Social/employment gains at risk: the revision of the Working Time Directive

The current Working Time Directive falls well short of workers' expectations. But the European Commission's proposal for its revision will actually make the situation worse. That would set a very dangerous precedent of forcing the standards of worker protection down.

A real need for harmonization

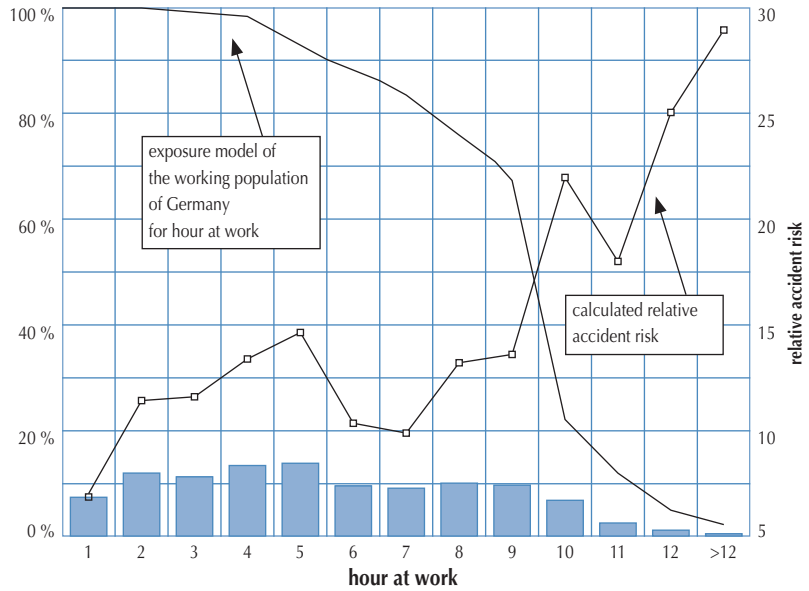
There are big differences between European Union countries as regards working hours. In the United Kingdom, the very widespread practice of individual exemptions from the maximum weekly working hours rules effectively forces people to work very long hours. That is damaging to their health and safety. The British government reports that 3,742,000 workers work longer than a 48-hour week. That amounts to approximately 20% of all full-time employees. When questioned, 69% of these workers said they would like to work shorter hours. This dissatisfaction with working over-long hours is shared by 56% of all full-time workers[1].

This is not a problem unique to the United Kingdom. The Dublin Foundation's survey on working conditions found that, in the Europe of Fifteen, 14% of workers were working more than 45 hours per week in 2000, and approximately one in three workers had long working days (more than 10 hours per day). Average working hours in the new Member States are above those for the Europe of Fifteen.

Length of hours is not the only relevant factor in the working time-health equation. Daily working hours cannot be ignored. Research, for instance, has found that work accident rates rise significantly after an eight-hour working day, and exponentially from the ninth working hour onwards[2] (see figure). How well the hours of work fit in with the individual's other non-work activities is also a major consideration. Some non-standard working hours (night work, week-end work) can reduce social life, and interfere with work-life balance. These work schedules are also incompatible with human beings' biorhythms. Night work in particular is implicated in sleep and digestive disorders, cardiac diseases, etc. Where women are concerned, various epidemiological studies point to a possible causal link between disrupted biorhythms as a result of night work, and the development of breast cancer[3].

Having regular, predictable work schedules is also important. Frequently changing work schedules, switching from spells of long-hours to short-hours working and, especially, not knowing work schedules for the weeks and months ahead, have calami-

Exposure model of the working population, accident frequencies, and accident risk by hour at work (■ accidents in %)



Source: *Scand J Work Environ Health* 1998, vol 24, suppl 3

[1] Source for British data: *Working Time – Widening the Debate*, Department for Trade and Industry, London, June 2004. Consultable on http://www.dti.gov.uk/consultations/files/publication-1252.pdf.

[2] Hänecke *et al.*, Accident risk as a function of hour at work and time of day as determined from accident data and exposure models for the German working population, *Scandinavian Journal of Work Environment and Health*, 1998, 24 (suppl. 3), p. 43-48.

[3] Cf. Swerdlow, A, *Shift work and breast cancer: a critical review of the epidemiological evidence*, London, HSE, 2003.

tous effects on health. Such situations are becoming increasingly common as a result of flexible working time policies that make people an adjunct to immediate production needs. So, periods in which an employer requires a worker to be available cannot be equated with free time in terms of the quality of rest, organization of domestic duties, choice of leisure pursuits, etc. Among the worst forms of flexibility are "on-call" or "part-time zero-hours" contracts. These allow workers to be called out at any time to work for their employer without any guaranteed minimum working hours. A recent judgement of the European Court of Justice has legitimized this kind of practice[4].

There is a clear link between work hours flexibility and work intensification. By allowing employers to operate a wide spread of working hours, legislation lets them treat workers like any other form of "just-in-time" managed commodity by micro-varying the staff at work such as to achieve continuously optimized labour force use. Recovery and relay times dwindle and disappear and, with them, irreplaceable opportunities for handing on information, discussion and informal management of problems and contingencies. This adds to work accidents and much other damage to physical and mental health.

The 1993 Directive: a stopgap fudge

The 1993 Working Time Directive included a few minimal gestures towards improving health and safety (see box). It was probably the only Community Directive to give a bigger place to a long and complicated series of flexibility, opt-out and exception clauses (articles 16 to 18) than to substantive measures. In many ways, it was not unlike Penelope's Web - everything put together by the legislation to ensure health and safety could be unpicked later by States or employers. Some of the opt-outs and exceptions had been provisionally included at the request of the United Kingdom, on the understanding that a more coherent directive would be put forward after a seven year transitional period. The political agreement reached in Council in 1993 was built on a shoddy compromise won through a promise to improve the situation within a reasonable time[5].

The most appalling feature of the Directive was to introduce a system of individual exemptions whereby employers could "negotiate" a worker's agreement to exceed the 48-hour maximum week. It allows workers' jobs and pay to be held to ransom in order to deprive million of people of a guarantee which is essential to preserving life and health. Individual opt-outs have been widely applied in the United Kingdom, where they affect about a third of full-time workers. Two of the new Member States have introduced similar rules (Cyprus and Malta), while other states have rules that permit individual opt-outs in specific sectors (Luxembourg, France, Germany and Spain).

The Directive was beset by controversy from the very start. The United Kingdom tried to have it declared void by the Court of Justice, but failed[6]. A series of questions for a preliminary ruling gave answers to problems of how different provisions should be interpreted and penalized failures to transpose it properly. Although well aware of the countless abuses that individual opt-outs had led to in the United Kingdom, the Commission failed to bring any irregularity proceedings whatsoever against it.

The only significant advance was the gradual extension of the scope of the Community provisions to jobs and sectors excluded from the original Directive[7].

The Commission's totally unacceptable proposal!

In September 2004, the Commission put forward proposals for a revision of the Directive.

Companies are allowed more flexibility in regard to the maximum 48 hour weekly working time. The reference period used to calculate weekly working time can be increased to a year.

The proposal still allows individual derogations (or "opt-outs") for employers, but with some limitations. They must be in writing and cannot be given at the beginning of the employment relationship. In some cases, but not all, opt-outs will require prior collective agreements. The proposal is already so clear that such abuses will take place, that it feels com-

Key provisions of the 1993 Directive

- Maximum (average) weekly working time: 48 hours.
- Daily rest: 11 consecutive hours (any time which is not worked is regarded as rest time, which may therefore include time spent travelling, doing unpaid housework, etc.).
- Weekly rest: an uninterrupted period of 24 hours once a week.
- Paid leave: at least four weeks a year.
- A compulsory break (of unspecified duration) in any working day longer than six hours.
- Special rules for night work, including health assessment in particular.

These measures are offset by a string of provisions that allow longer periods of calculation to be used (e.g., the 48-hour maximum is not an absolute limit, and much longer work weeks can be set provided the average 48 hours is complied with over a period of not more than 4 months). There is a long list of exemptions and derogations.

[4] Wippel v Peek & Cloppenburg, judgement of 12 October 2004, case C-313/02.

[5] Regrettably, occupational health abounds in unsatisfactory compromises which are described as provisional but never seem to get revised (like exposure limits for lead dating from 1983, or the Protection of Pregnant Workers Directive 1992).

[6] Judgement of 12 November 1996, commented on in *TUTB Newsletter*, No. 5, February 1997, p. 2-5.

[7] The various amendments to the 1993 Directive were codified in Directive 2003/88 of 4 November 2003 (*OJ* L 299 of 18 November 2003).

pelled to set a second maximum weekly working time of 65 hours. This is not a mandatory maximum: opt-outs will be possible by employer-worker agreements or collective agreements.

The proposal contains a definition of "on-call work", which allows employees to be forced to be present in the workplace at the employer's disposal, without having to count that time as working time. This provision violates international labour standards as laid down by the International Labour Organization as far back as 1930! ILO Hours of Work (Commerce and Offices) Convention No. 30 provides that "the term hours of work means the time during which the persons employed are at the disposal of the employer[8]".

If a supermarket check-out operator has to be in the workplace from 9.00 am to 8.00 pm, but only actually performs work activities for 5½ hours of that time, the new proposals will mean that she can be said to have worked for only half the time that she actually has to spend in her workplace at her employer's disposal. Workers could end up shouldering the whole burden of irregular work organization stemming from customer demand or production flow.

The debate on working time is therefore a litmus test of the shape of Community social policy to come. The basic choice is between deregulation which will further widen social inequalities, or improved living and working conditions for everyone. That is why the European Trade Union Confederation is pressing for a rejection of the Commission's proposal for a revision in its present form[9]. ■

Laurent Vogel, TUTB Researcher
lvogel@etuc.org

The hospital sector: a shabby excuse

The Commission's pretext for revising the definition of working time is the specific difficulties encountered by the hospital sector as a result of Court of Justice case law which holds that on-call duty performed by a doctor when he is required to be physically present in the hospital forms part of working time. Such difficulties could be resolved without bringing the working time rules into question. Specific provisions could have made through collective agreements.

Also, the Commission's concern for hospital budgets underestimates the public health problems caused by overworked hospital staff. A recent American study shows that eliminating extended work shifts in intensive care units led to a substantial reduction in medical errors, especially non intercepted medical errors with the most serious adverse consequences on the health and life of patients. The study of 2,203 patient-days found that doctors committed 35.9% more serious medical errors during extended work shifts than during shorter work shifts, and 5.6 times more diagnostic errors.

Source: Landrigan *et al.*, Effect of Reducing Interns' Work Hours on Serious Medical Errors in Intensive Care Units, *The New England Journal of Medicine*, vol. 351, No. 18, 28 October 2004, p. 1838-1848. (The study defines extended work shifts as a work schedule of 24 hours or more.)

[8] This Convention No. 30 definition was broadly re-enacted in Hours of Work and Rest Periods (Road Transport) Convention No. 67 (1939).

[9] The ETUC position can be found at http://www.etuc.org/en > Press > Archives (press release of 22 September 2004).