set a reference period of 12 months. Concerning the opt-out, GEOPA believes that it is not normal to give up a protective provision arising out of a European Directive. Under certain circumstances, however, this appears to be the only way for employers to benefit from the same level of flexibility. The GEOPA contends that if the opt-out were to be abolished it would be absolutely essential to enable the Member States to set a reference period of up to one year. Concerning the definition of working time, the GEOPA strongly believes that for certain groups of workers the Member States should be able to define those periods of presence in the workplace that are not considered as working time.

The organisation **Hotels, Restaurants and Cafés in Europe (HOTREC)** supports UNICE's position and did not wish to make any further comment.

The **Performing Arts Employers' Associations League Europe** (PEARLE*) is in favour of the reference period being set at 12 months as a general rule. Concerning the opt-out, PEARLE* would like to see it retained and considers that abolishing it would have serious consequences in the United Kingdom. An opt-out established by collective agreement would be welcomed by their sector in the other Member States but appears to be too restrictive for employers in the sector in the United Kingdom. Regarding the definition of working time, PEARLE* could support a definition that considers as "working time" the period during which physical presence in the workplace is required. Finally, issues of compatibility between working life and family life should be dealt with at national level.

The **Retail, Wholesale and International Trade Representation to the EU** (EUROCOMMERCE) considers that the revision of the Directive must be geared towards adapting it to current needs and realities and should, as a rule, enable the establishment of a one year reference period, with the possibility of going up to two years by collective agreement, retain the individual opt-out, find a solution to the consequences of the SIMAP/Jaeger rulings that is not limited to the health services sector, and not extend the scope of the Directive to matters such as compatibility between working life and family life, which need to be dealt with at national level.

European Trade Union Federations

The **European Mine, Chemical and Energy Workers Federation** (EMCEF) considers that the Commission should make a clear proposal concerning the exemption provided for in Article 17(1), which is in practice an opt-out for middle managers and experts, limiting the widespread use of this provision.

The **European Transport Workers' Federation** (ETF) supports the ETUC position, particularly as regards the call to abolish the opt-out, and repeats its call for sectoral social dialogue for the inland waterway navigation sector.

The **European Federation of Public Service Unions** (EPSU) is of the opinion that the existing reference periods should be maintained and that any derogation must be the subject of a collective agreement. Concerning the opt-out, the EPSU recommends that it be abolished. Regarding the definition of working time, the EPSU strongly objects to any revision based on economical or capacity related criteria. It considers that all parties must accept the judgements of the Court and make efforts to implement them adequately. The EPSU stresses that the existence of the opt-out and the derogations provided for in Article 17 constitute a major obstacle to the compatibility of working and family life. It calls on the Commission to encourage sectoral social dialogue in the hospital sector.

Union Network International (UNI-Europa) supports the reduction of long working hours, the abolition of the opt-out and the recognition of time on-call as working time. UNI-Europa argues that greater flexibility should only be introduced through collective bargaining.

The **European Metalworkers' Federation** (EMF) calls for the immediate abolition of the opt-out, adequate and balanced solutions to the consequences of the SIMAP/Jaeger rulings and a more solid framework for discussing the introduction of measures intended to better adapt working time to workers' needs. Finally, the EMF

argues that flexibility in the organisation of working time should be based on collective bargaining and calls for a review of the opportunity and necessity for the derogations provided for in Article 17(1).

2.2. Reactions from the European institutions to which the Communication was addressed

2.2.1. European Parliament

On 11 February 2004 the European Parliament adopted, by a large majority, a resolution on the organisation of working time⁷.

In this resolution, the Parliament:

- calls on the Council and the Commission to consider an amended directive as soon as possible;
- calls on the Commission to advance the formal process of social partner discussion and calls on the Commission to consider positively, when responding to the first stage of the consultation process, the legislative process provided for in Article 139 of the Treaty;
- requests that any initiative in this field be based on the premise that the health and safety of workers must take precedence but should be looked at alongside the reconciliation of family and professional life and any considerations of an economic nature;
- 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;
- calls for the revision, with a view to the phasing-out, as soon as possible, of the individual opt-out provided for in Article 18(1)(b)(i); in the meantime, calls on the Commission to identify practical ways of tackling potential or actual abuses of the opt-out provision including seeking views on how best to strengthen the voluntary nature of the opt-out.

2.2.2. Council

The Council had an informal discussion on the review of Directive 93/104/EC on the 4 March 2004.

2.2.3. Economic and Social Committee

The Economic and Social Committee is due to adopt its opinion in June 2004.

⁷ European Parliament resolution on the organisation of working time (Amendment of Directive 93/104/EC) (2003/2165(INI)) – Document A5-0026/2004.

3. COMMISSION ANALYSIS

The first consultation document analysed in detail the two provisions under review, and more specifically their implementation at national level, and the two other issues to be dealt with by the Commission during the course of this exercise.

First of all, the Commission shares the very broad consensus emerging from the social partners in respect on the need to modify the text of the Directive as it stands.

The review should aim at promoting the fundamental objective of the Directive, which is to protect workers' health and safety. Any initiative in this field should also be coherent with the Social Policy Agenda and the Lisbon Strategy, as well as with the conclusions of the Wim Kok report regarding the need to promote competitiveness.

The Commission would like to stress the need to adopt a global and consistent approach providing, for each issue, a solution that takes account of totality of the amendments. In the Commission's view, such an approach could enable a new balance to be struck between the protection of health and safety on the one hand and the need for flexibility in the organisation of working time on the other. The Commission thus highlights the global and interdependent character of the amendments proposed, which must be interpreted in this context.

3.1. Exemptions from the reference period

Directive 93/104/EC does not set an absolute limit on weekly working time, but an average to be calculated over a period of four months.

To enable increased flexibility, derogations from this reference period are permitted. The Member States may therefore extend the reference period to six months in the cases listed in Article 17(1) and (2). Moreover, the reference periods may be extended to one year by collective agreement or agreement reached between the social partners.

The objective of the reference period and of the possibility of extending it is to allow undertakings greater flexibility in the organisation of working time. Recital 17 of the Directive thus states that "in view of the questions likely to be raised by the organisation of working time within an undertaking, it appears desirable to provide for flexibility in the application of certain provisions of this directive, whilst ensuring compliance with the principles of protecting the safety and health of workers".

This recital clearly shows 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. The reference period is only one side of the coin, intended to provide greater flexibility, in the interest of both the employers and the employees.

In the Commission's opinion, the Directive should better reflect the existing trend, discernible in legislation and agreements at national level (see Chapter 1 of the Communication of 30 December 2003) towards extending the reference period for the calculation of maximum weekly working time.

3.2. Article 18(1)(b)(i) – the opt-out

Under certain conditions, this Article allows a Member State to introduce the possibility of an individual derogation ('opt-out') to: the maximum duration of weekly working time. This is, therefore, an exception to one of the basic rules of the Directive, subject to review before seven years have passed since the deadline for transposition by Member States, in other words before 23 November 2003.

The Commission Communication contained an in-depth analysis of the application of this Article in the only Member State that has put it into general use.

The Commission will restrict itself here to some brief comments, referring for the rest to the Communication.

A distinction should be made between the analysis of this provision *per se* and the evaluation of the only concrete example of its use.

Regarding the first point, it should be noted that the Community legislator has accompanied this exception with a series of conditions intended, firstly, to guarantee freedom of choice for the worker and, secondly, to ensure the possibility to prohibit or restrict any exceeding of the maximum weekly working time.

The Commission considers it imperative that these conditions be respected if use is to be made of this option. Regarding the concrete example of the application of this opt-out, it should be noted that the Commission has certain reservations regarding both the national provisions implementing this Article and its current use in practice.

The Commission considers it therefore necessary to amend the provisions of the Directive with the objective to raise the level of protection for workers compared to the present system, in the light of the experience gained in practice and the criticisms and comments made by interested parties.

The Commission strongly encourages social partners to engage into negotiations. If they decide not to do so, the Commission envisages to propose amendments based on one or more of the following approaches:

- tighten the conditions of application of the individual opt out provided in Article 18.1 (b) (i) in order to strengthen its voluntary nature and raise the level of protection for workers. Such conditions could for instance include the separation in time between the individual consent and the signature of the employment contract. They could also include an obligation to review regularly the individual consent given by the employee as well as a cap on the maximum number of hours permitted.
- permit exemptions from the maximum weekly working time only through collective agreements or agreements between the social partners.
- provide that derogations from Article 6(2) would only be possible when authorised by means of collective agreements or agreements between social partners. In undertakings without such applicable agreement and no representation of the employees, the individual opt out under tighter conditions would remain applicable.

- inspired by the European Parliament's resolution on the organisation of working time, revise the individual opt-out, with a view to its phasing-out, as soon as possible, and to identify, in the meantime, practical ways of tackling abuses.

3.3. Definition of working time

The Directive contains two mutually exclusive definitions, that of “working time” and that of “rest period”. According to the logic of the Directive, there are no intermediate or combined categories. All periods are considered to be either working time or resting period.

The Court’s judgments in the SIMAP and Jaeger cases, which were the subject of the first consultation paper, must be seen in the light of this binary system.

The Commission therefore wonders whether it is not this binary system itself which is at the root of the problem, and whether a new category should be added including characteristics of both the existing categories.

The Commission strongly encourages the European social partners to reach agreement on the definition of a third category of time, i.e. inactive part of on-call time. Failing that, the Commission will propose the insertion of such a definition into the Directive and clarifications regarding compensatory rest.

3.4. Reconciling work and family life

The need for a balance between work and family life is an all-embracing issue and cannot be restricted solely to “labour law”, let alone the “working time” issue.

However, the possibility of having a personal say in working conditions, and particularly working time, undeniably contributes not only to a better working environment but also to meeting the needs of workers better, particularly those with family responsibilities.

This being the case, while Directive 93/104/EC may not be the right instrument for dealing with the question of compatibility between work and family life in all its aspects, more could no doubt be done to encourage this objective in the text of the Directive.

3.5. Conclusions

The first conclusion to be drawn from the current phase of consultation is the need to revise the Directive. All the contributions from the social partners at Community level are in favour of such revision, and the Commission shares this view.

The main challenge in revising the Directive is finding the right balance between the fundamental objective of protecting health and safety while giving European companies the flexibility needed to keep pace with changes in the economic environment.

This is not possible without a clear overall approach and without a set of coherent and balanced proposals on the different questions raised.

The current text already gives the social partners a certain room for manoeuvre. The Commission considers that the role of social partners should be enhanced.

4. AIMS, PRINCIPLES AND CONTENT OF THE COMMUNITY INITIATIVE ENVISAGED

4.1. Aims

The Commission clearly indicated the criteria to be met by any future proposal in this area in its first consultation paper. The approach envisaged in that paper was as follows:

- ensure a high standard of protection of workers' health and safety with regard to working time;
- give companies and Member States greater flexibility in managing working time;
- allow greater compatibility between work and family life;
- avoid imposing unreasonable constraints on companies, in particular SMEs.

The Commission believes that a coherent and balanced package of measures is needed to achieve these, often conflicting, objectives. The required balance between protection and flexibility cannot be achieved by a few isolated amendments to specific aspects of the Directive, but only on the basis of a clear overview.

Over ten years on from adoption of Directive 93/104/EC, the Commission considers that Community legislation on organisation of working time is in need of modernisation to accommodate the new circumstances and requirements of both employers and workers. In the Commission's view, the social partners at both European and national levels, should play a fundamental role in bringing the legislation up to date.

The role of the social partners in the light of the fundamental challenges facing Europe, in particular that of modernising work organisation, was emphasised by the Lisbon strategy. Negotiations between the social partners are one of the best ways of making progress in the field of modernisation and management of change.

In its Communication "The European social dialogue, a force for innovation and change"⁸, the Commission stated that better governance of an enlarged Union relies on the involvement of all actors in decision-making and in the implementation process, and called for the social dialogue to make a greater contribution to European governance.

In this context, the Commission would encourage the social partners to initiate the process provided for under Article 139 of the EC Treaty.

⁸ Document COM(2002) 341 final.

4.2. Approach

The Commission is convinced that a solution meeting all the above criteria can only be reached through a global approach to the various points raised in its Communication.

Such an approach would succeed in combining the necessary flexibility with adequate guarantees of worker health and safety. It would also have the advantage of greater adaptability to the situation on the ground, which can vary enormously between sectors or even between companies.

If the social partners do not initiate the process provided for under Article 139 EC, the Commission is envisaging 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.

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• 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.

5. QUESTIONS TO THE SOCIAL PARTNERS

The Commission requests 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.

The Commission would ask 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.