COMMISSION OF THE EUROPEAN COMMUNITIES

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2004/0209 (COD)

COMMUNICATION FROM THE COMMISSION TO THE EUROPEAN PARLIAMENT

pursuant to the second subparagraph of Article 251 (2) of the EC Treaty

concerning the

common position of the Council on the adoption of a proposed Directive of the European Parliament and of the Council amending Directive 2003/88/EC concerning certain aspects of the organisation of working time

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1. BACKGROUND

Date on which the proposal was sent to Parliament and Council *(document COM (2004) 607 final: 2004/0209 (COD)*	22 September 2004
Date of the opinion of the Committee of the Regions	14 April 2005
Date of Parliament's opinion at first reading	11 May 2005
Date of the opinion of the European Economic and Social Committee	11 May 2005
Date on which the amended proposal was sent to Parliament and Council: *(COM (2005) 246 final)*	31 May 2005
Date of political agreement on the common position by the Council *(qualified majority)*	9 June 2008
Date of formal adoption of the common position by the Council	15 September 2008

2. OBJECTIVE OF THE COMMISSION PROPOSAL

The Commission's proposal seeks to amend the Working Time Directive[1] by achieving a balanced package of changes which responds to four main criteria:

- providing a legislative solution to the problems expressed during the Commission's public consultations in 2004 concerning the treatment of on-call time and the timing of compensatory rest;

- improving the protection of workers' health and safety, particularly as regards risks associated with excessive working hours;

[1] Directive 2003/88/EC of the European Parliament and of the Council of 4 November 2003 concerning certain aspects of the organisation of working time, OJ L 299, of 18.11.2003, p. 9.

- allowing more flexibility as regards the reference period for weekly working time, also in response to the 2004 public consultations; and

-providing greater support for the reconciliation of work and family life.

The main changes put forward by the Commission's amended proposal were as follows:

On-call time

To provide legislative definitions relating to 'on-call' time, and to distinguish between different types of on-call time, in response to recent decisions of the Court of Justice (*SIMAP* [2], *Jaeger* [3]…) which have had a profound effect on the organisation of working time in public services.

Reconciliation of work and family life

To provide that Member States shall encourage the social partners to conclude agreements supporting reconciliation, and will take the necessary measures to ensure that employers inform workers in good time of any changes to the organisation of their working time, and are obliged to examine workers' requests for changes to working hours or patterns.

Calculation of limits to weekly working time

The Directive provides that average weekly working time, including overtime, shall not exceed 48 hours. The proposal would not change the limit, but would give more flexibility in the calculation of the average, allowing the reference period to be extended by legislation to a maximum of twelve months, for objective or technical reasons or reasons concerning the organisation of work. Such an extension would be subject to the protection of health and safety of workers, and to consultation with the social partners.

Future of 'opt-out'

The 'opt-out' under Article 22(1) of the Directive presently allows Member States to provide that a worker may agree with his or her employer to work hours which exceed the 48-hour limit, subject to certain protective conditions. The amended proposal would provide for abolishing this derogation by a specified date, and would apply additional protective conditions in the meantime.

Timing of rest periods

To provide that in the case of derogations to minimum daily or weekly rest periods required by the Directive, the equivalent compensatory rest which must follow should be afforded within a 'reasonable period', to be decided by national law or by collective agreements or agreements of the social partners. This change would provide both workers and employers with more flexibility in the organisation of their work.

3. COMMENTS ON THE COMMON POSITION

1.1. Brief general comments on the common position

The common position includes a number of aspects which differ from the Commission's amended proposal. In particular, it does not take up several amendments proposed by

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[2] Judgment of the Court of 3 October 2000 in case C-303/98, *SIMAP*, [2000] ECR I-07963.

[3] Judgment of the Court of 9 September 2003 in case C-151/02, *Jaeger***,** [2003] ECR I-8389

Parliament, although the Commission's amended proposal had incorporated a significant number of Parliament's proposals.

The common position was adopted following a particularly protracted and difficult first reading in Council, during which significant numbers of Member States held strongly divergent positions, despite the efforts of successive presidencies (with the Commission's support) to find an acceptable compromise.

Some of the changes proposed by the Council – such as additional conditions to protect against abuse of the opt-out – can be supported by the Commission, since they would better protect a group of workers which is particularly vulnerable to excessive hours.

Other changes regarding the future of the 'opt-out' have ultimately been accepted by the Commission, in the light of important changes in the use of this option by Member States, which are outlined in more detail below.

The Commission has supported the overall agreement, having regard to the urgent need to clarify the legal situation and thus to allow more coherent application of the Directive across all Member States.

1.2. Outcome of the European Parliament's amendments at first reading

1.2.1. European Parliament amendments which were included (fully, partly or in spirit) both in the Commission's amended proposal and in the common position

The recitals:

- amendment No. 1 (citing the conclusions of the Lisbon European Council): see recital No. 4 in the common position;

- amendment No. 2 (detailed reference to Lisbon European Council conclusions): see recital No. 4 in the common position;

- amendment No. 3 (reference to increasing the rate of employment amongst women): see recital No. 5 in the common position;

- amendment No. 4 (stronger reference to protection of workers' health and safety, and adding a reference to reconciliation of work and family life): see recital No. 7 in the common position;

- amendment No. 8 (citing Article 31(2) of the Charter of Fundamental Rights): see recital No. 19 in the common position;

The articles:

- amendment No. 10 (inactive on-call time may be calculated proportionately): see Article 1.2 of common position (proposed new Article 2a);

- amendment No. 12 (adding a provision on reconciliation of work and family life): see Article 1.2 of common position (proposed new Article 2b);

- amendment No. 13 (deleting proposed new text in Article 16(b)): the deleted text no longer appears in the common position;

- amendments Nos. 16 and 18 (compensatory rest time): see Article 1.3(b) of common position (amending Article 17(2)) and Article 1.4 of common position (amending Article 18);

- amendment No. 17 (correcting an error): see Article 1.3(d)(i) of common position, amending Article 17(5);

- amendment No. 19 (reference period): see Article 1.5 of common position, amending Article 19.

1.2.2. European Parliament amendments which were included in the amended proposal, but not in the common position

- Amendment No. 11 (working time limits to apply per-worker, not per-contract)

See recital No. 2 in the amended proposal, which partly takes account of this amendment.

- Amendment No. 20 (to repeal the 'opt-out' under Article 22(1), three years after the Directive enters into force)

See Article 22(1) of amended proposal.

- Amendment No. 24 (following the proposed repeal of the opt-out, individual agreements which were still valid would expire within 1 year)

See Article 22(1c) of the amended proposal.

1.2.3. The main points of divergence between the Commission's amended proposal and the Council common position

Application per-worker of the working time limits and rest periods required by the Directive

The Commission considers that, given the need to ensure that the health and safety objectives of the Working Time Directive are fully effective, Member States' legislation should already provide for appropriate measures to ensure that the Directive's limits on average weekly working time and daily and weekly rest are, as far as possible, respected per-worker, in the case of workers working concurrently under two or more employment relationships which

come within the scope of the Directive. The Commission has already stated this view in its 2000 Report on the Working Time Directive[4].

This point gave rise to extensive discussion during the earlier period of the first reading in Council. The Commission's understanding is that at least 12 Member States presently apply these provisions per-worker, while at least 12 others apply them per-contract. This picture has informed the debate in Council. Despite Parliament's proposed amendment, it was not possible to reach any agreement on including any specific provision that these rules should be applied per-worker. The Commission considers that this issue would be suitable for review separately from the present legislative proposal.

On-call time

Under the amended proposal, a distinction is made between 'active' and 'inactive' periods[5] of on-call time at the workplace. The Commission proposed that active periods of on-call time (periods where workers were effectively carrying out their duties in response to a call) would always be considered as working time. Conversely, inactive periods would not be considered as working time unless national law or collective agreements so provided. However, inactive periods could never be counted as rest time.

The common position makes no change regarding 'active' on-call time, but would allow 'inactive' periods to be treated either as working time or as rest time, according to national law or to collective agreements.

Reconciliation of work and family life

Under the amended proposal, Member States would take the necessary measures to *'ensure'* that employers are obliged to examine workers' requests for changes to their working hours, taking account of both sides' needs for flexibility. The common position provides instead that Member States shall *'encourage'* employers to examine such requests, subject to additional qualifications.

However, the proposed text would still bring an overall improvement in working conditions, since the Directive contains no specific provisions on reconciliation, and the proposed text would also introduce a new obligation for Member States to ensure that employers inform workers in due time of any substantial changes to the organisation of working time.

The future of the 'opt-out'

The future of the opt-out was the single most controversial point during the prolonged and difficult Council discussions during the first reading.

The amended proposal envisaged that the 'opt-out' would be repealed three years after the proposed Directive entered into force, while stronger protective conditions would also apply in the meantime to workers who agreed to opt out.

The common position does not provide for repeal of the opt-out. Instead, it expands the increased protection already proposed by the Commission, to give a new four-point framework for the opt-out: more explicit limits, a range of more stringent practical conditions to protect workers, a future review of the opt-out based on detailed national reports, and a

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4 COM (2000) 787, at point 14.2.

5 *'On-call time'* means a period during which the worker is obliged to be available at the workplace in order to work if called upon to do so. '*Active*' periods are the periods during on-call time when the worker is effectively carrying out his/her duties in response to a call. *'Inactive'* periods are the periods where the worker remains on-call at the workplace, but is not effectively engaged in carrying out his/her duties.

provision which obliges Member States to choose between using the opt-out and being able to average working time over a longer period (up to 12 months) by legislation. This framework is described in more detail below.

The Commission's view remains that the opt-out is a derogation from the fundamental principle of a 48-hour maximum working week, which can present risks to workers' health and safety, both in the short and in the long term. For this reason, the Commission has consistently proposed to substantially strengthen the safeguards protecting workers who agree to use the opt-out.

The Commission's understanding is that the pattern of use of the opt-out has changed very considerably in recent years. In 2000, only one Member State actually used this derogation. In 2008, some fourteen Member States explicitly provide for use of the opt-out, though there are substantial differences in the way it is applied in national law.[6] In addition to the Member States which already use the opt-out, there are others that wish to maintain the possibility of using it in the future, in response to possible sectoral or general labour shortages.

In the Commission's view, this picture has strongly informed the debate in Council. Moreover, the requirement to treat all on-call time as working time has been a significant factor in the rapid proliferation since 2000 of opt-outs designed specifically for sectors using on-call time.

Some of the proposed changes to the treatment of inactive on-call time are expected to ease the difficulties experienced by certain Member States in providing the necessary trained staff either in the short or medium term (due to structural factors, or to labour flows between Member States and to third countries.) The review which is provided for under new Article 24a will allow the Commission to take stock of the impact of these changes on Member States' actual use of the opt-out, and will also provide much more detailed information on the actual use of the opt-out than is presently available. Based on this picture, the Commission can better frame overall conclusions (and, as appropriate, proposals) regarding the future of the opt-out.

The Commission has given long and detailed consideration to the best way forward, in the light of all these factors, and concluded that in order to allow the proposal to reach a second reading, it would be necessary to support the proposals on the opt-out which are contained in the common position, within the framework of an overall agreement.

Maximum working time, for workers who opt out of the 48-hour limit

The Working Time Directive already limits working time to 48 hours per week on average, including any overtime. However, under the 'opt-out' a worker may agree with the employer to work hours exceeding that limit. If a worker does so, the Directive does not set any explicit limit to his or her working time.

The Directive contains two implicit limits. Firstly, the hours worked cannot encroach on the minimum daily and weekly rest periods required by the Directive, and these requirements are not affected by the opt-out. Secondly, Article 22(1) states that the opt-out is subject to respect for general principles of protecting workers' health and safety, and the Court of Justice has consistently stated that derogations from Community law rights must be interpreted restrictively. Under Article 22(1)(d) of Directive 2003/88/EC, competent national authorities

[6] For example, some Member States use a generalised opt-out which is available to any sector, while others allow the opt-out only in a particular sector, or only in sectors which make extensive use of on-call time.

may intervene *'for reasons connected with the safety and/or health of workers'* to *'prohibit or restrict'* the possibility of workers exceeding the 48-hour limit, even where they have agreed to do so. It must be assumed, therefore, that even if a worker agrees to opt out, the excess hours which he or she may work are always implicitly limited by the actual risks to health and safety which they present.

The Commission considered nevertheless that the lack of a specific upper limit for opted-out workers posed a particular risk of abuse. The amended proposal would set a new explicit limit for opted-out workers, of 55 hours in any week, unless collective agreements or agreements between the social partners provided otherwise.

The common position takes a different approach, at proposed Article 22(2)(d). The limit for opted-out workers would be 60 hours (on average over 3 months) unless collective agreements or agreements between the social partners provide otherwise; or 65 hours (on average over 3 months), if inactive periods of on-call time were considered as working time and if no collective agreements applied.

The Commission recognises that the limits proposed by the common position do represent an advance on the present lack of any specific upper limit for workers who agree to opt out. The Commission also considers it justified to allow a slightly higher limit where inactive on-call time is recognised as working time, since such an approach provides, in general, a higher level of protection for workers' health and safety.

1.3. New provisions introduced by the Council, and the Commission's stance

The new protective framework for the opt-out:

The common position expands the increased protection already proposed by the Commission, to give the following four-point framework for the opt-out:

- *More explicit limits*: The opt-out is contextualised as a derogation which must be subject to the effective protection of workers' health and safety, and to the express, free and informed consent of the worker. Its use must be subject to appropriate safeguards to protect those conditions, and to close monitoring; such use also requires consultation with the social partners (Recital 12, proposed Article 22(1)).

- *Better practical protection for workers*: More and tighter practical conditions for using the opt-out. These are aimed at: better protecting workers against being pressured to opt-out, ensuring that they can return to the 48-hour limit quickly and without fear of victimisation if they wish to do so, obliging employers to keep full records for national authorities about how the opt-out is used in practice, and making sure that national authorities can monitor and intervene more effectively where there are health and safety risks. (proposed Article 22.2)

- *Further review*: the Commission will report to the Council[7] on the use of the opt-out, (and of other factors which may contribute to long working hours). This report will be based on detailed reports from Member States, which will include consultation of the social partners at national level; it may make appropriate proposals to reduce excessive working hours, including regarding the opt-out. The Council will evaluate these issues at that stage (proposed Article 24a).

[7] The report is to be made not later than four years after the date by which the proposal is to be transposed into national law.

- *Obligation to choose*: Member States would have to choose between allowing the opt-out (in any sector) and using the new option of extending reference periods for weekly working time to 12 months by legislation. If a Member State allows the opt-out, then reference periods may not generally exceed 6 months, unless a collective agreement or social partner agreement so provides. If a Member State does not allow the opt-out, then reference periods may be extended to a maximum of 12 months, either by collective agreement or by legislation. This provision should introduce a structural incentive for Member States to discontinue use of the opt-out (proposed Article 22a).

The Commission welcomes these developments, which would increase legal protection for workers' health and safety.

Exclusion of short-term workers from certain protective conditions

The common position provides, at proposed Article 22(3), that workers who are employed for not more than 10 weeks in a year by the same employer, are excluded from two of the protective conditions for opted-out workers.

Effectively, these workers may thus validly agree to opt-out during the first four weeks of employment (though not at the signature of the employment contract), and they may work hours which exceed the maximum limit for opted-out workers (60 hours per week on average, unless a collective agreement or agreement of the social partners provides otherwise; 65 hours per week, if inactive on-call time is counted as working time), subject to general principles of protecting workers' health and safety.

4. CONCLUSION

The Commission's position is to support the common position, which was agreed by qualified majority.

The Commission is aware that the common position differs in some respects from its amended proposal. In some instances, the changes reinforce the level of protection provided to workers.

The Commission believes that the present situation regarding on-call time and compensatory rest still urgently requires clarification through legislative change. This view was formed during extensive consultations before the Commission presented its original proposal in 2004, and has been reinforced by subsequent developments.

There are two main reasons for this conviction. The first is the practical impact of the ECJ rulings on the organisation of core public services (including emergency services, intensive care and casualty departments of hospitals, residential care for different vulnerable groups, and support services for people with disabilities), which already face a range of structural challenges for demographic and other reasons. This is particularly the case for Member States which experience significant net emigration of skilled workers.

The second is the link between the *SIMAP* and *Jaeger* decisions, and the rapid proliferation since 2000 of recourse to the opt-out. Many Member States who introduced the opt-out during that period have done so only, or primarily, for sectors which make extensive use of on-call time.

The Commission is also very conscious of the advantages for the overall protection of workers which flow from the Council's decision to link a political agreement on this amending proposal with a political agreement on the proposed new Directive on temporary agency work. This approach has allowed two key proposals to finally move into second reading, after a very long period of political blockage.

Overall, in view of the strongly divergent positions of Member States within the Council during the very protracted and difficult first reading on amendment of the Working Time Directive (almost four years), the Commission perceives that supporting the common position is the best way of allowing the legislative procedure on this important amending proposal to continue.