COMMISSION OF THE EUROPEAN COMMUNITIES

Brussels, 15.1.2004
COM(2003) 843 final/2

Corrigendum:
Annule et remplace la page
de couverture (titre acte) du
document COM(2003) 843
du 30.12.2003.
Concerne les versions FR, EN.

COMMUNICATION FROM THE COMMISSION TO THE COUNCIL, THE EUROPEAN PARLIAMENT, THE EUROPEAN ECONOMIC AND SOCIAL COMMITTEE AND THE COMMITTEE OF THE REGIONS

and the social partners at Community level concerning the re-exam of Directive 93/104/EC concerning certain aspects of the organization of working time

TABLE OF CONTENTS

INTRODUCTION

Directive 93/104/EC[1] of 23 November 1993 lays down minimum requirements with regard to the organisation of working time, with the aim of ensuring a better level of safety and health protection for workers. In order to ensure the protection of workers against harmful effects for their health and safety resulting from working excessive hours, insufficient rest or irregular organisation of work, the Directive lays down in particular:

- a minimum rest period of 11 consecutive hours for each 24-hour period;
- a rest break where the working day is longer than six hours;
- a minimum rest period of one day per week;
- maximum weekly working hours of 48 hours on average, including overtime;
- four weeks of paid annual leave;
- an average of no more than eight hours of work at night in any 24-hour period.

The Member States were required to transpose the Directive by 23 November 1996 at the latest. Transposal has been concluded in all the Member States. Further information on the transposal of the Directive may be obtained by consulting the report published in 2000.[2]

The scope of Directive 93/104/EC excluded air, rail, road, sea, inland waterway and lake transport, sea fishing, other work at sea and doctors in training. On 22 June 2000, the European Parliament and the Council adopted Directive 2000/34/EC[3] amending Council Directive 93/104/EC concerning certain aspects of the organisation of working time to cover sectors and activities excluded from that Directive. Directive 2000/34/EC was to be transposed by the Member States by 1 August 2003 (1 August 2004 with regard to doctors in training).

The subject of this communication is, unless otherwise specified, Directive 93/104/EC as amended by Directive 2000/34/EC (hereinafter referred to as "the Directive"). In contrast, it does not cover the sectoral directives[4] covering working time as, under the terms of Article 14 of the Directive, this shall not apply *"where other Community instruments contain more specific requirements relating to the organisation of working time for certain occupations or occupational activities"*.

---

1 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.

2 Report from the Commission – State of Implementation of Council Directive 93/104/EC, document COM(2000) 787.

3 Directive 2000/34/EC of the European Parliament and of the Council of 22 June 2000 amending Council Directive 93/104/EC concerning certain aspects of the organisation of working time to cover sectors and activities excluded from that Directive, OJ L 195, 1.8.2000, p. 41.

4 Council Directive 1999/63/EC of 21 June 1999 concerning the Agreement on the organisation of working time of seafarers concluded by the European Community Shipowners' Association (ECSA) and the Federation of Transport Workers' Unions in the European Union (FST) - Annex: European Agreement on the organisation of working time of seafarers, OJ L 167, 2.7.1999, p. 33.

The Directive contains two provisions allowing for their review prior to the expiry of a seven-year period reckoned from the deadline for transposal by the Member States, i.e. prior to 23 November 2003. These provisions concern the derogations from the reference period for the application of Article 6 (maximum working week) and the option of not applying Article 6 if the worker agrees to carry out such work (generally known, and hereinafter referred to as, *opt-out*).

On the other hand, the interpretation of the provisions of the Directive by the Court of Justice in a number of preliminary rulings pursuant to Article 234 of the Treaty has had a profound impact on the concept of "working time" and, therefore, on essential provisions of the Directive. It is therefore necessary and opportune to analyse the effects of this case law, particularly the judgments in the *SIMAP*[5] and *Jaeger*[6] cases, concerning the qualification as working time of periods on call for doctors if they are required to be at the health centre.

The aim of this communication is therefore threefold.

Firstly, it aims to evaluate the application of the two provisions subject to review (the derogations from the reference periods – Article 17(4) – and the opt-out – Article 18(1)(b)(i).

Secondly, it aims to analyse the impact of the case law of the Court concerning the definition of working time and the qualification of time on call, as well as new developments aimed at improving compatibility between working and family life.

Finally, it aims to consult the European Parliament and the Council, but also the European Economic and Social Committee, the Committee of the Regions and the social partners, on a possible revision of the text.

With regard to the European social partners, this communication should be considered as the first phase of consultation pursuant to Article 138(2) of the Treaty. The Commission will of course subsequently consult the social partners on the content of all proposals envisaged (Article 138(3)).

Council Directive 2000/79/EC of 27 November 2000 concerning the European Agreement on the Organisation of Working Time of Mobile Workers in Civil Aviation concluded by the Association of European Airlines (AEA), the European Transport Workers' Federation (ETF), the European Cockpit Association (ECA), the European Regions Airline Association (ERA) and the International Air Carrier Association (IACA), OJ L 302, 1.12.2000, p. 57.
Directive 2002/15/EC of the European Parliament and of the Council of 11 March 2002 on the organisation of the working time of persons performing mobile road transport activities, OJ L 80, 23.3.2002, p. 35.

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 October 2003 in case C-151/02, request to the Court by the Landesarbeitsgericht Schleswig-Holstein (Germany) in the proceedings pending before that court between the Landeshauptstadt Kiel and Norbert *Jaeger*, not yet published.

PART ONE: ANALYSIS AND EVALUATION

1. DEROGATIONS FROM THE REFERENCE PERIODS

1.1. The legal provisions

The reference periods for the application of Articles 5 (weekly rest period) and 6 (maximum working week) are laid down in Article 16 of the Directive.

With regard to calculating the maximum working week (48 hours), Article 16(2) lays down a reference period of not more than four months. However, it is possible to derogate from Article 16 and the reference periods may therefore be extended in the cases provided for in the three paragraphs of Article 17.

This option to derogate from the reference period is nevertheless limited by Article 17(4) of the Directive. This is worded as follows:

"*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".

In summary, the reference period for calculating the 48 hours is set at four months. It may be set at six months in cases where it is possible to derogate from Article 16. By collective agreement it may be extended up to 12 months.

1.2. Current situation in the Member States

It is not always easy to analyse national legislation with regard to the transposal of Articles 6 and 16. In certain cases, the Member States, instead of limiting average working time during a given reference period, lay down an absolute daily and/or weekly limit while allowing overtime within daily, weekly, monthly or yearly limits.

Only in four Member States (Greece, Ireland, Portugal and the United Kingdom) does the legislation faithfully reproduce the provisions of the Directive, i.e. a reference period of four months for calculating the maximum average weekly working time and the possibility of laying down a longer reference period by collective agreement which, however, may not exceed 12 months.

In Denmark, reference periods are not laid down by law. Collective agreements lay down reference periods of between four and 12 months.

In Finland, the four-month reference period is applied only to the maximum amount of overtime. Collective agreements may lay down a one-year reference period for ordinary working time, and for limiting overtime.

In France, the 48-hour limit is absolute and not an average to be calculated over a reference period.

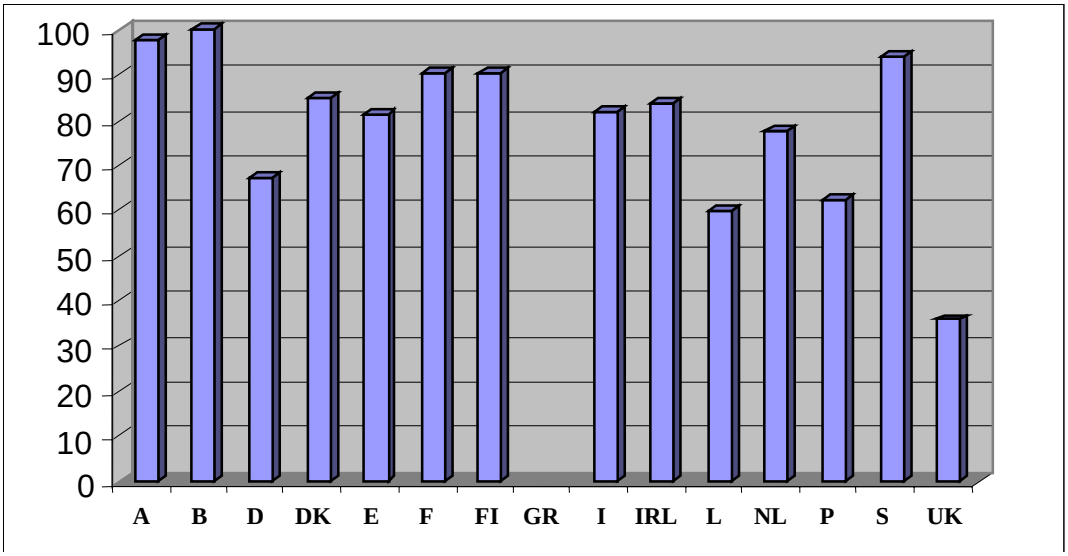
Other Member States have different reference periods, often of one year, but which apply only to the calculation of ordinary working time, which is considerably less than the 48 hours laid down in the Directive.

In general, there appears to be a tendency towards expressing working time as an annual figure.

1.3. Extending the reference period by collective agreement

According to Article 17(4) of the Directive, the reference period for calculating the 48 hours may only be extended to 12 months by collective agreement or other agreements concluded between the social partners. In practice, it would appear, however, that the Member States are not all in the same situation with regard to this possibility of extending the reference period. The coverage of collective bargaining – namely the proportion of workers whose pay and working conditions are laid down, at least to a certain extent, by collective agreements – varies considerably within the European Union, but is generally high, with the exception of the United Kingdom, as shown by the table below.

Rate of coverage of collective bargaining



Source: EIRO

Thus, although certain countries reach or approach 100% coverage, coverage in the United Kingdom is only 36%. The percentage of coverage would be even lower if only the private sector (22%) was taken into account.

Furthermore, it should be noted that the possibility of derogating from certain provisions of the Directive through agreements other than collective agreements concluded between social partners has not been widely used. Thus in the United Kingdom, for example, "workforce agreements" have hitherto been rarely used.[7]

2. THE USE OF ARTICLE 18(1)(B)(I)

2.1. The legal provisions

Article 18(1)(b)(i) of the Directive is worded as follows:

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 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.

This article therefore permits a Member State to make provision in its national legislation for the possibility for a worker to work, on average, more than 48 hours per week, provided that the conditions laid down in the various indents of this provision are complied with. These conditions include principally that the worker has given his individual agreement and the keeping of records.

The characteristic element in Article 18(1)(b)(i) is that the decision not to be covered by maximum weekly working time should be taken by the worker himself. The Court also referred to this principle in the SIMAP case, having held 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".*[8]

---

7 Barnard C. et al., *The use and necessity of Article 18.1(b)(i) of the Working Time Directive in the United Kingdom*, Final Report, December 2002., p. 114.

8 Case C-303/98, *SIMAP*, point 73.

The worker's agreement, however, must be free and informed. The worker may not be pressured into signing the agreement and may not suffer harm if he decides not to sign. As an exception to the Community scheme for the organisation of working time, the conditions established by the Directive for use of the opt-out must be met. The Member State wishing to make use of this option of not applying Article 6 must therefore take all measures necessary to ensure in particular that there is no suspicion surrounding the worker's decision. As the Advocate General, Jarabo Colomer, pointed out in his conclusions in the Pfeiffer case,[9] "*it should not be forgotten that the prime objective of the Directive is to ensure the health and safety of workers, who constitute the most vulnerable part of the employment relationship. In order specifically to prevent the employer from achieving, by subterfuge or through intimidation, a situation whereby the employee renounces the right for his weekly working time not to exceed the maximum laid down, this express manifestation of consent is surrounded by a series of guarantees to ensure that the interested party suffers no harm if he refuses to work more than 48 hours per week under the terms mentioned, that the employer keeps up-to-date records of employees carrying out such work where hours exceed the weekly maximum that the records in question are made available to the competent authorities, and that the entrepreneur provides to the competent authorities, at their request, information relating to agreements given by the workers*".

2.2. Current situation in the Member States

2.2.1. United Kingdom

2.2.1.1. National provisions

When transposing the Directive, only the United Kingdom made use of this possibility of not applying Article 6. Article 4(1) of the *Working Time Regulations*[10] included the 48 hours limit, but subject to the exception provided for by Article 5(1), which laid down that:

"The limit specified in regulation 4(1) shall not apply in relation to a worker who has agreed with his employer in writing that it should not apply in his case, provided that the employer complies with the requirements of paragraph (4)".

The conditions laid down in the various indents of Article 18(1)(b)(i) were transposed in Article 5(4), which reads:

The requirements referred to in paragraph (1) are that the employer:

(a) maintains up-to-date records which -

(i) identify each of the workers whom he employs who has agreed that the limit specified in regulation 4(1) should not apply in his case;

(ii) set out any terms on which the worker agreed that the limit should not apply; and

(iii) specify the number of hours worked by him for the employer during each reference period since the agreement came into effect (excluding any period which ended more than two years before the most recent entry in the records);

---

9 Conclusions of the Advocate General Mr Ruiz-Jarabo Colomer, presented on 6 May 2003, in joint cases C-397/01–C-403/01, Bernhard Pfeiffer et al v Deutsches Rotes Kreuz Kreisverband Waldshut eV.

10 *Working Time Regulations* (WTR) 1998, SI 1998/1833.

(b) permits any inspector appointed by the Health and Safety Executive or any other authority which is responsible under regulation 28 for the enforcement of these Regulations to inspect those records on request; and

(c) provides any such inspector with such information as he may request regarding any case in which a worker has agreed that the limit specified in regulation 4(1) should not apply in his case.

In addition, Article 4 laid down that:

(2) An agreement for the purposes of paragraph (1) -

(a) may either relate to a specified period or apply indefinitely; and

(b) subject to any provision in the agreement for a different period of notice, shall be terminable by the worker by giving not less than seven days' notice to his employer in writing.

(3) Where an agreement for the purposes of paragraph (1) makes provision for the termination of the agreement after a period of notice, the notice period provided for shall not exceed three months.

In 1999, the *Working Time Regulations*[11] were amended, particularly with regard to transposing this standard of the Directive. Article 4(1) concerning the maximal weekly working time is now worded as follows:

Unless his employer has first obtained the worker's agreement in writing to perform such work a worker's working time, including overtime, in any reference period which is applicable in his case shall not exceed an average of 48 hours for each seven days.

The rules concerning records were deleted and replaced by an obligation for the employers to keep "*up-to-date records of all workers who carry out work to which [the limit] does not apply by reason of the fact that the employer has obtained the worker's agreement as mentioned in paragraph (1)*" (Article 4(2).

2.2.1.2. Legal evaluation

SIMAPThe Commission notices that legislation and practice do not appear to offer all the guarantees laid down by the Directive. Firstly, a number of information sources note a certain generalisation in the presentation of the opt-out agreement when the work contract is signed. This practice appears to undermine the second indent of Article 18(1)(b)(i), which aims to guarantee the worker's free consent by ensuring that no worker may suffer harm due to the fact that he is not prepared to give his agreement. It is legitimate to suppose that if the opt-out agreement must be signed at the same time as the employment contract, freedom of choice is compromised by the worker's situation at that moment.

Moreover, according to the third and fourth indents of that article, the Member States wishing to use the opt-out must ensure that:

the employer keeps up-to-date records of all workers who carry out such work,

11 Working Time Regulations 1999, SI 1999/3372.

the records are placed at the disposal of the competent authorities, which may, for reasons connected with the safety and/or health of workers, prohibit or restrict the possibility of exceeding the maximum weekly working hours,

These two indents clearly show that the intention of the Community legislature was that the employer should keep a record of the hours actually worked by workers who had signed an opt-out agreement. This clearly derives from the text of the third indent, which provides for compulsory records "*of all workers who carry out such work*" (i.e. who work more than 48 hours during the reference period applicable) and not of workers who have signed a declaration. In order to know which workers "*carry out such work*", it is of course necessary to keep records of the number of hours actually worked.

This derives also from the aim underlying the fourth indent. The aim is that the competent authorities may prohibit or *restrict* the possibility of working more than 48 hours in order to protect the health and safety of workers. Clearly it is only possible to take a reasoned decision to prohibit or restrict the option of working more than 48 hours if one has access to the records of hours actually worked by the persons who signed the opt-out agreement.

The amendments introduced to the *Working Time Regulations* in 1999 reduce the obligations to keep records to the simplest terms: only the agreement itself must be conserved.

These provisions of national law have moreover led to a paradoxical situation where there may be records on hours actually worked by workers subject to the 48-hour limit but not for those who have opted to work longer hours, who are significantly more exposed to risks to their health and safety.

There is also the additional problem that it is impossible to monitor compliance with other provisions of the Directive. How can compliance regarding the daily rest period (Article 3), breaks (Article 4) or weekly rest period (Article 5) be monitored if there are no records of the time actually worked by these workers? In fact, the way the Directive is transposed into national law, it could in practice prevent the workers in question from benefiting from certain rights laid down in the Directive, which was evidently not the intention of the Community legislature.

2.2.1.3. Practical development

It has to be noted that the main characteristics of the system governing working time in the United Kingdom have remained unchanged despite the entry into force of the Directive, mainly as a result of using the opt-out.

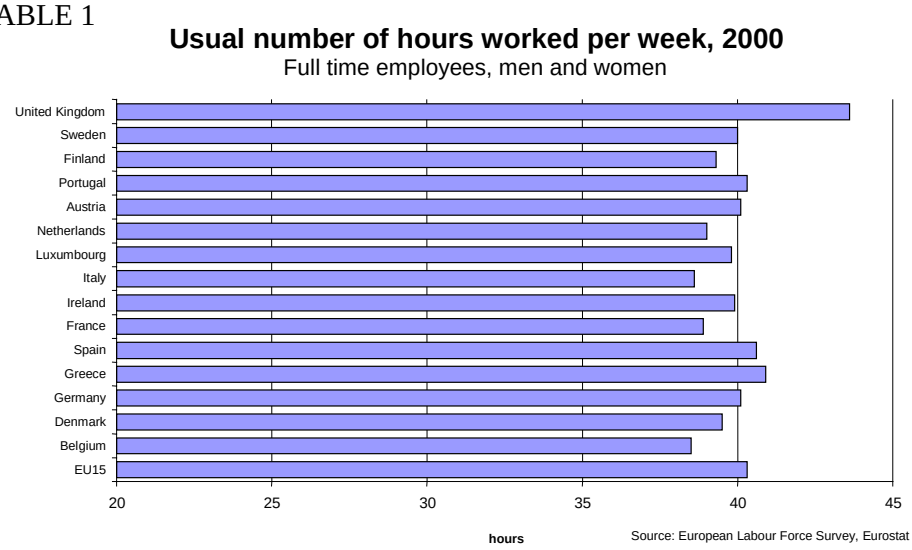
According to available figures, approximately **4 million** people, or **16%** of the workforce, currently work more than 48 hours per week, although there were only 3.3 million (or 15%) at the beginning of the 1990s. It also appears that the number of people working over 55 hours per week has increased, and now stands at 1.5 million. In fact, the United Kingdom is the only Member State where weekly working time has increased over the last decade.[12]

---

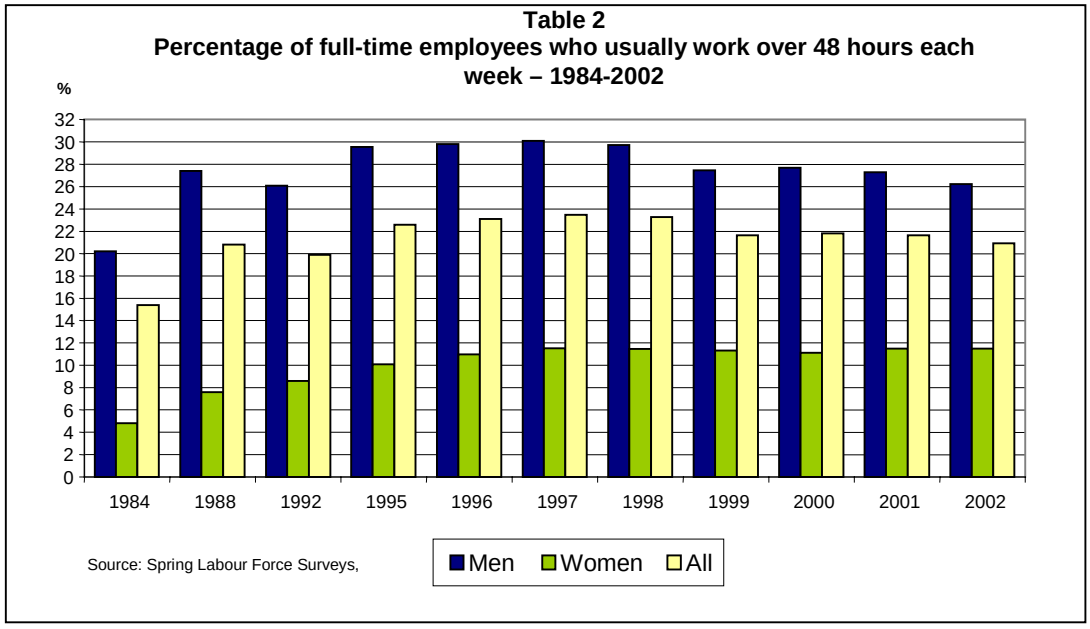
12 Beswick J. et al., Working Long Hours, HSL/2003/02, p. 4.

These figures are confirmed by data provided to the Commission by the United Kingdom government. According to a document dated April 2003, normal weekly working time, taking only full-time workers into account, is significantly higher in the United Kingdom than in the other Member States (see table 1).

TABLE 1



According to this same document, however, the percentage of people stating that they habitually work more than 48 hours has been constantly falling since 1999, albeit slowly, although the trend in the preceding period was upwards (see table 2).



The document from the United Kingdom authorities confirms figures obtained from other sources concerning the percentage of people habitually working more than 48 hours per week (about 4 millions, or 16% of workers).

Among those declaring that they work more than 48 hours, 65% say they work over 50 hours, 54% over 52 hours and 38% over 55 hours.

In relation to the total workforce, approximately 8% of workers say they work over 55 hours and 3.2% over 60 hours per week (see table 3). Another 1% say they work over 70 hours per week.

TABLE 3 – Number and proportion of full time employees usually working over certain hours

	Men		Wome		All	
	000's	*%*	*000's*	*%*	*000's*	*%*
> 48	3,07	26.2	763	11.5	3,83	20.9
> 50	2,01	17.2	483	7.3	2,49	13.6
> 52	1,68	14.4	379	5.7	2,06	11.3
> 55	1,19	10.2	252	3.8	1,44	7.9
> 60	490	4.2	98	1.5	588	3.2
> 65	315	2.7	58	0.9	374	2.0
> 70	157	1.3	35	0.5	192	1.0

Source: Spring 2002 Labour Force Survey

The percentage of people who say they work more than 48 hours varies according to whether the estimate is based on all full-time workers (20.9%) or all workers (16%).

It should be noted that these figures do not take into account persons with more than one employment relationship. According to the United Kingdom authorities, one million of persons have a second job. The figures of the "Labour Force Survey" concern only the main employment relationship. Therefore, the number of persons effectively working more than 48 hours per week could be higher.

In addition, among workers who say they work more than 48 hours over a certain period, some (46% according to the document from the Department of Trade and Industry – DTI) say they are "managers" and could therefore be covered by Article 17(1) of the Directive, which permits derogations, particularly from Article 6, for this category of workers.

2.2.1.4. How many workers have signed the opt-out agreement?

The above figures concern workers who say they habitually work more than 48 hours per week. However, the number of workers who have signed an opt-out agreement is considerably higher. There are no reliable statistics on the number of workers who have agreed (or refused) to sign the opt-out. However, all players agree that it is considerably higher than the number of workers who strictly need it.

For example, according to a survey of UK employers,[13] 65% of the 759 undertakings which replied to the questionnaire asked their employees to sign an opt-out agreement. The agreement had been signed by over half of the workers in 61% of these undertakings. In 28% of them, all workers had signed the opt-out agreement.

[13] Survey carried out by the Employment Lawyers Association in collaboration with Personnel Today.

According to a survey ordered by the CBI,[14] 33% of UK workers have signed an opt-out agreement, i.e. more than double those who say they actually work more than 48 hours over a long period.

These figures confirm that the number of people signing the opt-out is considerably higher than the number of workers who actually work more than 48 hours per week on average.

However, the figures may also vary widely depending on the sector. In the construction sector, for instance, according to a survey of employers in the sector,[15] 48% of operational workers worked more than 48 hours per week, although the opt-out had been systematically offered to 43% of these workers and, as required, to 14% of workers.

2.2.1.5. Why use the opt-out?

If the number of workers who have signed the opt-out agreement is far higher than those who work on average more than 48 hours per week over a 17-week period, one might well ask why. According to the available information, there are a number of reasons for using the opt-out:

People habitually work more than 48 hours and want to continue to be able to do so

As a reminder, 16% of UK workers say they habitually work more than 48 hours per week. Of these, 46% also say they have "management" tasks and could therefore be covered by Article 17(1) of the Directive, which permits derogations from a number of provisions of the Directive, particularly Article 6. In short, therefore, it appears that only a proportion of these workers actually has need of the opt-out, given that they exceed the maximum limit of 48 hours per week and do not appear to be covered by other derogations.

The reference period for calculating the 48 hours does not make it possible to respond to the flexibility needs of undertakings and it can only be extended to one year by collective agreement

The reference period for calculating maximum weekly working time is set at four months by Article 16(2). However, the various paragraphs of Article 17 permit derogations from Article 16 and, therefore, the fixing of a different reference period. Under Article 17(4), the reference period may not exceed six months. Member States have the option, however, while respecting the general principles of safety and health protection for workers, of permitting, for objective, technical or organisational reasons, collective agreements or other agreements concluded between social partners to lay down reference periods which are under no circumstances to exceed 12 months.

The United Kingdom has one specific characteristic in relation to the rate of coverage of collective bargaining (see point 1.3). Thus, in the private sector, only 22% of workers are covered by a collective agreement.

---

14 *2003 CBI/Pertemps Employment Trends Survey*.

15 UK Construction Industry, *Working Time Directive – Review of the opt-out facility*, October 2003.

This characteristic is clearly underlined in the recent CBI report.[16] According to the UK employers' organisation, "*the individual opt-out is particularly important to the UK given the importance attached to individually agreed contracts. The flexibilities a Member State chooses to make most use of is very much dependent on its industrial relations system. Some Member States make use of collective and workforce agreements to average working time over 52 weeks and some make use of the autonomous worker derogations, which allow for the exclusion of higher paid or professional workers from the working time limits*".

Potentially applicable derogations are unclear

It is apparent from all the contributions received, that the uncertainty as to the scope of the derogation in Article 17(1) of the Directive (workers whose working time is not measured and/or predetermined or may be determined by the workers themselves) is one of the reasons why people potentially covered by this derogation have opted to make use of the opt-out.

It minimises administrative constraints

The amendment to the *Working Time Regulations* introduced in 1999 significantly reduced constraints with regard to record-keeping concerning workers having signed the opt-out agreement. This simplification no doubt largely explains the use of the opt-out even where the worker does not generally exceed the 48-hour limit.

2.2.1.6. The effect of the opt-out on the health and safety of workers

The Directive aims to promote improvements in the work environment in order to guarantee a higher level of safety and health protection for workers. To achieve this objective, the Directive lays down minimum requirements, particularly concerning maximum weekly working time.

The link between long working hours and the health and safety of workers is well-established. Many research projects[17] have shown that work-related fatigue is increased by the number of hours worked. Experience shows that fatigue and loss of concentration cannot be avoided after a certain period of time, and that the risk of industrial accidents increases during the final hours of work. A number of studies conclude that a working week exceeding 50 hours may, in the long term, have harmful effects on the health and safety of workers.

In this context, it would be useful to be able to evaluate the extent to which the opt-out, or rather working time in excess of the limit laid down in the Directive, has had negative repercussions on the health and safety of workers.

This analysis appears not to be possible owing to the lack of reliable data. Following the 1999 amendment of the *Working Time Regulations*, the obligations to keep records were reduced to their simplest expression (only the agreement itself is kept) and it is therefore not possible to know who made use of the opt-out, the number of hours worked in excess of the maximum limit and, of course, the consequences in health and safety terms.

---

16 CBI, *The Working Time Directive and the individual opt-out*, p. 4.

17 See the doctrine quoted in document COM (90) 317 final.

However, there is no reason to think that the conclusions from research in this field, which show that long working hours have a certain impact on the health and safety of workers, would be contradicted in the case in question.

A recent study,[18] reviewing research into the link between long working hours and safety and health protection, indicates that "*the available evidence supports a link between long working hours and fatigue*". Furthermore, " *working long hours does seem to be associated with stress and poorer psychological health outcomes. […] current evidence is sufficient to raise concerns about a possible link between long hours and physical health outcomes, including cardiovascular disease, especially for hours exceeding 48 to 50 a week*".

Finally, with regard to the link between long working hours and safety, the study points out that "*there seems to be cause for concern about the relationship between long hours and safety/accidents (…)*".

It should be noted that factors such as freedom of choice for the worker may attenuate the effect of long working hours on health and safety. Thus, in a 1996 study,[19] the authors maintain that "*an individual who chooses to work 13 hr because he or she enjoys the work would probably report higher well-being scores than an individual who was required to work 13 hr due to a high workload*".

2.2.2. Application of Article 18(1)(b)(i) in other Member States

Originally, the United Kingdom did not make use of the option of not applying Article 6. However, after the Court of Justice's ruling in the *SIMAP* case, some Member States saw the opt-out arrangement as a way of alleviating some of the problems created by this case law, allowing doctors to continue to work for more than 48 hours per week (including on-call time) if they wished. Consequently, all the Member States which incorporated the opt-out clause in their legislation did so for the health sector alone (except Luxembourg).

It is not yet possible to evaluate how the opt-out clause is being applied in these countries, as too little time has elapsed. At this stage, it is possible only to mention the legislative measures which incorporate the opt-out arrangement.

2.2.2.1. Luxembourg

Luxembourg has introduced the opt-out arrangement for a specific sector, namely hotels and catering.
Article 4(4) of the Law of 20 December 2002 regulating the working hours of workers, apprentices and trainees in the hotels and catering sector stipulates that "*an employer who makes an employee work for more than 48 hours over a 7 day period calculated as the average of the reference period must have obtained the employee's prior consent. Consent must be given in writing at the beginning of each reference period. The employer must keep an up-to-date record of all workers performing work of this kind. In any event, for companies which are not subject to the obligation to*

---

[18] Beswick, J. et al., *Working Long Hours*, HSL/2003/02, available at: http://www.hse.gov.uk/research/hsl_pdf/2003/hsl03-02.pdf.

[19] Bliese, P. D., Halverson, R. R., *Individual and nomothetic models of job stress: An examination of work hours, cohesion and well-being*, quoted in Beswick, J., *Working Long Hours, p. 10*.

draw up a work organisation plan in accordance with Article 6 of this Law, the employer must keep an up-to-date record of the daily and weekly timetable of all his employees".

It should be pointed out that the reference periods established by this law are set at four weeks, eight weeks or six months depending on the size of the companies concerned, i.e. they generally give more protection than the periods set out in the Directive (four months, six months or one year).

This legislation comes into force on:

– 1 January 2003 for companies which regularly employ at least 50 persons and companies which provide catering on boats on inland waterways;

– 1 January 2004 for companies which regularly employ between 15 and 49 persons;

– 1 January 2005 for companies which regularly employ fewer than 15 persons and companies which operate on a seasonal basis.

2.2.2.2. France

In France too, the opt-out clause has been implemented only to a limited extent and in the context of legislation which affords a higher level of protection than the Directive.

Decrees Nos 2002-1421, 1422, 1423, 1424 and 1425 of 6 December 2002 amend the law which applies, respectively, to practitioners in hospitals, practitioners working part-time in public hospital establishments, assistants in hospitals, contracted practitioners in public health care establishments and doctors and pharmacists recruited by public health care establishments.

All these decrees contain a provision stipulating that these persons can carry out, on a voluntary basis beyond their weekly duties, additional work which gives rise either to time off in lieu or to compensation.

These decrees came into force on 1 January 2003.

2.2.2.3. Other Member States

Other Member States are in the process of drawing up new legislation incorporating the opt-out arrangement in the health sector or in cases where working time regularly includes time spent on call. This is the case, for example, in Germany, the Netherlands and Spain.

2.2.2.4. Future Member States

Among the future Member States, two (Malta and Cyprus) have transposed Article 18(1)(b)(i) into their labour legislation. Slovenia applies the opt-out arrangement to doctors alone. Other future Member States (Estonia, Hungary, Latvia and Lithuania) could make use of this provision in order to tackle the problems posed by the case law of the Court of Justice.

3. DEFINITION OF WORKING TIME

Article 2 of the Directive defines working time as "*any period during which the worker is working, at the employer's disposal and carrying out his activity or duties, in accordance with national laws and/or practice"*. "Rest period" is defined as *"any period which is not working time"*. In accordance with the reasoning expressed in the Directive, there is no interim category: any period can be considered to be only working time or a rest period, the two concepts being mutually exclusive.

3.1. Case law of the Court of Justice

3.1.1. SIMAP case[20]

The Court had to give an opinion on the legal definition, within the meaning of the Directive, of periods spent on call, whether or not the worker is required to be physically present at the workplace. In the SIMAP case, the Spanish court "*Tribunal Superior de Justicia de la Comunidad Valenciana"*, by virtue of Article 234 of the EC Treaty, submitted five requests for a preliminary ruling on the interpretation of Directives 89/391/EEC and 93/104/EC.

As regards the definition of "working time", the Spanish court asked whether time spent on call by doctors in primary health care teams -- on the basis of either being physically present at the health establishment or being contactable -- should be considered to be working time or overtime within the meaning of the Directive. The Court replied that "*time spent on call by doctors in primary health care teams must be regarded in its entirety as working time and, where appropriate as overtime, within the meaning of Directive 93/104 concerning certain aspects of the organisation of working time, if they are required to be at the health centre. If they must merely be contactable at all times when on call, only time linked to the actual provision of primary health care services must be regarded as working time"*. According to the Court, that interpretation is in conformity with the objective of the Directive, which is to ensure the safety and health of workers. The Court notes that, as the Advocate General has emphasised in his Opinion, *that to exclude duty on call from working time if physical presence is required would seriously undermine that objective*[21].

The Court of Justice implicitly supported the theory that the three features of the definition of working time were cumulative. In point 48 of the judgment, the Court states that "*the characteristic features of working time are present in the case of time spent on call by doctors in primary care teams where their presence at the health centre is required. It is not disputed that during periods of duty on call under those rules, the first two conditions are fulfilled. Moreover, even if the activity actually performed varies according to the circumstances, the fact that such doctors are obliged to be present and available at the workplace with a view to providing their professional services means that they are carrying out their duties in that instance*".

---

[20] Judgment of the Court of 3 October 2000 in case C-303/98, request submitted to the Court by the *Tribunal Superior de Justicia de la Comunidad Valenciana* (Spain) in the dispute between *Sindicato de Médicos de Asistencia Pública* (SIMAP) and *Conselleria de Sanidad y Consumo de la Generalidad Valenciana*, ECR 2000, p. I-07963.

[21] Judgement of the Court of 3 October 2000 in case C-303/98, point 49.

In other words, the Court noted that the three features of the definition of working time were present in the case in question. The fact that the Court expressly sought to give reasons for the presence of the third criterion leads one to conclude that the Court does not support the theory that the criteria of the definition are independent.

3.1.2. The Jaeger case[22]

In this case, the Court was once again required to give an opinion on the definition of time spent on call by doctors when they are required to be physically present in a hospital. Although the underlying facts of the case were fairly similar to those in the SIMAP case, the Court was asked on this occasion to give its views on the question of whether on-call services should be considered in their entirety as working time, even if the party concerned does not in fact perform his professional duties but is authorised to sleep during the time concerned. According to the jurisdiction of referral, this question was not asked and, as a result, the Court did not reply to it in the SIMAP judgment.

In the Court's view (points 60 and 61 of the judgment), the fact that, in the SIMAP judgment, it did not expressly rule on the fact that doctors performing on-call duty where they are required to be present in the hospital can rest or even sleep during the periods when their services are not required was in no way material. Periods of professional inactivity of this kind were an inherent aspect of on-call duty. The Court therefore confirmed that "*Directive 93/104 must be interpreted as meaning that a period of duty spent by a doctor on call ('Bereitschaftsdienst'), where presence in the hospital is required, must be regarded as constituting in its entirety working time for the purposes of that Directive, even though the person concerned is permitted to rest at his place of work during the periods when his services are not required, with the result that that Directive precludes a Member State's legislation which classifies as a rest period an employee's periods of inactivity in the context of such on-call duty*".

It should be stressed once again that the Court did not support the Advocate General's view that the three criteria in the definition of working time were independent. It clearly follows from the judgment that the three criteria are cumulative. In fact, the Court states (point 63) that "*the decisive factor in considering that the characteristic features of the concept of 'working time' within the meaning of Directive 93/104 are present in the case of time spent on call by doctors in the hospital itself is that they are required to be present at the place determined by the employer and to be available to the employer in order to be able to provide their services immediately in case of need. In fact, as may be inferred from paragraph 48 of the judgment in SIMAP, those obligations, which make it impossible for the doctors concerned to choose the place where they stay during waiting periods, must be regarded as coming within the ambit of the performance of their duties*".

Finally, it should be noted that the Court clearly marked out the Member States' room for manoeuvre in interpreting the definition of "working time". According to the Court (points 58 and 59), the concepts of "working time" and "rest period" "*constitute concepts of Community law which must be defined in accordance with*

---

[22] Judgment of the Court of 9 October 2003 in case C-151/02, request submitted to the Court by the *Landesarbeitsgericht Schleswig-Holstein* (Germany) concerning the dispute pending before that court between *Landeshauptstadt Kiel* and Norbert *Jaeger*, not yet published.

objective characteristics by reference to the scheme and purpose of that Directive … Only such an autonomous interpretation is capable of securing for that Directive full efficacy and uniform application of those concepts in all the Member States. Accordingly, the fact that the definition of the concept of working time refers to 'national law and/or practice' does not mean that the Member States may unilaterally determine the scope of that concept. Thus, those States may not make subject to any condition the right of employees to have working periods and corresponding rest periods duly taken into account since that right stems directly from the provisions of that Directive".

3.2. The impact of the Court's case law

Prior to the SIMAP judgment, 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. This is why, when they intervened before the Court in the SIMAP case, the Commission and the Member States argued that even in cases where the doctor was present within the health centre, periods spent on call would continue not to be regarded as working time as defined in Article 2 of the Directive.

As the Commission pointed out in its report on the transposal of the Directive[23], national implementation measures generally tended to reproduce, at the very least, the Directive's definitions of "working time" and "rest period". In some cases, national legislation did not contain express definitions of working time or rest period, as these concepts were traditionally defined by collective agreements and/or case law.

Some Member States had provisions on intermediate categories (between working time and rest periods), such as readiness to work, on-call duty, standby duty, travelling time, etc.

In most Member States, periods spent not working during on-call duty were excluded from working time, on the basis of the aforementioned interpretation of the concept of 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 Court's case law therefore has a major impact on Member States which did not define time spent on call requiring physical presence at the workplace as being entirely dependent on the concept of working time. Although the impact of the case law cannot be limited to the health sector alone, it is in this sector that the impact is greatest, given that it is relatively common for work (essentially that undertaken by doctors) to be organised in such a way as to include regular periods of on-call duty.

The impact of the Court's case law will be even greater when Directive 2000/34/EC is applied with respect to "trainee doctors", i.e. as of 1 August 2004 and, in particular, at the end of the transition period[24] (five years, which can be extended to

---

[23] Report from the Commission - State of implementation of Council Directive 93/104/EC of 23 November 1993 concerning certain aspects of the organisation of working time ("Working Time Directive"), COM(2000) 787 final, p. 8.

[24] According to the new Article 17.2(4)(a)(iii), "*Member States shall ensure that in no case will the number of weekly working hours exceed an average of 58 during the first three years of the transitional period, an average of 56 for the following two years and an average of 52 for any remaining period*".

eight years at most). In fact, in many countries, most of the on-call duty requiring physical presence at the workplace is performed by trainee doctors. According to the White Paper on Sectors and Activities excluded from the Working Time Directive[25], which referred to a study carried out on the Commission's behalf, "*hours worked by doctors in training … routinely exceeded 55 hours a week in many countries*".

Compliance with the maximum working time of 48 hours per week, including all time spent on call, means that most Member States have to recruit additional doctors to ensure the same level of care. The impact assessment has still to be carried out both at national and at Community level[26]. However, during the hearing relating to the *Jaeger* case, the representative of the German Government said that if the Court confirmed the case law in the SIMAP case, staffing requirements would increase by some 24% and between 15 000 and 27 000 additional doctors would have to be employed, although far fewer doctors were out of work in Germany. Germany estimated, on that occasion, that additional costs would run to EUR 1.75 billion[27]. The United Kingdom feels that it would be necessary to recruit between 6 250 and 12 550 doctors and 1 250 staff other than doctors. The additional costs would come to between £380 and £780 million. Finally, the Netherlands takes the view that it would need to recruit 10 000 new care staff, which would represent an additional cost of EUR 400 million. All these Member States agree that, even if it were possible, from a budgetary point of view, to recruit the staff required to provide the same level of care, this would be impossible in practice because of the current lack of candidates with the necessary training to take on these jobs.

In order to limit the impact of the Court's case law, particularly while new organisational models have not been put in place or recruitment levels are lower than necessary, it is to be feared that some Member States will have recourse to derogations or exceptions, essentially to the possibility provided in Article 18(1)(b)(i), i.e. the possibility of not applying Article 6 if the worker gives his agreement individually. This is already the case in some Member States or will be the case in the near future. There is also the risk that, in view of the problems they face, some Member States might be tempted to resort to arrangements which offer much less protection, such as using self-employed doctors, who are not covered by the provisions of the Directive.

4. ENSURING COMPATIBILITY BETWEEN WORK AND FAMILY LIFE

The flexibility of working time is generally perceived as being in the interests of employers in particular, often to the detriment of employees. However, greater flexibility in the organisation of working time would meet the growing needs of workers, particularly those with dependent children or elderly relatives, as well as the interests of companies, which need to be able to respond to user and customer demand for extended operating hours or to adapt rapidly to sharp fluctuations in demand.

---

25 Document COM(97) 334 final, point 64.

26 The Commission launched two invitations to tender for an impact assessment on the SIMAP judgment in the Member States. No bids were received in time during the first invitation to tender and the only bid received during the second was rejected by the evaluation committee.

27 See point 44 of the conclusions by the Advocate-General Ruiz-Jarabo Colomer in the *Jaeger* case (C-151/02).

The need for greater compatibility between work and family life stems from the sociological changes in European societies, particularly the mass influx of women into the labour market, the rise in the divorce rate, the instability and heterogeneity of the household structure, and demographic phenomena.

Measures in support of greater compatibility between the private and professional spheres and equality of opportunity between men and women improve the overall quality of employment by enabling as many people as possible to participate. They also improve productivity by increasing motivation and availability and by opening up greater opportunities for vocational or personal training.

In all the Member States, measures have been implemented or are planned, either under legislation or through agreements between the social partners, to make working time more flexible and to make work and family life more compatible. According to a recent survey[28], the measures taken are very varied, as regards both their content and the people to which it applies, although they often include one of the following elements:

- Possibility to reduce or adapt working hours in order to care for young or seriously ill children or terminally ill family members
- Facilitation and encouragement of part-time working
- Increased possibilities for individuals to adapt their working hours to suit their partner's working situation
- Institution of time credit systems
- Phasing-out of working hours for elderly workers.

The Commission is firmly of the view that the revision of the Working Time Directive could be exploited in such a way as to encourage the Member States to take steps to improve the compatibility of work and family life.

[28] Recent developments in the European Union and EFTA countries in the areas of working time, flexible working hours and reconciliation of work and family, June 2003.

PART TWO: THE OPTIONS

The above analysis shows that beyond the two questions that, according to the provisions of the Directive have to be reviewed, the judgements of the Court in the SIMAP and Jaeger cases referred to above have also to be considered.

There are a number of possible avenues. This is why it is necessary to lay down the criteria which the Commission feels must be met by whatever solution is adopted.

First and foremost, the approved approach should:

- 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.

Making progress towards more flexible working time arrangements accords with the Social Policy Agenda, which sets out a general approach to the whole issue of employment quality, from occupational safety and health up to and including the need to reconcile work and family life and getting the right balance between flexibility and security.

Greater flexibility in the way working time is organised will meet the needs both of employers and of workers. For the employers, the essential point is to be able to adapt effective working time to fluctuations in demand, whether seasonal or irregular. For the workers, greater flexibility can meet their needs in terms of making work more compatible with family commitments.

Existing provisions in Article 18.1 b) i) that give the possibility of being able, on a voluntary and individual basis, to work more than 48 hours per week, averaged out over a given period, could put at risk the Directive's aim of protecting workers' safety and health. That is also why the Directive makes provision for this clause to be re-examined after seven years.

The only experience that is applicable here (in the United Kingdom, cf. Part One, point 2) has shown the existing difficulties in ensuring that the spirit and terms of the Directive are respected and that real guarantees are provided for workers. It also brings out an unexpected effect in that it is difficult to ensure (or at least check) that the other provisions in the Directive have been complied with, concerning whether workers have signed the opt-out agreement.

The Commission would like the addressees of this communication to express their opinion on the need to revise the current text or introduce other initiatives, not necessarily legislative. Five main issues emerge which need to be addressed:

– the first refers to the reference periods;

– the second relates to the Court of Justice's interpretation of the concept of *working time* in the SIMAP and JAEGER cases;

– the third concerns the conditions of application of article 18.1 b) i) (opt out);

– the fourth, covers measures aiming at improving the reconciliation between work and family life;

– the fifth whether an interrelated approach to these issues would allow for a balanced solution capable of meeting the criteria set above.

PART THREE: HOW TO PROCEED

The present Communication seeks to launch a wide-ranging consultation process capable of resulting in a possible amendment of the Directive.

It is therefore aimed at the European Parliament, the Council, the Economic and Social Committee, the Committee of the Regions and the social partners at Community level. The key aim of the Communication is to solicit the views of these institutions and organisations on the issues discussed in the text.

As regards the European social partners, this Communication constitutes the consultation provided for in Article 138(2) of the Treaty (first phase of the consultation process). They are invited to give their opinion on the need to amend the Directive on the issues identified in Part two. They will be consulted subsequently in accordance with paragraph 3 of the aforementioned Article, on the content of any proposal envisaged.

In order to involve interested organisations at national level, the Communication will be made available to all interested parties on the Internet site of the Directorate-General for Employment and Social Affairs (http://europa.eu.int/comm/employment_social/consultation_en.html). All interested organisations can send their comments and suggestions by e-mail only to the following address: empl-labour-law@cec.eu.int. Comments should reach us no later than 31 March 2004.

The Commission will conduct a detailed examination of the contributions received.

Following this examination, the Commission will draw the necessary conclusions, which, of course, it is not possible to anticipate.