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PROPOSAL

from: European Commission
dated: 31 May 2005

Subject: Amended 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

Delegations will find attached an amended proposal from the Commission, submitted under a covering letter from Ms Patricia BUGNOT, Director, to Mr Javier SOLANA, Secretary-General/High Representative.

Encl.: COM(2005) 246 final - 2004/0209 (COD)



COMMISSION OF THE EUROPEAN COMMUNITIES

Brussels, 31.5.2005
COM(2005) 246 final

2004/0209 (COD)

Amended 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**

(presented by the Commission)

~~{SEC(2004) 1154}~~

EXPLANATORY MEMORANDUM

1. INTRODUCTION

On 22 September 2004, the Commission adopted a 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.¹ This proposal was forwarded to the European Parliament and the Council on 22 September 2004.

On 11 May 2005, the Economic and Social Committee gave its opinion on the Commission proposal.² The Committee of the Regions gave its opinion on 14 April 2005.³

The European Parliament gave its opinion at first reading on 11 May 2005.⁴

2. AMENDMENTS

Amendments proposed by the European Parliament

The Commission is prepared to accept all the amendments set out below, which, it thinks, improve the proposal and maintain its aims and political viability, taking account of the positions already expressed by the Member States to the Council:

- amendment No 1 (citing the conclusions of the Lisbon European Council): see recital No 4;
- amendment No 2 (rewording recital No 4): see recital No 4;
- amendment No 3 (reference to increasing the rate of employment amongst women): see recital No 5;
- amendment No 4 (addition of a reference to compatibility between work and family): see recital No 7;
- amendment No 8 (citing Article 31(2) of the Charter): see recital No 14;
- amendment No 11 (aggregation of hours in cases involving several employment contracts): see recital No 2;
- amendment No 12 (addition of a provision concerning compatibility between work and family life): see Article 2b;
- amendment No 13 (deletion of Article 16b(2)): see Article 16;
- amendments Nos 16 and 18 (compensatory rest time): see Articles 17(2) and 18(3);
- amendment No 17 (correction of an error): see the first indent of Article 17(5);

¹ COM(2004) 607 final.

² OJ C [...], [...], p. [...].

³ OJ C [...], [...], p. [...].

⁴ OJ C [...], [...], p. [...].

- amendment No 19 (reference period): see Article 19;
- amendment No 24 (provision concerning the validity of opt-out agreements signed prior to the entry into force of this Directive): see Article 22(1c).

By contrast, the Commission cannot accept at this stage the other amendments proposed by the Parliament. Some of them do not constitute an improvement to the Directive or are not acceptable from a strictly legal point of view. Others might, in the Commission's view, disrupt the balance of the initial text and make it more difficult to obtain an agreement or a sufficient majority in the Council.

The Commission is conscious of its role in the codecision procedure as an intermediary between the two arms of the Community legislature.

Among the amendments not accepted by the Commission it should be noted that, with regard to amendment No 20 (on the individual opt-out), the Commission has clearly indicated that, while unable to accept it as it is, it is prepared to explore a possible compromise on this question which is dividing the co-legislators. Furthermore, with regard to amendment No 10 (concerning on-call time), the Commission also pointed out that it shares the concerns of the European Parliament with regard to the health and safety of workers who are regularly on call and that it would add a provision to ensure that inactive periods of on-call time are not taken into account with regard to the daily and weekly rest period.

Amended 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

THE EUROPEAN PARLIAMENT AND THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty establishing the European Community, and in particular Article 137(2) thereof,

Having regard to the proposal from the Commission,⁵

Having regard to the opinion of the European Economic and Social Committee,⁶

Having regard to the opinion of the Committee of the Regions,⁷

Acting in accordance with the procedure laid down in Article 251 of the Treaty,⁸

Whereas:

- (1) Article 137 of the Treaty lays down that the Community supports and supplements the activities of the Member States with a view to improving the working environment to protect workers' health and safety. Directives adopted on the basis of the aforementioned Article must avoid imposing administrative, financial and legal constraints in such a way as to hold back the creation and development of small and medium-sized undertakings.
- (2) Directive 2003/88/CE of the European Parliament and of the Council, of 4 November 2003, concerning certain aspects of the organisation of working time,⁹ establishes minimum requirements concerning the organisation of working time, notably on daily and weekly rest, breaks, maximum weekly working time, annual leave and certain aspects of night work, shift work and patterns of work. **These minimum requirements apply to all workers as defined in Article 3a of Directive 89/391/EEC.**¹⁰

⁵ OJ C [...], [...], p. [...].

⁶ OJ C [...], [...], p. [...].

⁷ OJ C [...], [...], p. [...].

⁸ OJ C [...], [...], p. [...].

⁹ 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, 18.11.2003, p. 9.

¹⁰ Council Directive 89/391/EEC of 12 June 1989 on the introduction of measures to encourage improvements in the safety and health of workers at work, OJ L 183, 29.6.1989, p. 1.

- (3) Two provisions of Directive 2003/88/EC have a clause providing for a review before 23 November 2003. They are Article 19 and Article 22(1).
- (4) More than ten years after the adoption of Council Directive 93/104/EC,¹¹ the initial Directive concerning the organisation of working time, it has become necessary to **take into consideration modernise Community legislation on working time, with a view to responding better to new realities and demands from both employers and workers and provide the resources to meet the growth and employment objectives laid down by the European Council on 22 and 23 March 2005 in the context of the Lisbon strategy.**
- (5) Reconciliation of work and family life is **also** an essential element for achieving the objectives set by the Union in the Lisbon strategy, **particularly for increasing the rate of employment amongst women**. The aim is not only to create a more satisfactory working environment, but also to respond better to workers' demands, in particular those with family responsibilities. A number of amendments introduced in Directive 2003/88/EC, ~~particularly with regard to Article 22,~~ **are intended to permit greater compatibility between work and family life.**
- (6) In this context, the Member States should encourage the social partners to conclude agreements at the appropriate level establishing rules for improving compatibility between working life and family life.
- (7) There is a need to **strengthen** ~~strike a new balance between~~ the protection of workers' health and safety and ~~the need~~ for greater flexibility in organising working time, particularly with regard to on-call time and, more specifically, inactive periods during on-call time, **and also to strike a new balance between reconciling work and family life on the one hand and a more flexible organisation of working time on the other.**
- (8) The provisions on the reference period must also be re-examined, with the objective of simplifying existing arrangements in order to adapt them to the needs of employers and employees.
- (9) The experience gained in the application of Article 22(1) shows that the purely individual decision not to be bound by Article 6 of the Directive can be problematic with regard to the protection of workers' health and safety and the freedom of choice of the worker.
- (10) In accordance with Article 138(2) of the Treaty, the Commission consulted the social partners at Community level on the possible direction for Community action in this field.
- (11) Following this consultation, the Commission considered that Community action was desirable and consulted the social partners again on the content of the envisaged proposal, in accordance with Article 138(3) of the Treaty.

¹¹ 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.

- (12) Following this second phase of consultation, the social partners at Community level did not inform the Commission of their wish to initiate the process which could lead to the conclusion of an agreement, as set out in Article 138(4) of the Treaty.
- (13) Given that the objectives of the planned action, which consists of modernising Community legislation concerning the organisation of working time, cannot be achieved sufficiently by the Member States and may therefore be better realised at Community level, the Community may take measures, in accordance with the principle of subsidiarity enshrined in Article 5 of the Treaty. In accordance with the principle of proportionality, as set out in that Article, this Directive does not go beyond what is necessary for the attainment of those objectives.
- (14) This Directive respects fundamental rights and observes the principles specifically recognised in particular by the Charter of Fundamental Rights of the European Union. In particular, it seeks to ensure full respect of the right to fair and equitable working conditions **referred to in** (Article 31 of the Charter of Fundamental Rights of the European Union), **and in particular paragraph 2 thereof, which lays down that "every worker has the right to limitation of maximum working hours, to daily and weekly rest periods and to an annual period of paid leave"**.
- (15) In accordance with the principles of subsidiarity and proportionality referred to in Article 5 of the Treaty, the objectives of the action envisaged above cannot be achieved adequately by the Member States, in so far as this involves modifying a Community legal act in force.

HAVE ADOPTED THIS DIRECTIVE:

Article 1

Directive 2003/88/EC is hereby amended as follows:

1. In Article 2, paragraphs 1a, **1aa** and 1b shall be added:

"1a. "on-call time": period during which the worker has the obligation to be available at the workplace in order to intervene, at the employer's request, to carry out his activity or duties.

1aa. "workplace": the place or places where the worker normally carries out his activities or duties and which is determined in accordance with the terms laid down in the relationship or employment contract applicable to the worker.

1b. "inactive part of on-call time": period during which the on-call worker is on call within the meaning of Article 1a but is not required by his employer to effectively carry out his activity or duties."

2. The following Article 2a shall be added:

"Article 2a

On-call time

The inactive part of on-call time shall not be regarded as working time unless national law or, in accordance with national law and/or practice, a collective agreement or an agreement between the social partners decides otherwise.

The inactive part of on-call time may be calculated on the basis of an average number of hours or a proportion of on-call time, taking account of experience in the sector concerned, by collective agreement or agreement between the social partners or following consultation of the social partners.

The inactive part of on-call time may not be taken into account in calculating the rest periods laid down in Articles 3 (daily rest period) and 5 (weekly rest period)."

The period during which the worker effectively carries out his activity or duties during on-call time shall always be regarded as working time.

~~**If necessary, the inactive part of on-call time may be determined as an average of the number of hours or a proportion of on-call time, taking account of experience in the sector concerned, by law, following consultation of the social partners, or by collective agreement or agreement between the social partners.**~~

~~**The inactive part of on-call time may not be taken into account in calculating the rest periods laid down in Articles 3 (daily rest period) and 5 (weekly rest period)."**~~

3. **The following Article 2b shall be added:**

"Article 2b

Compatibility between working and family life

The Member States shall encourage the social partners at the appropriate level, without prejudice to their autonomy, to conclude agreements aimed at improving compatibility between working and family life.

The Member States shall take the measures necessary to ensure that:

– employers inform workers in good time of any changes in the pattern or organisation of working time;

– workers may request changes to their working hours and patterns, and that employers are obliged to examine these requests taking into account employers' and workers' needs for flexibility."

4. **Article 16b shall be deleted.**

~~**"b) for the application of Article 6 (maximum weekly working time), a reference period not exceeding four months.**~~

~~**However, Member States may, for objective or technical reasons, or reasons concerning the organisation of work, extend the reference period referred to above to twelve months, subject to compliance with the general principles**~~

~~relating to the protection of the safety and health of workers, and provided there is a consultation of the social partners concerned and every effort is made to encourage all relevant forms of social dialogue, including negotiation if the parties so wish.~~

~~Whenever the duration of the employment contract is less than one year, the reference period cannot be longer than the duration of the employment contract.~~

~~Periods of paid annual leave granted in accordance with Article 7 and periods of sick leave shall not be taken into account or shall be neutral for the purposes of calculating the average."~~

5. Article 17 shall be amended as follows:

a) In paragraph 1, the terms "Articles 3 to 6, 8 and 16" shall be replaced by "Articles 3 to 6, 8 and 16a) and c)".

b) In Article 17(2), the terms "provided that the workers concerned are afforded equivalent periods of compensatory rest" shall be replaced by "provided that the workers concerned are afforded equivalent periods of compensatory rest within a reasonable period, ~~which cannot be longer than 72 hours~~, to be determined by **national legislation or a collective agreement or agreement concluded between the social partners**.~~within a reasonable period, which cannot be longer than 72 hours following the working time in question, in accordance with national legislation or a collective agreement or agreement concluded between the social partners"~~.

c) In paragraph 3, in the introductory sentence, the terms "Articles 3, 4, 5, 8 and 16" shall be replaced by "Articles 3, 4, 5, 8 and 16a) and c)".

d) Paragraph 5 shall be amended as follows:

i) The first indent shall be replaced as follows:

"In accordance with paragraph 2 of this Article, derogations may be made from Article 6 in the case of doctors in training, in accordance with the provisions set out in the second to the ~~seventh~~ sixth indents of this paragraph."

ii) The final indent shall be deleted.

6. In Article 18, third subparagraph, the expression "on condition that equivalent compensating rest periods are granted to the workers concerned" shall be replaced by "on condition that equivalent compensating rest periods are granted to the workers concerned within a reasonable period, ~~which cannot be longer than 72 hours~~, to be determined by **national legislation or a collective agreement or agreement concluded between the social partners**".~~within a reasonable period, which cannot be longer than 72 hours following the working time in question, in accordance with national legislation or a collective agreement or agreement concluded between the social partners"~~.

7. Article 19 shall be replaced by the following:

~~"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 organisation of work, collective agreements or agreements concluded between the two sides of industry to set reference periods, concerning the maximum weekly working time, in no case exceeding twelve months."~~ **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 organisation of work, the reference period to be set at a period not exceeding 12 months:**

a) by collective agreement or agreement between the social partners, as laid down in Article 18;

b) by legislative or regulatory provision, provided that the Member States take the measures necessary to ensure that:

– the employer informs and consults the workers and/or their representatives in good time concerning the introduction of such a reference period;

– the employer takes the measures necessary to avoid or overcome any risk relating to health and safety that could arise from the introduction of such a reference period."

8. The second paragraph of Article 20 shall be deleted.

9. Article 22 shall be amended as follows:

a) Paragraph 1 shall be replaced by the following text:

"1. During a period not exceeding three years following the date laid down in Article 3 of Directive [2005/--/EC], Member States shall have the option not to apply Article 6, while respecting the general principles of the protection of the safety and health of workers. Implementation of this option, however, shall be expressly laid down by collective agreement or agreement between the social partners at the appropriate level or by national law."

~~The condition provided for in the previous paragraph is not applicable where there is no collective agreement in force and there is no collective representation of the workers within the undertaking or the business that is capable of concluding a collective agreement or an agreement between the two sides of industry on the issue, according to national law and/or practice.~~

b) The following paragraph 1a shall be added:

"1a. In any event, Member States wishing to make use of this option shall take the necessary measures to ensure that:

a) 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 Article 16b, unless he has first obtained the worker's agreement to perform such work. This agreement shall be valid for a period not exceeding one year, renewable. An

agreement given at the time of the signature of the individual employment contract or during any probation period shall be null and void;

b) no worker suffers any detriment because he is not willing to give his agreement to perform such work;

c) no worker works more than ~~6~~55 hours in any week, unless the collective agreement or agreement concluded between the social partners lays down otherwise;

d) the employer keeps up-to-date records of all workers who carry out such work ~~and of the number of hours actually worked~~and adequate records for establishing that the provisions of this Directive are complied with;

e) 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;

f) 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 Article 16b, ~~as well as information on the number of hours actually worked by the workers concerned~~and adequate records for establishing that the provisions of this Directive are complied with."

c) The following paragraph 1b shall be added:

"1b. Member States making use of the option laid down in this Article before the date laid down in Article 3 of Directive [2005/--/EC] may, for reasons relating to their labour market arrangements, ask for the option to be extended beyond the period laid down in paragraph 1 of this Article.

The Commission shall decide on the response to this request, giving reasons for its decision."

d) The following paragraph 1c shall be added:

"1c: Member States may lay down that any agreement given by a worker before the date laid down in Article 3 of Directive [2005/--/EC], and still valid on that date, shall remain valid for a period not exceeding one year from that date."

10. The following Article 24a shall be added:

"Article 24a

Application~~Application~~**Evaluation** report

Not later than ~~five~~three years after ~~the entry into force of this Directive~~the date laid down in Article 3 of Directive [2005/--/EC], the Commission shall submit to the European Parliament, the Council and the European Economic and Social Committee a report on the application of its provisions, in particular of Articles 19 and 22 ~~and on any request under Article 22(1b), paragraphs 1 and 2,~~

accompanied where applicable by any appropriate proposals ~~including, if necessary, a phasing out of this provision.~~"

Article 2

Member States shall lay down rules on sanctions applicable in the event of infringements of national provisions enacted under this Directive and shall take all necessary measures to ensure that they are applied. The penalties provided for must be effective, proportionate and dissuasive. Member States shall notify these provisions to the Commission by the date given in Article 3 at the latest and any subsequent amendment within good time. They shall, in particular, ensure that workers and/or their representatives have adequate means of enforcing the obligations under this Directive.

Article 3

Member States shall adopt the laws, regulations and administrative provisions necessary to comply with this Directive by [] at the latest, or shall ensure that the social partners introduce the necessary provisions by way of an agreement, whereby the Member States must make all the necessary arrangements to enable them to guarantee at any time that the objectives of this Directive are being attained. They shall forthwith forward to the Commission the text of these provisions and a table of correspondence between these provisions and this Directive.

When Member States adopt these provisions, they shall contain a reference to this Directive or shall be accompanied by such a reference on the occasion of their official publication. The methods of making such reference shall be laid down by the Member States.

Article 4

This Directive shall enter into force on the [] day after its publication in the *Official Journal of the European Union*.

Article 5

This Directive is addressed to the Member States.

Done at Brussels, [...]

For the European Parliament
The President
[...]

For the Council
The President
[...]