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PROPOSAL

from: European Commission
dated: 22 September 2004

Subject: 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 a proposal from the Commission, submitted under a covering letter from Ms Patricia BUGNOT, Director, to Mr Javier SOLANA, Secretary-General/High Representative.

Encl.: COM(2004) 607 final



COMMISSION OF THE EUROPEAN COMMUNITIES

Brussels, 22.9.2004
COM(2004) 607 final

2004/0209 (COD)

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

I. AIM OF THE PROPOSAL

1. This proposal aims to amend Directive 2003/88/EC¹ of the European Parliament and of the Council of 4 November 2003 concerning certain aspects of the organisation of working time.
2. The review of some of the provisions of Directive 2003/88/EC, with a view to a possible modification, is imposed by the Directive itself. Indeed, the Directive contains two provisions prescribing their review before 23 November 2003. These provisions concern the derogations to the reference period for the application of Article 6 (maximum weekly working time) and the possibility not to apply Article 6 if the worker gives his agreement to carry out such work (the "opt-out").
3. On the other hand, the interpretation of certain provisions of the Directive by the European Court of Justice, on the occasion of several requests for preliminary rulings under Article 234 of the Treaty, had a profound impact on the concept of "working time" and, consequently, on essential provisions of the Directive. The Commission therefore considered that it was necessary and convenient to analyse the effects of this case law, in particular of the rulings in the SIMAP² and Jaeger³ cases, which held that on-call duty performed by a doctor when he is required to be physically present in the hospital must be regarded as working time.
4. Under Article 138 of the Treaty, the Commission consulted the social partners at Community level on the possible direction of a Community action in this matter. After this consultation, the Commission considered that a Community action was desirable and consulted the social partners at Community level again on the content of the envisaged proposal, in accordance with Article 138 (3) of the Treaty. The result of this second stage consultation is summarised hereafter.

II. RESULTS OF THE SECOND STAGE CONSULTATION OF THE SOCIAL PARTNERS

5. First of all, it must be pointed out that the social partners declined the invitation to enter into negotiations in this field, with a view to reaching a European agreement and asked the Commission to adopt a proposal of a Directive.
6. On the content of a proposal to amend the Directive, social partners' opinions are divided. With regard to Article 22(1) ("opt-out"), the organisation representing workers (ETUC) argues that the only acceptable option is its phasing-out, as soon as possible. On the contrary, among the organisations representing the employers,

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, Sindicato of Médicos of Asistencia Pública (SIMAP) v. Conselleria de Sanidad y Consumo de la Generalidad Valenciana, ECR 2000, p. I-07963.

³ Judgment of the Court of 9 October 2003 in case C-151/02, Reference for a preliminary ruling: Landesarbeitsgericht Schleswig-Holstein (Germany) in the proceedings pending before that court between Landeshauptstadt Kiel and Norbert Jaeger, not yet published.

UNICE argues in favour of maintaining Article 22(1) and of adding the possibility for Member States to allow an opt-out by collective agreement. The CEEP is in favour of maintaining Article 22(1) while, at the same time, strengthening the conditions in which it applies.

7. On the derogations from the reference period, the ETUC recalls that the annualisation of the reference period is already possible within the current legislative framework. The ETUC considers that the possibility of extending the reference period to 12 months by law or regulation would hinder the conclusion of modern working time agreements. For the ETUC, therefore, the current provisions should not be amended. On the other hand, UNICE considers that the Directive should allow a general reference period of a year, with the possibility of extending this by collective agreement. This modification would make it possible to respond to the needs of companies faced with important fluctuations in their activity, to reduce the administrative burden for companies, in particular for SMEs, and would support employment in periods of fluctuations in demand. The CEEP argues in the same direction.
8. In relation to the definition of working time, opinions are also rather divergent. The ETUC considers that the introduction of the concept of "inactive part of on-call time" is a disproportionate measure compared to the problems faced by Member States. According to the ETUC, less far-reaching solutions could be envisaged. On the other hand, UNICE argues that only time actually worked should be considered as "working time" and suggests that the definition of working time be modified to reflect this. CEEP strongly supports the introduction of the concept of "inactive part of on-call time", which should not be considered as working time.

III. JUSTIFICATION OF THE PROPOSAL

9. On several occasions⁴, the Commission stressed its conviction that only an overall approach to the issues identified and submitted to consultation of the social partners at Community level would allow a balanced solution and ensure that the established criteria were met.
10. The Commission has clearly indicated the criteria to be met by any future proposal in this area:
 - ensure a high standard of protection of workers' health and safety with regard to working time;
 - give companies and Member States greater flexibility in managing working time;
 - allow greater compatibility between work and family life;

⁴ See in particular the two documents of consultation of the social partners: Communication from the Commission to the Council, to the European Parliament, to the European Economic and Social Committee and to the Committee of the Regions concerning the re-examination of Directive 93/104/EC concerning certain aspects of the organisation of working time, Document COM(2003) 843 final and Second stage of consultation of the social partners at the Community level concerning the review of Directive 93/104/EC concerning certain aspects of the adaptation of the working time, document SEC(2004) 610.

- avoid imposing unreasonable constraints on companies, in particular SMEs.
11. The Commission is of the opinion that the present proposal meets these criteria best.
 12. The proposal ensures a high level of protection of workers' health and safety, whilst allowing companies flexibility in managing working time. As regards in particular the individual opt-out from the 48-hour average weekly limit, the proposal introduces a dual system, combining the advantages of the individual approach with those of collective bargaining. The individual opt-out will require prior collective agreement or agreement among social partners, but only in those cases where such agreements are possible under national legislation and/or practice. In other cases, opt-out on the basis of individual consent alone will remain possible, but reinforced conditions will apply to prevent abuses and to ensure that the choice of the worker is entirely free. Furthermore, the Directive introduces a maximum duration of working time for any one week, unless otherwise provided by collective agreement.
 13. It also allows better compatibility between work and family life, in particular by the changes proposed with regard to Article 22(1). Within the framework of the objectives of the Lisbon Strategy, recital 6 recalls that it is for Member States to encourage the social partners to negotiate on this issue.
 14. Moreover, this proposal gives companies and Member States greater flexibility in the organisation of working time. Indeed, the reference period for the calculation of the maximum weekly working time could be extended up to one year, thus allowing companies to deal with more or less regular fluctuations in demand.
 15. With the aim of ensuring an appropriate balance between the protection of workers' health and safety, on the one hand, and the need for flexibility for companies, on the other hand, and considering that inactive parts of on-call time do not require the same level of protection as the active periods, the proposal establishes that the inactive part of on-call time is not working time within the meaning of the Directive, unless national legislation, collective agreements or agreements between the social partners decide otherwise.
 16. Finally, it takes into consideration the particular situation of companies, in particular of SMEs. The opt-out is maintained for companies with no collective agreement in force and no collective representation of the workers that is capable of concluding a collective agreement or an agreement between the two sides of industry on the issue (essentially micro and small enterprises). Moreover, the possibility of fixing a one-year reference period will simplify the management of employees' working time, while allowing a better adaptation to fluctuations in demand.

IV. CONTENT OF THE PROPOSAL

17. It is proposed to amend Directive 2003/88/EC as follows.
18. *Article 2 (Definitions):* The definitions of "working time" and of "rest period" remain unchanged. This proposal inserts two new definitions: "on-call time" and "inactive part of on-call time", which are added to the existing definitions. These two new definitions aim to introduce a concept into the Directive which is not strictly speaking a third category of time, but a mixed category incorporating, in different proportions,

the two concepts of "working time" and of "rest period". The proposed notion of "on call time" covers situations in which the worker must stay at the workplace.

19. *New Article 2a (On-call time)*: As a result of the insertion of the two new definitions, this Article aims to define the arrangement applicable to on-call time and more specifically to the inactive part of on-call time. It is clearly established that the inactive part of on-call time is not considered "working time" , unless otherwise stipulated by national law or, in conformity with national law and/or practice, by collective agreement or agreement between the two sides of industry. As regards the periods during which the worker carries out his activities or duties, they must be regarded entirely as working time within the meaning of the Directive.
20. *Article 16, b) (Reference periods)*: According to this modification, the standard reference period would remain 4 months. However, Member States could extend this period up to one year, subject to the consultation of concerned social partners and to the encouragement of social dialogue in this matter. It is also specified that the duration of the reference period can under no circumstances be higher than the duration of the employment contract.
21. *Article 17(1) and (3) (Derogations)*: These modifications must be read in conjunction with the modification in Article 16 b). It removes the possibility of derogating from the four-month reference period. Since national law can establish a reference period of up to one year, it is no longer necessary to allow for this derogation of up to six months.
22. *Article 17(2) (Derogations)*: Articles 3 and 5 establish periods of daily and weekly rest of, respectively, 11 consecutive hours per period of 24 hours and of 24 hours plus the 11 hours of daily rest for each seven-day period. It is, however, possible to derogate from these two provisions. In such cases, workers must, in principle, be granted an equivalent period of compensatory rest. This modification aims to clarify that the periods of compensatory rest have to be granted within a reasonable time and, in all the cases, within a time limit not exceeding 72 hours for daily rest.
23. *Article 18 (Derogations by collective agreements)*: This Article adds the same clarification concerning compensatory rest (see above).
24. *The first and the third paragraphs of Article 19 and the second paragraph of Article 20* are deleted. In both cases, this involves deleting derogations from the reference period, which become obsolete as a result of the amendment proposed for Article 16, b).
25. *Article 22(1)*: This Article establishes the conditions to be met by Member States who make use of the possibility not to apply Article 6 (maximum weekly working time).

If Article 6 is not to apply, this must be authorized by a collective agreement or an agreement between the social partners at the appropriate level.

This condition is not applicable when a collective agreement is not in force and there is no collective representation of the workers within the undertaking or the business that is empowered, in accordance with national law and/or practice, to conclude a collective agreement or an agreement between the two sides of industry on the issue.

In such cases, the individual worker's consent, in accordance with the established conditions, is sufficient.

The authorisation by collective agreement or agreement between the two sides of industry is necessary, but not enough. In any case, a worker's individual consent is necessary. Concerning individual consent, the conditions are more clear and stringent. The worker's agreement has to be given in writing, it cannot be given at the beginning of the employment relationship or during any probation period, its validity is limited, an absolute maximum limit of weekly working hours is fixed and the obligation of keeping registers is imposed.

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 Commission⁵,

Having regard to the opinion of the European Economic and Social Committee⁶,

Having regard to the opinion of the Committee of the Regions⁷,

Acting in accordance with the procedure laid down in Article 251 of the Treaty⁸,

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.
- (3) Article 19 and Article 22(1) of Directive 2003/88/EC contain clauses requiring re-examination before 23 November 2003.

⁵ OJ C [...] of [...], p. [...].

⁶ OJ C [...] of [...], p. [...].

⁷ OJ C [...] of [...], p. [...].

⁸ OJ C [...] of [...], 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, of 18.11.2003, p. 9.

- (4) More than ten years after the adoption of the Directive 93/104/EC¹⁰, the initial Directive on the organisation of working time, it is necessary to modernise Community legislation on working time, with a view to responding better to new realities and demands, both from employers and employees.
- (5) Reconciliation between work and family life is an essential element to allow the Union to reach the objectives set in the Lisbon Strategy. It not only creates a more satisfactory working atmosphere, but also means workers' needs are taken into account more, particularly those with family responsibilities. Several of the modifications introduced by Directive 2003/88/EC, particularly in relation to Article 22, allow a better compatibility between work and family life.
- (6) In this context, it is for Member States to encourage social partners to conclude agreements, at the appropriate level, establishing rules to ensure better compatibility between work and family life.
- (7) It is necessary to strike a new balance between the protection of workers' health and safety and the need to give companies more flexibility in the organisation of working time, in particular with regard to on-call time and, more specifically, to inactive parts of on-call time.
- (8) The provisions on the derogations to 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 individual final decision not to be bound by Article 6 of the Directive can be problematic in two respects: 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 of Community action in this field.
- (11) Following this consultation, the Commission considered that a Community action was desirable and consulted the social partners at Community level again on the content of the envisaged proposal, in accordance with Article 138 (3) of the Treaty.
- (12) On the occasion of this second consultation, the social partners 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) Since the objective of this Directive, namely the modernisation of Community law on the organisation of working time, cannot be sufficiently achieved by the Member States and can, therefore, be better achieved at Community level, the Community may adopt measures, in accordance with the principle of subsidiarity as set out in Article 5 of the Treaty. In accordance with the principle of proportionality, as set out in that

¹⁰ Council Directive 93/104/EC of 23 November 1993 concerning certain aspects of the organization of working time, OJ L 307, of 13.12.1993, p. 18.

Article, the Directive does not go beyond what is necessary in order to achieve 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 (Article 31 of the Charter of Fundamental Rights of the European Union).
- (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, insofar 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, points 1a 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.

1b "inactive part of on-call time ": period during which the worker is on call within the meaning of Article 1a, but not required by his employer to 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 two sides of industry decides otherwise.

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

3. In Article 16, point b) is replaced by the following:

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

However, Member States may, by law or regulation, 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.

The periods of paid annual leave, granted in accordance with Article 7, and the periods of sick leave shall not be included or shall be neutral in the calculation of the average; "

4. Article 17 shall be modified 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 16, a) and c)".

b) In paragraph (2), the terms "provided that the workers concerned are afforded equivalent periods of compensatory rest" are replaced by "provided that the workers concerned are afforded equivalent periods of compensatory rest within a reasonable period, which cannot be longer than seventy-two hours".

c) In paragraph (3), the terms "Articles 3, 4, 5, 8 and 16" are replaced by "Articles 3, 4, 5, 8 and 16, a) and c)".

d) paragraph (5) shall be amended as follows:

i) The first subparagraph 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 subparagraphs 2 to 7."

ii) The last subparagraph is deleted.

5. In Article 18, third subparagraph, the expression "on condition that equivalent compensating rest periods are granted to the workers concerned" is replaced by "on condition that equivalent compensating rest periods are granted to the workers concerned within a reasonable period, which cannot exceed seventy-two hours".

6. Article 19 is 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."

7. The second paragraph of Article 20 is deleted.

8. Article 22 is modified as follows:

a) Paragraph (1) is replaced by the following:

"1. 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. The implementation of this option must, however, be expressly foreseen by a collective agreement or an agreement between the two sides of industry at national or regional level or, in accordance with national law and/or practice,, by means of collective agreements or agreements concluded between the two sides of industry at the appropriate level.

The implementation of this option is also possible, by virtue of an agreement between the employer and the worker, in cases where there is no collective agreement in force and there is no workers' representation within the undertaking or the business that is empowered, in accordance with national law and/or practice, to conclude a collective agreement or an agreement between the two sides of industry on the issue."

b) The following paragraph (1)a shall be added:

“(1)a. In any case, Member States making use of the possibility provided for by paragraph 1 shall take the necessary measures to ensure that:

a) no employer requires a worker to work more than forty-eight hours over a seven-day period, calculated as an average for the reference period referred to in Article 16 b), 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 sixty-five hours in any one week, unless the collective agreement or agreement between the two sides of industry provides 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;

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 time;

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 16(b), as well as information on the number of hours actually worked by the workers concerned."

9. The following Article 24a is added:

"Article 24a

Application report

Not later than five years after the date referred to in Article 3 of this Directive, , 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 Article 22(1) and (2). The Commission shall propose any appropriate amendments, including, if necessary, a phasing out of Article 22(1) and (2)."

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 communicate to the Commission the text of those provisions and a correlation table between those 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
[...]