Organisation of working time

2004/0209(COD) - 15/09/2008 - Council position

The Council adopted, by qualified majority, a common position with a view to the adoption by the European Parliament and the Council of a Directive amending Directive 2003/88/EC concerning certain aspects of the organisation of working time. The Spanish and Greek delegations voted against and the Belgian, Cypriot, Hungarian, Maltese and Portuguese abstained.

The European Parliament adopted 25 amendments to the Commission proposal. 13 of these amendments were incorporated into the amended Commission proposal in whole, in part of after being reworded. The Council could accept 8 of the 13 amendments, as wholly or partially incorporated into the Commission's amended proposal, namely those: citing the conclusions of the Lisbon European Council; making reference to increasing the rate of employment amongst women; adding a reference to compatibility between work and family life; citing the Charter of Fundamental Rights; concerning compensatory rest time.

The Council also accepted, subject to redrafting, the principles underlying amendments: the addition of a provision concerning compatibility between work and family life; the deletion of Article 16b(2) concerning the 12-months reference period; reference period.

However, the Council did not deem it advisable to take amendments concerning: the aggregation of hours in cases involving several employment contracts; the provision concerning the validity of opt-out agreements signed prior to the entry into force of the Directive; a copy of the Directive shall be sent to the governments and parliaments of the candidate countries.

Provisions regarding on-call time: the Council agreed with the definitions of "on-call time" and "inactive part of on-call time" as suggested by the Commission in its original proposal and confirmed in its amended proposal. The Council also agreed with the Commission on the need to add a definition of the term "workplace" in order to make the definition of "on-call time" clearer.

With regard to the new Article 2a on on-call time, the Council concurred with the Commission on the principle that the inactive part of on-call time should 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 Council shares the Commission's view that the introduction of this new category should be of help in clarifying the relationship between working time and rest periods.

The Council also followed the Commission's approach with regard to the method of calculation of the inactive part of on-call time while providing that it may not only be established by collective agreement or agreement between the social partners but also by national legislation following consultation of the social partners.

The Council acknowledged as a general principle that the inactive part of on call time should not be taken into account in calculating the daily and weekly rest periods. However, the Council also considered appropriate to provide for the possibility of introducing some flexibility in the application of this provision through collective agreements, agreements between the social partners or by means of national legislation following consultation of the social partners.

Compensatory rest time: the Council can agree with the Parliament's amendments as reworded in the Commission's amended proposal. The general principle is that workers should be afforded periods of compensatory rest in circumstances where normal rest periods cannot be taken. The determination of the

length of the reasonable period within which equivalent compensatory rest is granted to workers should be left to the Member States, taking into account the need to ensure the safety and health of the workers concerned and the principle of proportionality.

Reconciliation of work and family life: the Council concurs with Parliament on the need to improve the reconciliation between work and family life. This concern appears quite clearly in the common position. The Council agrees with amendment as reworded in the Commission amended proposal which states that the Member States shall encourage the social partners at the appropriate level, without prejudice to their autonomy, to conclude agreements aimed at improving reconciliation of work and family life. Inspired by Parliament's amendments, the text introduces references to Directive 2002/14/EC establishing a general framework for informing and consulting employees in the European Community, and to the consultation of the social partners. The common position provides that Member States should encourage employers to examine workers' requests for changes to their working hours and patterns, subject to business needs and to both employers' and workers' needs for flexibility.

Reference period (Article 19): the Council shares the European Parliament's views that the extension of the reference period should go hand in hand with an increased involvement of workers and their representatives and with any necessary preventive measures with regard to risks to workers' health and safety. It, however, considered that a reference to Section II of Directive 89/391/EC, which lays down a number of provisions in this respect, would provide for appropriate guarantees in this regard.

Framework for the opt-out (possibility not to apply the maximum weekly working time (48 hours) if the worker accepts to work longer):the Council was unable to accept the amendment according to which Article 22 concerning the opt-out should be repealed 36 months after the entry into force of the Directive, or the Commission's amended proposal which provided for the possibility of extending this option after three years. After having examined different possible solutions, the Council eventually came to the conclusion that the only solution acceptable to a qualified majority of delegations would be to provide for the continuation of the opt-out, while introducing safeguards against abuse to the detriment of the worker. In particular, the common position provides that the use of the opt-out cannot be combined with the option provided in Article 19(b). Furthermore, it states that, before implementing the opt-out, consideration should be given to whether the longest reference period or other flexibility provisions provided by the Directive do not guarantee the flexibility needed.

With regard to the **conditions applicable to the opt-out**, the common position provides that:

- § the working week in the EU should remain at a maximum 48h unless a Member State provides for an opt-out either through collective agreements, or agreements between the social partners at the appropriate level, or through national law following consultation of the social partners at the appropriate level, and the individual worker decides to use the opt-out. The decision therefore remains with the individual worker and he cannot be forced to work beyond the 48-hour limit;

- § the use of this option is, moreover, subject to strict conditions which aim at protecting the worker's free consent, at introducing a legal limit to the number of hours worked per week in the context of the opt-out and at providing for specific obligations on employers to inform the competent authorities at their request.

- With regard to the protection of the **worker's free consent**, the common position stipulates that the opt-out is only valid if the worker has given his agreement prior to performing such work and for a period not exceeding one year, renewable. The employer cannot, in any case, victimise a worker because he is not willing to give his agreement to perform such work or because he withdraws his agreement for any reason. Moreover, except in the case of short term contracts (see below), an opt-out can only be signed after the

first four weeks of work and a worker cannot be asked to sign an opt-out upon signature of his contract. Finally, the worker is entitled within specific deadlines to withdraw his agreement to work under the opt-out.

- The text introduces legal **limits to the number of hours allowed to be worked per week** in the framework of the opt-out, which are not provided for under the current Directive. 60 hours per week, calculated as an average over a period of 3 months, would normally be the limit, unless otherwise provided for in a collective agreement or an agreement between the social partners. This limit could be increased to 65 hours, calculated as an average over a period of 3 months, in the absence of a collective agreement and when the inactive part of on-call time is regarded as working time.

- The Common Provision stipulates that employers must keep a **record of the working hours** of employees working in the framework of the opt-out. 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. Moreover, the employer may be requested by the competent authorities to provide 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 the common position.

- The text provides for specific conditions in the case of **short term contracts** (not exceeding 10 weeks in total over a period of 12 months): the agreement to use the opt-out can then be given during the first four weeks of an employment relationship and the legal limits to the number of hours allowed to be worked per week in the framework of the opt-out would not apply. However, a worker may not be asked to give his agreement to work in the framework of the opt-out at the time of signature of his employment contract;

- The common position further provides that, when making use of the opt-out, a Member State may allow by means of laws, regulations or administrative provisions, for objective or technical reasons, or reasons concerning the organisation of work, the reference period to be set at a period not exceeding six months. This reference period should not, however, affect the three-month reference period applicable for the calculation of the 60 or 65 hours maximum weekly limit.

Monitoring, evaluation and review provisions: the common position provides for detailed reporting requirements regarding the use of the opt-out and other factors which may contribute to long working hours, such as the use of Article 19(b) (12-months reference period). These requirements are intended to allow for close monitoring by the Commission. More specifically, the Common Position provides that the Commission:

§ will, no later than four years after the entry into force of the Directive, submit a report accompanied, if necessary, by appropriate proposals to reduce excessive working hours, including the use of the opt-out, taking into account its impact on the health and safety of the workers covered by this option. This report will be evaluated by the Council;

§ may, taking this evaluation into account, and no later than five years after the entry into force of the Directive, submit a proposal to the Council and the European Parliament to revise the Directive, including the opt-out option.