

The EU Working Time Directive

* by Jonatan Henriksson

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While some analysts claim that people today in Europe value leisure time more than they did in the past, the hitch is that, excluding those lucky persons who either inherit or win on lottery, wealth generation comes from work. What is true for individuals is also true for society at large. The total amount of work hours in a society is an important determinant of economic success, which goes a long way to explain the interest economists take in variables such as labour market participation and unemployment rates. Also working time – the amount of hours during which workers actually perform work during a given period, whether a week or a year – is a crucial factor in this regard. As Europe aims to catch up with the US in terms of economic growth – the so-called Lisbon strategy – working time is arguably one of the key areas where improvements are necessary. At present, the US out-competes Europe on working time.

During autumn 2004, and perhaps beyond, working time will be an especially hot potato at the EU level. The Commission adopted on 22 September a proposal for revision of the (in-) famous Working Time Directive. Negotiations in the Council will begin very soon as the issue is a priority for the Dutch Presidency. Originally agreed in 1993, the Directive provides for limits on the amount of hours people can work per day and per week. It also sets down minimum periods of rest on a daily, weekly, and annual basis.

Recognised by everybody, including the Commission, as a complex text, the Directive represents a corner-stone in EU social affairs legislation. It may, however, be questioned whether regulation of working time has any place at all at European level.

First, what purpose, if any, does the Directive serve? I can think of three possible answers. Officially, it is said to be a health and safety text. The Directive would guarantee a social right of workers not to work more than health and safety considerations permit.

An alternative answer is that the Directive is an expression of the “European social model”. As such, it would represent a specific European consensus on the organisation of work: the principle of limited working time; the importance of collective bargaining; the right to an annual paid holiday. On this reading, its purpose is primarily symbolic.

E E I Opinion Paper No III

24 September, 2004

Finally, one might consider the Directive from the point of view of the Internal Market. The setting of minimum standards with regard to working time would provide a safeguard against companies' re-localising to countries with a low degree of working time regulation, and against an ensuing competitive spiral of de-regulation undermining the social rights of workers. Some would say such competitive pressures increased with the entry of the new Member States on 1 May 2004, and need to be held back.

The Directive is, however, unsuccessful in fulfilling any of these objectives. Its *raison d'être* is therefore difficult to justify.

Here is why.

Let us consider a key provision in the Directive: the individual opt-out. Introduced at the insistence of the UK government, it enables the Member States, in their implementing regulations, to give individual workers the right to opt-out from the 48h ceiling on weekly working time set by the Directive. A worker who has signed an opt-out agreement with his employer can thus work an unlimited number of hours per week as far as the Directive is concerned. So far, only the UK, Malta, and Cyprus have made use of the opt-out provision in a general way.

One cannot avoid the conclusion that the existence of the opt-out contradicts the idea of the Directive as a health and safety text. If health and safety of workers is protected by a limited working week, which, after all, is the fundamental logic of the Directive, how can this fact be reconciled with the opt-out?

The opt-out also undermines the notion of a European social model. Clearly, there can be no consensus on such a model as some countries, by having recourse to the opt-out, demonstrate in practice that they are unable to stick even to the minimum standards defined in the Directive.

Nor does the opt-out fit with the Internal Market reading of the Directive. As long as the option to apply this provision remains open to Member States, there can be no guarantees against competitive de-regulation.

Is the solution, then, as the trade unions say, to abolish the opt-out? I do not agree. The opt-out is only the external symptom of a greater misconception. It is rather the idea of a Working Time Directive at European level as such which needs to be rethought.

This becomes apparent if one considers the close link between the opt-out and the limits on working time provided for in the Directive. At present the limit is 48h per week on average, calculated over four months (one year with trade union consent). Were these limits less restrictive, the opt-out would arguably not be needed, as the necessary flexibility would be there anyway. However, on the other hand, if the limits were loosened further,

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the Directive would be even less able than today to fulfill any of its purported purpose(s).

We are apparently confronted with a sort of "Catch 22" dilemma. Either way the Directive is revised, its relevance may be questioned. The only

way out, it would seem, is to reconsider the Directive altogether. This is politically unrealistic, sure, but is certainly the solution most in line both

with the principle of subsidiarity and the Lisbon Strategy. The EU should not regulate working time; it is better left to the Member States. Any attempt to ignore this advice could only, at best, result in a watered-down compromise with little real value either for companies or workers. At worst, by adding red tape, it could stifle the EU's efforts of becoming the most competitive player in the world market.

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