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from : The Presidency

to : Permanent Representatives Committee (Part 1)

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- COM (2004) 607 final

Subject : **Proposal for a Directive of the European Parliament and the Council
amending Directive 2003/88/EC concerning certain aspects of the
organisation of working time**

I. INTRODUCTION

Following the submission of the Commission proposal to the Council on 22 September 2004, the Council held a first exchange of views on 4 October. As from 6 October, the Social Questions Working Party has had several meetings on the Commission proposal. Basically, three major outstanding issues have been identified in the course of the discussions:

- The approach to be taken as regards "on-call time";
- The approach to be taken on compensatory rest;
- The "opt-out" clause, i.e. the option not to apply Article 6 of the Directive regarding maximum weekly working time (48 hours).

While the first two issues require further discussions in the framework of the Social Questions Working Party, the Presidency now considers that political guidance should be sought from the Committee of Permanent Representatives on the "opt-out" issue. It is to be noted that several delegations (CZ, EL, FI, FR and IT in particular) still maintain specific scrutiny reservations on this issue at this stage.

II. THE CONTENTS OF THE COMMISSION PROPOSAL ON THE "OPT-OUT"

The Commission's proposal introduces a dual system:

- priority is given to the opt-out that requires prior collective agreement or agreement between the two sides of industry, followed by the individual consent of the worker;
- only in cases where such agreements are impossible under national legislation and/or practice, because there is no empowered workers' representation, opt-outs on the basis of individual consent alone remain possible.

In any case, the Commission proposes to reinforce the conditions that will apply to prevent abuse and to ensure that the choice of the worker is entirely free. In particular, the worker's agreement has to be given in writing, it cannot be given at the beginning of the employment relationship (at the time of signing the employment contract) or during any probationary period, its validity is limited to one year, an absolute maximum limit of weekly working hours (65) is imposed as well as the obligation of keeping for each worker up-to-date records of the number of hours actually worked.

III. POSITIONS OF THE DELEGATIONS

The opinions of delegations can roughly be divided into three main groups.

On the one hand, a number of delegations (BE, ES, FR, CY, LT, FI, SE) question the need for maintaining the opt-out in view of the flexibility introduced by the proposal as a whole (resulting in particular from the possibility of setting reference periods concerning maximum weekly working time of up to 12 months). They are therefore in the first instance in favour of abolishing the opt-out on grounds of principle (e.g. contrary to health and safety and the need for a level playing field to avoid any downward spiral of deteriorating standards). As a compromise, most of these delegations could envisage a phasing-out option whereby the opt-out would be abolished after a transitional period during which it could remain under certain conditions.

It should be noted that the phasing-out option has not been discussed in detail at the level of the Working Party. It is recalled that the European Parliament, during its former legislature, favoured a phasing-out approach.

On the other hand, a group of delegations (EE, LV, MT, PL, SI, SK, UK) cannot accept the Commission proposal on the opt-out for an opposite reason. They consider the opt-out to be a necessary tool to be retained, preferably as it stands in the current Directive, but in any case not in the restrictive way the Commission is now proposing. In this respect certain delegations, particularly the UK, have made it clear that they are not able to make use of the derogation through collective agreements in the same way as other Member States, due to the distinctive characteristics of their industrial relations systems. These delegations feel that the priority given to the use of the opt-out by means of collective agreement will in practice mean that they can use the opt-out only in a very limited way. They consider that Member States should be able to allow the opt-out either by collective agreement or by individual choice, depending on the nature of their industrial relations systems.

Finally there is a group of delegations (DK, DE, EL, IE, IT, LU, HU, NL, AT, PT) that is more open or flexible with regard to the Commission's proposal. It should be noted that, within this group, Germany and Denmark are of the opinion that a compromise solution should be found that has the approval of all delegations.

IV. PROPOSALS UNDER DISCUSSION

In the Working Party, several proposals have been put forward by delegations that seek to find a compromise solution on the principle of the opt-out:

- the UK and Slovak delegations made a suggestion to put the individual opt-out and the opt-out that is agreed upon by means of collective agreement on an equal footing (i.e. the priority given to the collectively agreed "opt out" would be removed). It would be up to Member States to decide whether to allow either the individual or the collective opt-out or both;

- the Italian delegation put forward a suggestion that makes clear that the opt-out could be introduced either by national law or by collective agreements. In essence, the Italian suggestion also gives Member States the possibility of introducing or maintaining the opt-out without any further conditions which would give priority to a collective agreement. Furthermore, the Italian proposal specifies that, in the case of a collectively agreed use of the opt-out, it would not be necessary to obtain the agreement of the individual worker, since the workers' interests would be sufficiently protected by their trade unions representatives during the negotiation with the employers;

- the Portuguese delegation put forward a suggestion that would maintain the priority given to a collectively agreed use of the opt-out but which would remove the second part of the Commission proposal on worker representation. In essence this would mean that the individual opt-out would also be allowed in a situation where there is worker representation but where management and worker representation have not been able to conclude an agreement on the use of the opt out. Furthermore, the Portuguese suggestion differentiates between the conditions that would be applicable, on the one hand, for the individual opt-out and, on the other hand, those applicable in the case of the opt-out agreed upon by means of collective agreement. Where the use of the opt-out was provided for by a collective agreement, no worker should work more than 65 hours in any one week. Where the use of the opt-out was provided for by an agreement between the employer and the individual worker, no worker should work more than 55 hours in any one week.

None of these suggestions as such has met with enough support to represent a viable compromise.

V. THE WAY FORWARD

Given the fact that the Commission proposal seems not to be acceptable to a large majority of delegations and that the suggestions from the UK/Slovak Republic delegations and from Italy were acceptable neither to the Commission nor to the group of delegations favouring phasing-out, the Presidency is of the opinion that the middle ground necessary to bridge the gap between the diverging opinions of Member States could be found on the basis of the Portuguese proposal.

The Presidency considers that a second element could be introduced into the Portuguese suggestion in order to encourage management and workers' representatives to engage actively in negotiations on a collectively agreed opt out. This could consist of further differentiating the conditions applicable in the case of an opt-out negotiated by collective agreement and those applicable in the case of an individual opt-out. This is already the case in:

- the Commission proposal, which already foresees a maximum number of hours' work under the opt-out (the 65 hours "cap"), unless a collective agreement provides otherwise;
- the Portuguese suggestion, which retains this idea while making a distinction between the cap for an individual opt-out, which should be put at 55 hours, and the cap for a collectively agreed opt-out, which should be set at 65 hours;
- the Italian suggestion, where the individual consent of the worker is not required in the case of a collectively agreed opt-out.

Additionally, such a differentiation could also be envisaged for other specific conditions. For instance, the length of the opt-out agreement (maximum 1 year in the Commission proposal), the renewability of the agreement, and the question of the opt-out agreement being null and void once this agreement has been signed at the moment of recruitment or during any probationary period.

In essence, the idea of the Presidency is that stricter conditions could be applied to the individual opt-out than to the collectively agreed opt-out in order to encourage social dialogue. In this way, priority would be given to the collective use of the opt-out whilst, at the same time, the conditions for using the individual opt-out would be less restrictive than in the proposal of the Commission.

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The Presidency would like to invite the Committee to express its opinion on the suggested way forward.
