

European Sunday Weekly Rest Day Legislation Remains
Unlawful

by

Brighton G Kavaloh,
A Postgraduate Law Researcher in European Legislative Studies,
London, England.

Introduction

The main purpose for writing this article is to respond to the relentless attempts in recent times to legislate in the European Union, Sunday as an official weekly rest day. The lobbyists championing this cause have been among other associations, the Roman Catholic Bishops (COMECE), some Protestants church representatives and certain Members of the European Parliament (MEPs).¹ I will now provide a synopsis of the background on this issue and show how it has developed to the present day.

The Working Time Council Directive 93/104/EC of 23 November 1993, Article 5, second paragraph stipulated that a minimum weekly rest period ‘*shall in principle include Sunday.*’² Sunday as a weekly rest day was enshrined into European Community Law, but it was annulled by the European Court of Justice (ECJ) after a legal challenge from the United Kingdom government on 12 November 1996.

Based on the Court’s application of Article 137 (ex Article 118a) of the Treaty of the European Union, it was concluded that in so far as the Council was concerned “*the connection between the health and safety of workers and the requirement that the weekly rest period ‘shall in principle include Sunday’ in the second sentence of Article 5 of the Directive, had not been established.*”³ There was no satisfactory explanation given “*why Sunday, as a weekly rest day, is more closely connected with the health and safety of workers than any other day of the week.*”⁴ And accordingly the ruling was that the sentence be annulled.

In September 2004, the Commission submitted a proposal to review Council Directive 2003/88/EC. The European Parliament voted the submission at its first reading in May 2005. After a three year period of stalemate, an agreement was only reached in June 2008 at which seven MEPs supported by Catholic Bishops initiated an amendment aiming yet again at attempting to include a Sunday weekly rest day clause

¹ <http://www.comece.org> 07/04/2009

² Official Journal of the European Communities, Vol.36, L307, 12 December 1993

³ Case-84/94 United Kingdom v Council of the European Union, Industrial Relations Law Reports, Vol.26, No.1, January [1997] IRLR 32.

⁴ Case 84/94 United Kingdom of Great Britain and Northern Ireland v Council of the European Union. Court of Justice of the European Communities Reports of Case before the Court of Justice and the Court of First Instance. ECR 1-5805 and 1-5806, para, 37.

previously annulled. The new amendments were not entertained even after the first and the second reading in the House of Parliament due to procedural reasons.⁵ And since then, five parliamentarians on 2 February 2009 launched a Written Declaration to lobby the House for its adoption. A majority of 394 MEPs need to sign, before 7 May 2009. The main purpose of the Declaration is to call on “*the Member States and the EU institutions to protect Sunday, as a weekly rest day in the forthcoming national and EU working time legislation in order to enhance the protection of worker’s health and the reconciliation of work and family.*”⁶ I will now proceed to argue that the attempts to enshrine Sunday as a weekly rest day in the European Community remains unlawful, in spite of the launch of a Written Declaration initiative.

Background

The European weekly rest day legislation initially was linked more to the health and safety measures of employees in the work place. The legal basis for it was the Treaty of the European Community Article 137 (previously Article 118a). The Community organisation was to support and complement the endeavours of the Member States to improving primarily ‘the working environment to protect workers’ health and safety.’⁷ To accomplish its objectives, the Council was to “*adopt by means of directives, minimum requirements for gradual implementation...*”⁸

The Council of the European Community adopted a Resolution on 21 December 1987 entitled “*Safety, hygiene and health at work.*”⁹ There was no link made between the protection of the worker’s health and safety and Sunday as a weekly rest day nor was it raised as an issue. This argument is supported by the Council’s own affirmation when it officially adopted the measure as a formal Directive on 12 June 1989. It stated that “*the objective of this Directive is to introduce measures to encourage improvements in the safety and health of workers at work.*”¹⁰ However, Sunday as a

⁵ http://www.comece.org/comece.taf?_function=news&_sub=&id=1&langauge=en 18/12/2008

⁶ European Parliament Written Declaration DC\763921EN.doc

⁷ Nigel Foster, Blackstone’s EC Legislation 2005-2006 (Oxford: University Press, 2005), 16th Edition, p.42

⁸ Ibid

⁹ Official Journal No. C28/1 (88/C28/01) 3rd February 1988 – The Council Resolution of 21 December 1987.

¹⁰ Official Journal of the European Committees No. L183/1 (89/391/EEC), 26 May 1989

weekly rest day with a sociological connotation in Europe began to emerge when the Commission requested the Economic and Social Committee (hereafter ECSOC) to appraise the elements of the Community Charter of Basic Rights.¹¹ In order to expedite time, ECSOC's recommendation was for a list to be drawn of basic social principles to be enacted and adhered to by all Member States.

Furthermore, the Community Institutions were to “*take the procedural steps necessary to ensure that the scope of these basic principles and rights is interpreted with due respect for the standards already recognised in other international social legal instruments.*”¹² The International Labour Conventions 14¹³ and 106¹⁴ were cited and reference was made to the weekly rest period but no particular day was suggested. Further, the Council of Europe, Social Charter, Article 2(5) stipulated that “*The weekly rest period shall, whenever possible, coincide with the day of the week established as a day of rest by the traditions or customs of the country or district.*”¹⁵ Article 2(5) again did not specify the actual week rest day but left it to each country to determine.

The International Labour Convention 106 noted that “*The traditions and customs of religious minorities shall, as far as possible, be respected.*”¹⁶ The short guide to the Social Charter provided an addendum on respect of Article 2(5) that cited Sunday as the day which all states that had ratified the Charter should incorporate as an official day of rest. At this point, not all Member States had ratified the Charter and therefore the European Parliament could not legislate it. It was left to the discretion for each Member State to decide on the issue.

On 5 October 1990, the Council approached ECSOC for its opinion on the proposal for a Council Directive on the organisation of working time. ECSOC made reference

¹¹ Official Journal of the European Communities No. C126/4 (89/C126/04), 23 May 1989.

¹² Ibid

¹³ Convention 14 Weekly Rest (Industry), 1921, Article 7, International Labour Conventions and Recommendations, Vol.1, 1949-1951, International Labour Office, Geneva, International Labour Organisation. (This Convention came into force on 19 June 1923).

¹⁴ Convention 106, Weekly Rest (Commerce and Offices), 1957, Article 6, International Conventions and Recommendations 1952-1976, Vol. 11, International Labour Offices, Geneva, International Labour Organisation, p.91

¹⁵ European Social Charter, collected texts (3rd edition) 2002, Council of Europe Publishing, 2003, p.13

¹⁶ International Labour Conventions and Recommendations 1952-1976 Vol. 2 Convention No.106 (Weekly Rest in Commerce and Offices) Article 6(4), p.93

to health as defined by the World Health Organisation which was to be understood as signifying the physical, mental and social conditions and in so doing linked the worker's health and safety measure to Sunday as a weekly rest day."¹⁷ In justifying this stance, ECSOC stated that "in countries with Christian traditions the day of rest has to be Sunday."¹⁸

The European Parliament debate on the subject of organisation of working time pertaining to Sunday as a rest day followed. I will now provide brief extracts of some arguments put forward by MEPs.

Van Dijk (NL) argued that "*The premise that night work ought in principle to be forbidden is, in my opinion, much more important than preserving Sunday as a day of rest. After all, you do not get sicker through working during the day on Sunday than on Mondays, but the same cannot be said of about night work.*"¹⁹

Pronk [PPE]-(NL) said "*It remains a day for the family. It is a day of rest in our increasingly hectic societies. We have tabled amendments on this point. We consider it important to preserve that day of rest. After all, one cannot sacrifice everything to society. Certain values remain that we always keep sacrosanct.*"²⁰

And, Van Der Waal (NI)-(NL) said "*I do not wish to plead for EC regulations of Sundays. Sunday legislation is eminently a matter for Governments of Member States and ought to remain so. But it would be important if, in the Directive before us, it were clearly stated that Sunday, as the Christian day of rest, as God's day, merited a place apart in the internal market.*"²¹

However, Papandreou, a Member of the Commission (GR) argued "*I do agree, of course, that the week end is the usual acceptable time for rest but given that the proposal is concerned with the health and safety of workers and that there is no direct*

¹⁷ Official Journal of the European Communities, C60, Vol. 34, 8 March 1991, Information and Notices

¹⁸ Ibid

¹⁹ Official Journal of the European Communities, Debates of the European Parliament 1990-1991 session, Report of Proceedings form 18-22 February 1991, Europe House, Strasbourg, p.30. Note that the ILO did not specify the day of the week.

²⁰ Ibid, p.32

²¹ Ibid, p.36

*connection between health and safety and the weekend. I do not think that we can rightly establish this assumption in the proposal.*²²

After considering all the arguments, Parliament and the Council of the European Union adopted Directive 93/104/EC of 23 November 1993 inserting Article 5b which included the provision that the minimum rest period ‘*shall in principle include Sunday*’.²³

The Sunday weekly rest day in Europe was by law anchored into the European Union in 1993. It must be noted that recital 10 stated that “*with the respect to the weekly rest period, due account should be taken of the diversity of cultural, ethnic, religious and other factors in the Member states.*”²⁴ It was “*ultimately for each Member State to decide whether Sunday should be included in the weekly rest period, and if so to what extent.*”²⁵ Here again the issue of Sunday law legislation was left for the Member States to decide. But no sooner was the Council Directive in operation, that it faced a legal challenge from the British Government.

Legal Challenge

In March 1994, the United Kingdom of Great Britain and Northern Ireland brought an action under Article 230 (ex Article 173) of the Treaty for the annulment of Working Time Council Directive 93/104/EC of 23 November 1993.²⁶ The UK Government requested the European Court of Justice to annul the Directive in its entirety or failing which in the alternative to repeal selected provisions which included Article 5, second paragraph (the minimum weekly rest period shall ‘in principle include Sunday’). However, the Council’s rebuttal was that the UK application was unfounded.

²² Ibid, p.38

²³ Official Journal of the European Communities, Vol. 36, L307, 12 December 1993

²⁴ Ibid

²⁵ Ibid

²⁶ Case 84/94 UK v Council of the European Union, Court of Justice of the European Communities, Reports of Case before the Court of Justice and the Court of First Instance (ECR 1-5755). In details see also Case 84/94 United Kingdom v Council of the European Union, Industrial Relations Law Reports, Vol.26, No 1. January ([1997] IRLR 1-76)

The UK Government based its legal challenge on four pleas alleging, (1) defective legal basis (2) breach of the principle of proportionality (3) misuse of powers and (4) infringement of essential procedural requirements.²⁷ In the first instance, the applicant observed that “*Directives adopted under Article 118a(2) of the EEC Treaty must have a genuine and objective link between health and safety, on the one hand, and the situation to be governed by those Directives, on the other.*”²⁸ However, it argued that “*In the present case, the link between health and safety is too tenuous for the Directive to be properly based on Article 118a of the EEC Treaty. Thus, for example, the link between the rule of Sunday rest ... on the one hand, and on the other, health and safety of workers is as remote as the link between the health of employees and generous conditions of pay.*”²⁹

However, the UK and the Council of the European Union both recognised the social dimension of the Directive as it comes under the title of Social Policy. Whereas the UK saw a dichotomy between Article 118a, health and safety on the one hand and the social dimension on the other, the Council did not. The UK argued that “*the legislator should explain that numerous elements of the Directive were concerned with improvement of the living and working conditions of employees and/or with the social dimension of the internal market rather than with health and safety considerations.*”³⁰ The Council stated however that “*any measure adopted on the basis of the Article 118a will thus necessarily pursue a ‘social’ objective*” due to Chapter 1 of Title VIII of the Treaty which includes Article 118a.³¹

The most crucial point to bear in mind, especially as relates to the current debate to legislate Sunday as an official weekly rest day by the European Parliament is to seriously consider the legal reasoning and subsequent judgment of the Court of Justice delivered on 12 November 1996.

The European Court of Justice in this leading case considered both arguments and counter arguments from the UK (applicants) and the Council of the European Union

²⁷[1997] IRLR 30

²⁸[1997] IRLR 33

²⁹Ibid

³⁰UK (Applicant) v Council of the European Union (Defendant) Case 84/94, Industrial Relations Law Reports, Vol. 26, No.1, January 1997, pp 30-31

³¹Ibid

(respondents) respectively. It summed up that *“In order to deal with those arguments, a distinction must be drawn between the second sentence of Article 5 of the directive and its other provisions.”*³² There was a clear intention by the Court to seek to separate Article 5 second sentence.

The Court concluded in its judgement as follows:

*“As to the second sentence of Article 5, while the question whether to include Sunday in the weekly rest period is ultimately left to the assessment of Member States, having regard, in particular, to the diversity of cultural, ethnic and religious factors in those States (second sentence of Article 5, read in conjunction with the tenth recital), the fact remains that the Council has failed to explain why Sunday, as a weekly rest day, is more closely connected with the health and safety of workers than any other day of the week.”*³³

Based on the above the Court upheld the UK government’s alternative claim and annulled the second sentence of Article 5.

Article 5b Annulment and its Compliance

Subsequently, the European Community institutions immediately complied with the judgment of the Court of Justice. At its sitting, the European Parliament on Thursday, 12 December 1996 adopted a Resolution on Sunday work. The adopted measures called:

“Member States and social partners in their transposition of the working time Directive to pay due regard to the traditions and cultural, social, religious and family needs of their citizens and to recognise that special character of Sunday as a day, as usually all family members are free on that day; reaffirms the right of workers to a weekly day of rest...” And also *“Member States to recognise that in a multi-cultural*

³² Case 84/94 UK v Council of the European Union, ECR I-5805

³³ Case 84/94 UK v Council of the European Union, ECR I-5806

*society there are also religious communities who may have preference for an alternative rest day.”*³⁴

Here again, it is important to note that the European Parliament reiterated the discretion of Member States but significantly stated it was imperative that each Member State in their consideration of Sunday as a weekly rest day should take due regard to minority religious groups who may have an alternative rest day.

The Commission concurred with the European Court of Justice for it noted “*Article 5 (weekly rest): the second sub-paragraph of Article 5, which refers to Sunday rest, is deleted. This formalises the decision of the European Court of Justice.*”³⁵

Directives 93/104/EC and 2000/34/EC were both codified.³⁶ The changes came into force on the date of the Directive’s publication in the Official Journal of the European Communities.³⁷

Attempts to reinstate Article 5b of Directive 93/104/EC

Directive 2003/88/EC of the European Parliament and the Council of 4 November 2003 concerning certain aspects of the organisation of working time without Article 5 subparagraph two was in operation. In 2008, during the revision of the Working Time Directive 2003/88/EC, seven MEPs supported by Catholic Bishops (COMECE) initiated two amendments aiming at including a Sunday weekly rest clause.

The first amendment was a new recital (6a) which sought to explain that “*the likelihood of sickness in companies that require staff to work on Sundays is greater than in companies that do not require staff to work on Sundays. The health of workers depends, among other factors, on their opportunities to reconcile work and family to establish and maintain social ties and to pursue their spiritual needs. Sunday, as the*

³⁴ Official Journal of the European Communities C20 Vol. 40 20/01/1997 Minutes of sitting of Thursday, 12 December 1996 B4-1354, 1368,1413 and 1433/96 – Resolution on Sunday Week.

³⁵ Official Journal of the European Communities, C249, Vol.42, 1 September 1999 (1999/C249/04), Information and Notices

³⁶ Official Journal of the European Union, C61, Vol. 46, 14 March 2003, Information and Notices

³⁷ Ibid.

*traditional weekly rest day, contributes to the objectives more than any other day of the week.*³⁸

What then followed was the current proposal amending Article 5(2a) to include “*The minimum rest periods referred to in the first paragraph shall in principle include Sunday.*”³⁹ It should be noted this would constitute the introduction of the previously annulled Article 5(2). The justification for these amendments lay in “... *Eurofound findings demonstrate that absenteeism and sick-leave increase significantly in companies working on Sunday.*”⁴⁰

The amendments aimed at including the protection of Sunday as a weekly rest day were neither debated nor voted on by the European Parliament for procedural reasons.⁴¹ However, the Catholic Bishops appealed to churches and various organisations to stay mobilised on the Sunday issue.

Law Infringement

On 31 January 2000, Jorge Hernandez Mollar (PPE DE), a European Member of Parliament in a written question (E-0170/00) to the Commission sought clarification on the Community’s position on the subject of weekly rest days on religious grounds.

Given the influx of immigrants from Maghreb countries working in various EU states, inquired what provisions were in place considering that “*the rest days generally given are Fridays and Saturdays, allowing them to keep these days sacred.*”⁴² And furthermore, that they be the opportunity “*to extend the regulation of weekly rest days on religious grounds and introduce the necessary coordination with the practice usually followed in the Member States of the EU of keeping Sunday as a day of rest.*”⁴³

³⁸ www.cec-kek.org/pdf/CSCProtectionofSunday_EN.pdf 30/03/2009

³⁹ www.cec-kek.org/pdf/CSCProtectionofSunday_EN.pdf 30/03/2009

⁴⁰ www.cec-kek.org/pdf/CSCProtectionofSunday_EN.pdf 30/03/2009

⁴¹ www.cec-kek.org/pdf/CSCProtectionofSunday_EN.pdf 30/03/2009

⁴² Official Journal of the European Communities C280 E 03/10/2003 P.0193-0193

http://eur_lex.europa.eu

⁴³ Ibid

The legal response from Mrs Dianantopoulou on behalf of the Commission on the 15 March 2000 reiterated that it was not for the European Parliament or Council to legislate but rather to support and complement Member States.⁴⁴ . To the contrary, the Commissioner underlined legal obligations the European Community was expected to adhere. She wrote:

“On 25 November 1999, the Commission adopted a package of two legislative proposals and a proposal for a programme to combat discrimination in the Community based on Article 13 (ex Article 6a) of the EC Treaty.”

“One of these initiatives is a proposal for a horizontal directive to combat discrimination, inter alia, on grounds of religion. Article 12 of this proposal requires Member States to encourage social partners to contribute to the implementation of the principle of equality of treatment by adopting collective agreements, codes of conduct, research or exchange of experiences and good practice aimed at preventing discrimination.”⁴⁵

The ethos of the European Union is therefore to fight religious discrimination. To ignore the annulled Article 5(b) of the Council Directive 93/104/EC as argued by the Court of Justice would be tantamount to an infringement of the Community Law on discrimination.

Submissions

1. In the light of the annulment of Article 5(b) of the Council Directive 93/104/EC, I argue that as long as Article 137 (ex Article 118a) is linked to health and safety measures, Sunday law legislation whatever form it may take will be anchored into the European Union by default and thus render it as unlawful. Notwithstanding it is for this reason UK and the Council seemed to have invoked the sociological approach, which seems to provide the current

⁴⁴ Ibid

⁴⁵ Ibid see also Commission of the European Communities, Establishing a General Framework for Equal Treatment in Employment and Occupation, COM (1999) 565 Final, Brussels.

preoccupation on the part of those intending to anchor Sunday law in the European legislation.

2. European Member States by law are to decide whether to have Sunday as a weekly day of rest and not the European Community institutions or any other religious group or associations. It is the Member States who must “*pay due regard in particular to diversity of cultural, ethnic, and religious factors in those Member States.*”⁴⁶
3. Religious discrimination is prohibited by European Community law. According to Case 13/63 Italy v Commission “*Discrimination may consist not only in treating like cases differently but also in treating different cases alike.*”⁴⁷ And as such to enact a law that treats the minority groups, who worship on alternative days such as Fridays and Saturdays in the same way as those who worship on Sundays is to discriminate against those minority religious groups.
4. Sunday as a weekly rest day violates the human rights against those who may want to worship on an alternative day. Article 9(1) of the Convention provides “*the right to freedom of thought, conscience and religion...*”⁴⁸ But also continues “*freedom to manifest one’s religion or beliefs shall be subject only to such limitations as are prescribed by law and are necessary in a democratic society... for the protection of the rights and freedoms of others.*”⁴⁹

The Convention has three measures to test the limitations of Article 9 and these are:

- (1) when prescribed by law
- (2) legitimate aim and
- (3) and when is ‘necessary in a democratic society’

⁴⁶ ECR 1-5785 to 1-5786 ECR para.139. see also tenth Recital in OJ L307 Vol.36 13.12.1993

⁴⁷ Case 13/63, Italy v Commission [1963] ECR 165 and also Case 130/75, Vivien Prais v Council of the European Communities [1976] ECR 1-1592 and 1-1593.

⁴⁸ Henry Steiner and Philip Alston, International Human Rights in Context, Law, Politics and Morals (Oxford University Press, 2000) p.1425

⁴⁹ Ibid

Legislation of Sunday as a weekly rest day in the European Union fails on all three counts.

Conclusion

I sincerely applaud efforts to enhance the protection of workers' health and safety at their workplace and the reconciliation of work and family life, but there is no correlation between these objectives and the need for a legally instituted Sunday rest day.

In my view, the attempt to enshrine Sunday Law in Europe currently in progress through the Written Declaration procedure still remains unlawful. This issue was last before the ECJ in 1993 and it was decided that although the Working Time Directive was properly adopted and in keeping with the Treaty, the second sentence of Article 5 was not, and so was annulled.⁵⁰

The Written Declaration is merely repetition, wrongly adopted and at variance with Article 137 (ex 118a) of the Treaty of the European Union and as such manifestly falls outside of the scope of the Directive. Those pushing for this motion are misdirected in arriving at the inference that their efforts to amend the Directive would be successful by a mere explanation as to why Sunday as a weekly day of rest contributes more than any other day of the week to the health and safety of workers. The fact remains that the explanations submitted with the Written Declaration are repetition of the arguments rejected in previous attempts to amend the Directive and therefore must fail even today.

MEPs are earnestly requested to consider the fundamentals upon which the Union is founded as follows:

⁵⁰ Case-84-94 United Kingdom v Council of the European Communities [1996] ECR I-5809 para.49 and [1997] IRLR 57 para.49. For Actions of Annulment see http://europa.eu/institutions/inst/justice/index_en.htm

1. “The Union is founded on the principles of liberty, democracy, respect for human rights and fundamental freedoms and the rule of law, principles which are common to the Member States”.⁵¹
2. “The right to equality before the law and the protection of all persons against discrimination constitutes a fundamental right and is essential to the proper functioning of democratic societies”.⁵²
3. “The right of individuals not to be discriminated against on arbitrary grounds has long been recognised by International Organisations, the European Union and its Member States”.⁵³

My concern is that those advocating for this proposal have again failed to consider the implications of this Legislation. It remains unclear how this law would be monitored, enforced and whether there will be penalties for non compliance. Europe is a multi-cultural and diverse region.

Removing the cloak on this issue, it appears to me that this is just another attempt to use Parliament to make laws which benefit only (Sunday worshippers) and to discriminate those that do not fall within this Criterion. In my view it is clear that accepting the proposed amendment will only serve to infringe the rights conferred by Article 9 (1) of the Convention and will thus discriminate against those that worship on alternative days. None of the measures put in place by the Convention to test the limitations of Article 9 have been established.

Whilst it is wholly appreciated to provide legal protection to ensure that every individual has the right to observe any day of their choice for worship it is entirely inappropriate to force a doctrinal position on all Union Citizens. This matter deserves a full debate engaging all the parties concerned and in particular the minority groups so that the legal position is made clear and that the possible future religious

⁵¹ Nigel Foster, Blackstone’s EC Legislation 2005-2006 (Oxford: University Press, 2005), 16th Edition , p.92.

⁵² Commission of the European Communities, On Certain Community Measures to Combat Discrimination, COM (1999) 564 Final, Brussels, p2.

⁵³ Ibid.

ramifications of this proposed Legislation are considered in light of the aims and objectives of the European Union.

I respectfully ask for a stay of the Written Declaration for reflection and consultation.

List of Abbreviations

COMECE – Commission of the Bishops Conferences of the European Community

ECJ – European Court of Justice

ECSOC - Economic and Social Committee

EEC - European Economic Community

EU - European Community

IRLR – Industrial Relations Law Reports

MEP – Members of European Parliament