

The Working Time Limit Opt-Out – A Test Case for the EU' Social Model

By Jonathan Henriksson*

The working time Directive stands out as one of the most controversial dossiers at EU level – and rightly so as its symbolic significance goes well beyond the substance of the legislative text itself. The Directive is a corner-stone of the Union's social acquis and raises a fundamental question about the nature of the EU. Is it a market primarily ensuring economic freedoms for enterprises and individuals or does it also protect labour standards and social rights on an equal basis?

The question is not rhetorical: as the May 29 French referendum on the EU Constitution demonstrated, the nature of the EU is open to questioning. The referendum might even come to be regarded, in retrospect, as the starting point for a political battle concerning “economic” *contra* “social” Europe. In this case, the outcome of the negotiations on the working time Directive could be a first indicator of the vision likely to finally prevail.

What are, then, the protracted discussions on working time about? Originally agreed in 1993, the Directive provides for a 48-hour working week. The 48-hour limit is not absolute, but an average calculated over 4 months (or up to 12 months if decided by collective agreement) in order to help enterprises deal with fluctuations in demand. At the same time, the Directive contains a provision whereby Member States may allow individual workers to work more than 48 hours per week on average: the so called “opt-out” clause.

In September 2004, the Commission proposed a revision of the Directive. Although the opt-out is not the only point of contention in this process of revision (there is also, for instance, the question of whether on-call time is to be considered as working time), it is certainly the most politicised. Alejandro Cercas, the Spanish MEP and *rapporteur* on the Directive, has argued that the opt-out is incompatible with the EU Charter of Fundamental Rights which upholds everybody's right to a limited working week. On 11 May, the European Parliament voted with 378 votes against 262 to abolish the opt-out. In the Council, the Member States are divided. Two blocking minorities have formed around the issue of the opt-out: one, led by the UK, fights for its retention while another, with France as the leading country, aims to get rid of it. Neither side seems inclined, for the moment, to accept a compromise.

22, rue de Pascale
B-1040 Brussels
Tel.: +32 2 233 3837
Fax: +32 2 230 9218

info@european-enterprise.org

www.european-enterprise.org

Finding a solution is not made any easier by the ideological turn which the debate has taken. If one truly believes, as Mr. Cercas, that the opt-out is in contradiction with a fundamental right, how could maintaining it ever be justified?

Yet there is good reason for taking a step back and considering the opt-out in the light of the two main *raisons d'être* of the Directive. The first one is social: the understanding that working time needs to be limited as long hours can be damaging to workers' health and safety. The second reason is economic: the need for minimum standards in order to prevent distortion of competition between Member States.

The validity of the "economic case" against the opt-out may be questioned. Does the opt-out really constitute an unfair advantage which would oblige Member States to deregulate in order to stay competitive? We should first keep in mind that the opt-out is optional and, therefore, by no means imposed on Member States. Presently, the UK is the only country making extensive use of the opt-out. The temptation of certain countries to introduce the opt-out in certain sectors is more linked to the jurisprudence of the Court regarding on-call time than to any competitive pressures resulting from the application of the opt-out on the British isles.

In addition, the opponents of the opt-out have paradoxically offered an effective argument as to why the opt-out might not be having a knock-on deregulatory effect in the internal market. By asserting, as UK socialist MEP Stephen Hughes, that long hours come at the expense of lower productivity, they would seem to concede, implicitly, that the opt-out could not give rise to an unfair competitive advantage. On this reading, countries which allow the opt-out are shooting themselves in the foot.

Rather than being a question of economic necessity, the opt-out is better understood as the result of specific political preferences in certain countries. The case for getting rid of the opt-out on internal market grounds thus appears weak.

On the other hand, there might be sound political reasons for keeping it in the Directive. Nobody contests that workers' health and safety does not benefit from working more than 48 hours per week. But should not the fate of the opt-out be determined in the domestic political process of each country? Could the EU legitimately – by abolishing the opt-out against the will of the UK government – in some sense substitute the UK's responsibility for its own workers' well-being? Would it not be preferable if the countries that dislike the opt-out led by example rather than imposed their vision?

The answer to these questions depends on one's idea of the EU. If one considers the EU first and foremostly as an economic space, with social rights guaranteed (or not) at national level, the suppression of the opt-out does not make sense. However, if one judges that the EU has a separate responsibility for workers' welfare, beyond and above that of

national governments, one might conclude that the EU has the moral authority to end the opt-out in spite of the UK government's view.

As the Council gathers on 2-3 June to discuss the working time Directive, and in particular the fate of the opt-out, employment ministers would do well to reflect about the wider implications of their decisions for the EU. Do they want to take us closer to the social Europe apparently desired by French voters, or would they rather stick to a model where social rights ultimately is a matter for national decision?

** Jonatan Henriksson is Policy Advisor at an industry association based in Brussels. The views expressed in this Opinion Paper are his own.*

This publication is an EEI Opinion. This publication does not necessarily represent the belief of the EEI and all data, references and opinions should be attributed to accredited authors. The EEI does not take an institutional position on individual issues.