COMMISSION OF THE EUROPEAN COMMUNITIES

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2004/0209 (COD)

OPINION OF THE COMMISSION

pursuant to Article 251 (2), third subparagraph, point (c) of the EC Treaty

on the European Parliament's amendments to the Council's common position regarding the proposal for a

Directive of the European Parliament and of the Council amending Directive 2003/88/EC concerning certain aspects of the organisation of working time

AMENDING THE PROPOSAL OF THE COMMISSION pursuant to Article 250 (2) of the EC Treaty

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1. BACKGROUND

Date on which the proposal was sent to Parliament and Council	22 September 2004
(document COM (2004) 607 final: 2004/0209 (COD)	
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:	31 May 2005
(COM (2005) 246 final)	
Date of political agreement on the common position by the Council	10 June 2008
(qualified majority)	
Date of formal adoption of the common position by the Council	15 September 2008
Date of Parliament's opinion at second reading	17 December 2008
(P6_TA (2008) 0615)	
Date of transmission of Parliament's opinion at second reading	14 January 2009

2. PURPOSE 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;

- 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.

The '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.

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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.

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 October 2003 in case C-151/02, *Jaeger***,** [2003] ECR I-8389

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. COMMISSION'S OPINION ON THE AMENDMENTS PROPOSED BY PARLIAMENT

3.1. Summary of the Commission's position

The Parliament has adopted 22 amendments to the Common Position. The Commission can accept 15 of these amendments, either in full or in part.

The Commission can accept six amendments as they stand (nos. 7, 9, 15, 18, 19, and 21), and can accept nine in part (nos. 1, 11, and 20), or in principle and/or subject to rewording (nos. 2, 3, 12, 13, 14, and 22).

The Commission rejects seven amendments (nos. 4, 5, 6, 8, 10, 16, and 17).

Overall, the position of the Parliament and the Common Position of the Council differ on several significant issues. However, the Commission remains convinced of the urgent importance of adopting the amending proposal before the end of the present legislative mandate. In particular, it is very conscious of the urgent need to find a solution to the outstanding problems regarding the questions of on-call time and compensatory rest, which directly affect the organisation of key public services across the EU. It is also crucial to quickly re-establish legal certainty in relation to workers' rights regarding limits to working time and minimum rest entitlements, which form such an important part of the Community social *acquis*. A sustainable basis for agreement will need to provide a carefully balanced solution, which strengthens overall protection for workers' health and safety, while at the same time allowing greater flexibility for both workers and employers in the practical organisation of working time.

In this context, the present Opinion describes the Commission's position towards the amendments voted by the Parliament, and sets out concrete proposals with the aim of helping the Council and the Parliament to reach such a basis for agreement.

3.2. Parliament's amendments at second reading

3.2.1 On-call time

Amendment 9 *(inactive parts of on-call time)* (Article 2a): accepted.

The Commission is able to support the amendment, but is prepared to explore a possible overall compromise on the issues covered by amendment 9, which at present are dividing the co-legislators.

This amendment has four parts. The first part states that both active and inactive periods of on-call time shall be regarded as working time. (Under the Common Position, active periods

are working time, but inactive periods are not regarded as working time unless national law or collective agreements so provide. This also reflects the Commission's original and amending proposals.) The second part provides that when calculating working time, inactive periods of on-call time may be counted in a specific manner, (other than hour-for-hour), by national law or collective agreements. (The Common Position contains a similar provision, although there are differences of detail.) The third part deals with whether inactive periods of on-call time may be counted towards minimum rest periods. (The Common Position allows this to be done by national law or collective agreement; but under the amendment, inactive on-call time could not be counted towards minimum daily or weekly rest periods.) The fourth part deletes a statement in the Common Position that active periods of on-call time are always to be regarded as working time (this point would, instead, be covered by the broader statement in the first part of the Parliament's amendment).

The Commission accepts the third part of Amendment 9, which states that the inactive part of on-call time shall not be counted towards minimum rest periods required by the Directive. This reinstates an important provision from the Commission's original and amending proposals.

The Commission can also accept in substance the first, second and fourth parts of the amendment, so that periods of inactive on-call time would be regarded as working time, but could be counted in a specific way when calculating working time. In particular, the Commission considers that the second part of the amendment could, in principle, make a valuable contribution to an overall solution regarding on-call time which would be acceptable both to Parliament and to Council, subject to some reformulation of the text so that the experience in the sector concerned, and compliance with the general principles of protecting workers' health and safety, are both included as relevant criteria.

3.2.2 Compensatory rest

Amendment 3 *(timing of compensatory rest)* (Recital 8): accepted in principle and/or subject to rewording.

The amendment reformulates a recital on the timing of compensatory rest, consistent with the amendments proposed to the corresponding Article 17. It also includes a reference to collective bargaining arrangements.

The Commission can accept the reference to collective bargaining, since it would improve consistency with Article 18 of the Directive.

The Commission can accept in principle the proposed change regarding the timing of compensatory rest, but believes that reformulation is needed, in order to provide some additional flexibility. See detailed comments on Amendment 13.

The Commission would be willing to explore a possible compromise between the approach of the amendment and that of the Common Position.

Amendment 13 *(timing of compensatory rest)* (Article 17, paragraph 2): accepted in principle and/or subject to rewording.

The amendment deals with the timing of equivalent compensatory rest (already required under the Directive where a worker misses part or all of a minimum daily or weekly rest periods). Under the amendment, compensatory rest would be taken 'following' time on duty,

rather than 'within a reasonable period' afterwards, as under the Common Position or under the Commission's amended proposal. (The Commission's original proposal was that compensatory rest was to be taken within a reasonable period, which could not exceed 72 hours, but this did not attract the necessary support.)

The Commission can accept in principle the proposed change regarding the timing of compensatory rest, but believes that reformulation is needed, in order to provide some additional flexibility. Such a formulation should ensure proper protection of workers' needs to rest and recover, while also allowing for some necessary flexibility about the organisation of work and rest time in the specific circumstances of certain sectors or activities. The Commission is prepared to explore a possible compromise on this question, which is dividing the co-legislators.

A possible approach is that equivalent compensatory rest would, as a general rule, be taken following the period of duty concerned. This is the wording that best ensures the protection of workers' physical and mental need to rest and recover. However in specified sectors or activities, and for duly justified reasons, national laws or collective agreements could provide for equivalent compensatory rest to be taken within a 'reasonable period', which must be clearly defined, by taking account of the objective of protecting workers' health and safety, and of relevant experience in the sectors or activities concerned.

Amendment 14 *(timing of compensatory rest)* (Article 18): accepted in principle and/or subject to rewording.

The amendment covers the same point as amendment 13, but in the context of collective agreements.

The Commission can accept in principle the proposed change regarding the timing of compensatory rest, but believes that reformulation is needed, in order to provide some additional flexibility. The detailed comments on amendment 13 (except for references to national laws) also apply in this context.

3.2.3 The reference period

Amendment 7 *(deleting the obligation to choose between the opt-out, and extension of the reference period)* (Recital 14): accepted.

The amendment would delete the recital linked to Article 22a of the Common Position, which was meant to provide an incentive for Member States not to use the opt-out, or to discontinue their use of the opt-out. (See detailed explanation under Amendment 21.)

The Commission can accept this amendment. The Commission had not proposed such an obligation in its original and amended proposals. Moreover, its deletion would provide an incentive for companies not to resort to the opt-out, but to make use of the longer reference period.

Amendment 15 (*reference periods*) (Article 19 paragraph 1 point b): accepted.

The relevant provision allows Member States to extend the reference period (for calculating limits to average weekly working time) to a maximum of 12 months by legislation. (The existing Directive already allows a similar extension by collective agreement.)

The effect of the amendment is to limit the use of this option to workers who are not covered by collective agreements or agreements between the social partners; and to provide that in such cases the Member State must ensure that employers inform and consult workers about introducing such a work pattern, and that they take the necessary measures to deal with any resulting health and safety risks.

The Commission can accept this amendment, which largely reinstates text contained in the Commission's amended proposal.

Amendment 21 *(deleting obligation to choose between the opt-out, and extension of the reference period)* (Article 22a): accepted.

The amendment would delete Article 22a of the Common Position, which was meant to provide an incentive for Member States not to use the opt-out, or to discontinue their use of the opt-out. Article 22a provides that any Member State which allows use of the opt-out may not also use the new provision (Article 19 (b)) which allows the reference period to be extended to a maximum of 12 months by legislation (see comments on amendment 15). In such a situation, the Member State could still allow the reference period to be extended to 12 months by collective agreement, but reference periods set by other means, such as national law, could not exceed 6 months.

The Commission can accept this amendment. The Commission had not proposed such an obligation in its original and amended proposals. Moreover, its deletion would provide an incentive for companies not to resort to the opt-out, but to make use of the longer reference period.

3.2.4 Reconciliation of work and family life

Amendment 11 *(reconciliation of work and family life)* (Article 2b): accepted in part.

This amendment has three parts. The first part strengthens employers' obligations to inform and consult workers 'well in advance' about changes to work patterns. The second part would create a right for workers to request changes to their work patterns in order to facilitate reconciling work and family life, and an obligation for employers to consider such requests fairly. The third part states that employers could refuse such requests only in limited circumstances.

This Article originates in the Parliament's opinion at first reading, and the first and second parts reinstate text from the Commission's amended proposal. The Common Position maintained an obligation for employers to inform workers in advance, but reduced the scope of the obligation and removed the right for a worker to request changes as well as the obligation for an employer to consider them.

The Commission can partly accept this amendment. In the first part, the Commission can accept that employers should inform workers 'well in advance' rather than 'in due time', but considers that the change proposed by the Common Position (to inform only of 'substantial' changes) is a reasonable one, and should not be deleted.

The Commission does not accept the second and third parts of the amendment, because it considers that these elements would tend, at this juncture, to exacerbate the difficulty of finding overall agreement on the proposal, and that they can be better addressed in another context. In particular, the proposed criterion for any refusal by an employer seems difficult to

apply in practice, and this question would benefit from a more extensive discussion than will be feasible in the present context.

3.2.5 The opt-out

Amendment 4 *(opt-out)* (Recital 11): rejected.

The amendment makes two changes to the recital about the future of the opt-out: it adds the word 'final' regarding the individual worker's decision to use the opt-out, and states that the Directive's provision for opt-out should end.

The Commission cannot accept this amendment. As regards the word 'final' : this word was supposed to indicate that the ultimate decision whether to work longer than the 48-hour limit is made by the worker. However, in the light of the extensive discussions which have been held on this issue, the Commission considers that it could be misleading, since a worker's agreement to opt-out is not final in the sense of being a permanent agreement, and can be withdrawn. For this reason, the Commission would prefer to delete the word at this stage.

As regards the future of the opt-out, please see detailed comments on Amendment 16.

Amendment 5 *(deleting framework for any use of the opt-out)* (Recital 12): rejected.

The amendment deletes a recital which sets the opt-out in context as a derogation from the 48-hour limit to working time, which is subject to the effective protection of workers' health and safety and to the express, free and informed consent of the worker concerned. The recital also states that the opt-out must be used subject to appropriate safeguards to ensure that those conditions are respected, and to close monitoring. This amendment is closely related to the outcome of Amendment no 16 on the future of the opt-out.

The Commission could accept this amendment, but only in the context of the solution envisaged by the Parliament (the abolition of the opt-out, under Amendment 16). However, if the opt-out remains (see comments on amendment 16), the Commission considers that this recital should also remain. Therefore, it rejects this amendment. It is essential for the protection of workers' health and safety that any use of the opt-out should be subject to the explicit conditions mentioned above, and that those conditions should be enforced through effective safeguards and monitoring. The existing text responds to this need and improves protection for workers.

Amendment 6 *(deleting a proviso that other forms of flexibility should be considered before resort to opt-out)* (Recital 13): rejected.

The amendment would delete a proviso that before deciding to apply the opt-out, alternative forms of flexibility should first be examined to see whether they would suffice. This amendment is closely related to the outcome of Amendment no 16 on the future of the opt-out.

The Commission could accept this amendment, but only in the context of the solution envisaged by the Parliament (the abolition of the opt-out, under Amendment 16). However, if the opt-out remains (see comments on amendment 16), the Commission considers that such a condition is desirable, to encourage Member States and social partners to first consider less problematic alternatives. Therefore, it rejects this amendment.

Amendment 16 *(opt-out)* (Article 22 paragraph 1): rejected.

The amendment would have the effect of terminating the possibility for Member States to allow use of the opt-out, three years after the amending proposal enters into force.

The Commission's amended proposal was to eliminate the opt-out after 3 years (but with a proviso that Member States already using it at that stage could apply for a further extension of time, subject to a further review.)

The Commission cannot accept this amendment. The Commission's view, as already indicated in its Communication on the Common Position[4], remains that the opt-out is a derogation from the principle of a 48-hour working week, which can present risks to workers' health and safety, both in the short term and in the long term.

However, while being in principle supportive of the eventual phasing out of the opt-out, the Commission does not consider that present conditions allow for the phasing-out of the opt-out, in the light of major changes to the pattern of use of the opt-out by Member States and of the positions expressed by Member States during, and since, the Council's first reading.

The Commission considers, in view of an overall compromise, that all provisions pertaining to the opt-out have to be assessed together with the review clause (see comments on Amendment 22).

Amendment 17 *(period for validity of individual opt-out)* (Article 22, paragraph 2, point (a)): rejected.

The amendment provides that where a worker agrees to opt out of the 48-hour limit to average weekly working time, that agreement shall be valid for a period not exceeding six months (rather than one year, under the Common Position.) The Commission had proposed a period of one year in its original and amended proposals.

The Commission cannot accept this amendment, because it would primarily add a bureaucratic burden not in line with better regulation. It is important to note that the worker is in any case entitled to withdraw his or her agreement to opt-out (with at most two months' notice), under Article 22.2(e) of the Common Position.

Amendment 18 (*no opt-out during probationary period*) (Article 22, paragraph 2, point (c), sub-point (i)): accepted.

The effect of the amendment is that a worker could not validly agree to opt-out during any probationary period.

The Commission accepts this amendment, which reinstates the text contained in the Commission's original and amending proposals. It is important to protect workers who are in a vulnerable phase of employment, from the risk of undue pressure to agree to longer working hours.

[4] COM (2008) 568, section 3.2.3

Amendment 19 *(deletes limits to working time of opted-out workers)* (Article 22, paragraph 2, point d): accepted.

The amendment would delete the upper limits proposed by the Common Position (60 hours per week, or 65 hours in some situations, on average) for the working time of workers who agree to opt-out. At present, the Directive does not set any explicit upper limit to the working time of workers who agree to opt-out. The Commission's original and amended proposals had both proposed to introduce a new specific limit for the working time of opted-out workers.

This article in the Common Position has been the most criticised since the adoption and has led to considerable misrepresentations about its objectives. As both the European Parliament, and a majority of Member States, are against including a figure, and since there is no upper limit in the current Directive, the Commission is able to support its deletion in order to facilitate an agreement between the co-legislators. It should also be recalled that Member States are free to set upper limits for the working time of workers who agree to opt-out.

Amendment 20 *(exclusion of certain short-term workers)* (Article 22, paragraph 3): accepted in part.

The amendment deletes a provision, inserted by the Common Position, which would exclude certain short-term workers from two provisions intended to protect workers who agree to opt-out. The effect of the amendment is that, firstly, workers employed for less than ten weeks per year with the same employer could not validly sign an opt-out within the first four weeks of employment. Secondly, if such a worker agreed to opt out, any upper limit to working time for opted-out workers under Article 22.2 (d) would also apply to him or her.

The Commission can partly accept this amendment. If the opt-out is to remain, then short-term workers should be able to use it: in health and safety terms, excess hours pose fewer risks when they are limited to short periods than when they are continued over long periods. Therefore, the Commission considers that Article 22(3), as proposed by the Common Position, should remain unchanged where it refers to paragraph 2(c)(ii) (so that, in effect, a worker who is employed for less than ten weeks per year with the same employer may validly sign an opt-out during the first four weeks of that employment).

However, the Commission accepts deleting the reference to paragraph 2(d) as the Commission has also accepted Amendment 19, where the Parliament has proposed to delete the upper limit for opted-out workers (see detailed comments on Amendment 19.)

Amendment 22 *(deletion of review clause)* (Article 24a): accepted in principle and/or subject to rewording.

The amendment deletes a provision requiring Member States which use the opt-out (or which otherwise allow long working hours) to provide detailed reports to the Commission on how the derogation is applied in practice, including the views of social partners. The Commission would then report to Parliament, and to the Council which would evaluate the situation; the Commission may also make further proposals.

This amendment is closely related to the outcome of Amendment no 16 on the future of the opt-out. The Commission can accept this amendment in principle. However, in the event that the opt-out remains (see comments on amendment 16), the Commission believes that a review

clause is indispensable in order to secure an agreement between the co-legislators, based on the reformulation of the wording of the directive currently in force.

3.2.6 Other issues

Derogation for autonomous workers

Amendment 12 *('autonomous workers' exemption)* (Article 17, paragraph 1, point (a)): accepted in principle and/or subject to rewording.

The amendment would reformulate the wording of a provision in the existing Directive, which allows for derogations from limits to working time and from minimum rest periods as regards 'managing executives and other persons with autonomous decision-taking powers'. Under the amendment, the derogation would apply only to workers in senior management positions.

The Commission can accept this amendment, subject to some reformulation. The Commission considers that the proposed wording is somewhat too restrictive, but accepts the underlying need to amend this provision, in order to clarify that it refers only to employees who are sufficiently autonomous to enjoy genuine control over their own working hours.

Application per-worker

Amendment 8 *(per-worker application)* (Recital 16 (a): rejected.

The amendment would insert a recital providing that where a worker has more than one contract of employment, his or her working time under all contracts should be taken into account when calculating working time.

The Commission considers (as already stated in its 2000 Report on application of the Working Time Directive[5]) that in view of the health and safety objectives of the Directive, its limits to working time must, as far as possible, be applied per worker (and not per contract) in the case of any worker who works concurrently under two or more employment relationships. However, there is a considerable variation in the approaches followed by the Member States in that respect.

The Commission considers that the inclusion of this issue in the current revision would make it nearly impossible to reach agreement in Council. Therefore, the Commission rejects this amendment.

Amendment 10 *(per-worker application)* (new Article 2a (a)): rejected.

The amendment would insert a new provision stating that where a worker has more than one contract of employment, his or her working time under all contracts should be taken into account when calculating working time.

The Commission considers (as already stated in its 2000 Report on application of the Working Time Directive[6]) that in view of the health and safety objectives of the Directive, its

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5 COM (2000) 787, at point 14.2

6 COM (2000) 787, at point 14.2

limits to working time must, as far as possible, be applied per worker (and not per contract) in the case of any worker who works concurrently under two or more employment relationships. However, there is a considerable variation in the approaches followed by the Member States in that respect.

The Commission considers that the inclusion of this issue in the current revision would make it nearly impossible to reach agreement in Council. Therefore, the Commission rejects this amendment.

Considerations when amending the Directive

Amendment 1 *(considerations for revision of working time organisation)* (Recital 7): accepted in part.

The amendment reformulates a list of factors which are relevant to the present review.

The Commission can accept this amendment, subject to some reformulation as regards the reference to life-long learning. (This reference does not relate to any operative provision in the text, and therefore seems inappropriate in the context of the current proposal.)

Reference to decisions of the Court

Amendment 2 *(Court of Justice's decisions)* (Recital 7a): accepted in principle and/or subject to rewording.

The amendment introduces a new recital, which describes the concept of working time in the light of recent decisions of the Court of Justice.

The Commission can accept this amendment in principle, but subject to some reformulation. The aim of the reformulation would be:

- to ensure that the text fully reflects the Court's decisions (for example, it is not clear that the Court's decisions would require all working time to involve presence at a place determined by the employer) and

- to ensure that the text is consistent with the express definition of working time at Article 2 paragraph 1 of the Directive, since the present revision does not propose any change to that paragraph.