Organisation of working time

2004/0209(COD) - 22/09/2004 - Document attached to the procedure

COMMISSION'S IMPACT ASSESSMENT

1- PROBLEM IDENTIFICATION

The review of certain provisions of Directive 2003/88/EC is imposed by the Directive itself. Two provisions needed to be reviewed before 7 years had elapsed since transposition into Member States' national law. These relate, firstly, to the derogations to the reference period for the application of Art. 6 (maximum weekly working time) and the possibility not to apply Art.6 if the worker gives his agreement to carry out such work (the so-called 'opt-out').

For further information on the background to this question, please refer to the complementary summary on the Commission's proposal COM(2004)0607.

2- OBJECTIVES

In its Communication of 30 December 2003, the Commission lays down the criteria to be met in the proposal it would adopt: 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; and avoid imposing unreasonable constraints on companies, in particular SMEs.

3- POLICY OPTIONS AND IMPACTS

The various possibilities for the four areas under discussion, as well as their related impacts, are summarized below:

3.1- Issue 1: *derogations to the reference period.*

Currently, for the application of the maximum weekly working time (48 hours), the Directive provides for a reference period that does not exceed four months. Member States can fix a reference period of six months for certain activities (e.g. security guards). Lastly, the national social partners can agree a reference period not exceeding one year.

3.1.1- Option 1: *keeping the status quo*. This option would maintain the current situation unchanged. This is not to say that the current situation is unsatisfactory, whether from the point of view of workers' health and safety or from the point of view of flexibility given to employers. However, in reality, the main negative aspect of the current situation is that, in not providing for a reference period of one year except by collective agreement, the Directive's text, as it currently stands, places Member States and employers in different situations.

3.1.2- Option 2: *reducing the reference period*. This option would mean setting reference periods that are shorter than they are currently. This could be done by three modifications: setting a period shorter than the current four month one; eliminating the possibility of a derogation provided for in the various sub-paragraphs of Art. 17 (abolition of the possibility for a Member State to set a reference period of 6 months in the cases covered by this Article); or eliminating the derogation provided for in Art 18 (the possibility of a reference period of one year by collective agreement). Although from one point of view, this would not appear to have any negative impact as far as the protection of workers' health and safety is concerned, from another, the impact that such as change would have on flexibility in the organisation of working time in Europe, means that **the reduction in the reference period is an option that should not be considered**.

3.1.3- Option 3: *extension of the reference period*. This option would involve establishing reference periods that are longer than the current ones. This could be done in several ways: setting a reference period longer than the current 4-month one; setting a reference period that is longer for the derogations permitted under Art. 17 (6 and 12 months); setting a reference period that is longer than the current 4-month one, but with no possibility of derogation. This extension would be in line with the visible trend towards the annualisation of working time. It would also bring simplification and clarity to the Directive.

3.2- Issue 2:*Individual opt-out* (Art 22, paragraph 1)

The 'opt-out' is a facility given to a Member State to provide for in its national legislation the possibility for a worker to work, on average, more than 48 hours per week, as long as the conditions laid down in Art 22, paragraph 1, are respected.

3.2.1- Option 1:*keeping the status quo*. If the status quo is kept, the Commission would be obliged to face the consequences of the conclusions it reached following the evaluation exercise of this provision in the United Kingdom. It has reservations regarding how the UK transposed the Directive into its national legislation, as well as its practical application. **Thus, at least for what concerns the UK, the status quo would not be an option and amendments to the legislation will have to be introduced**.

3.2.2- Option 2: *keeping the opt-out but tightening the conditions of application so as to strengthen its voluntary nature and prevent its abuse*. This option would seek to keep the flexibility offered by the opt-out, but at the same time eliminating the possibility of its abuse. This option would therefore bring a solution to problems encountered and enable the use of the opt-out while respecting what the legislator is seeking, i.e. its voluntary nature.

3.2.3- Option 3: *opt-out only by collective agreement*. In the current text of the Directive, the use of the opt-out depends on the Member State and the wishes of the individual worker. This option would give collective bargaining an active role in this field. In general, this option would not prevent companies which have a need for it (social dialogue is possible in the majority of cases), but it would require collective bargaining and could therefore result in additional costs in comparison with the current situation.

3.2.4- Option 4: *opt-out only by collective agreement where this system exists or is feasible*. This option differs from the previous one because it permits the use of the individual opt-out, as it currently exists, when there is no collective agreement applicable to the worker and there is no collective representation of workers to permit such a negotiation. This approach resembles the previous one, since the recourse to the opt-out would be dependent on the agreement of the social partners at the appropriate level. The individual opt-out would be applicable where there was no applicable agreement and there is no possibility of collective bargaining at company level. The advantage of this approach would be that, in addition to those already outlined for the preceding option, the gulf between the countries with different industrial relations cultures would no longer exist. In countries where collective bargaining does not exist

(or cannot exist), the individual opt-out would continue to be possible. **This option is the one that best combines the need to adapt to the level closest to the ground and an integral respect of national traditions in the area of industrial relations**.

3.2.5- Option 5: *gradual abolition of the opt-out*. This option, which was defended by the European Parliament, in particular, in its resolution on the reexamination of the Directive, would lay down a transitional period during which the individual opt-out could continue to be used, with a decreasing maximum weekly limit of working hours, falling until the 48 hours general rule is reached. The impact of this option would depend heavily on the length of the transitional period during which the individual opt-out would remain possible. The longer this period, the longer the time companies and workers would have to adapt to the new conditions.

3.2.6- Option 6: *abolition of the opt-out*. This option would consider the elimination of the Directive's Art 22, paragraph 1. The issue that needs to be asked is whether the elimination of the opt-out would damage the competitiveness of Community industry or at least that of the Member States that made good use of the opt-out, i.e. the UK, given that there is no doubt that it would be beneficial as far as the level of workers' health and safety is concerned.

3.3- Issue 3: *the definition of working time*.

The Directive views time as being either working time or resting time. There is no intermediate category.

3.3.1- Option 1: *keeping the status quo*. The definition of working time, as interpreted by the European Court of Justice (ECJ) in the SIMAP and Jaeger cases, continues to apply. In view of the information at the Commission's disposal, this status quo option is not feasible given the danger of serious repercussions on public health services and, probably, on other services also.

3.3.2- Option 2: *exclude on-call time from the 48 hours a week limit*. According to ECJ case law, time spent on-call must be counted as working time within the meaning of the Directive. This option would involve leaving intact this qualification of on-call time, but would exclude it from the calculation of the maximum working week. This option, although it might appear attractive because it does not call into question the SIMAP/Jaeger case law, **would inevitably be a source of conflict and uncertainty**.

3.3.3- Option 3: *include a new definition of 'inactive on-call time' in the Directive*. This option would offer a solution to the 'working time/rest time' dichotomy and would introduce a third category, inactive on-call time. It is likely that this option would allow Member States that have not already modified their legislation, to keep it in force.

3.4- Issue 4: *compatibility between work and family life*.

In its two documents consulting the social partners, the Commission expressed its desire to take advantage of the review of the Directive to ensure that greater account of this objective is taken in the Directive.

3.4.1- Option 1: *keeping the status quo*. One option would be to not introduce a new provision, but to ensure that this dimension is better taken into account in the existing provisions of the Directive.

3.4.2- Option 2: *insert a new article*. This option would involve asking the Member States to encourage the social partners, at all levels, to negotiate measures promoting compatibility between work and family life.

CONCLUSIONS: according to the Commission, the proposal which would best fulfil these criteria would contain the following elements: with regard to the opt-out, ensure that the derogations from Art 6.2 would only be possible by collective agreement or agreement between the social partners; in companies not having such agreements or worker representation, the individual opt-out, with stricter conditions, would continue to apply; as far as the definition of working time is concerned, following the SIMAP/Jaeger rulings, introduce into the text of the Directive the definition of a third category ('inactive on-call time'), which would not be considered as 'working time' within the meaning of the Directive; with respect to compatibility between work and family life, an article should be inserted to encourage the social partners to negotiate measures that would promote greater compatibility between work and family life. In the two documents consulting the social partners, the Commission stressed its belief that only a global approach to the four areas identified for re-examination would permit a balanced solution to be found and guarantee the respect of criteria defined and described in point 2 (Objectives) of this summary.

4- FOLLOW-UP

While waiting for the European Parliament's opinion, the Council was informed by the Luxembourg Presidency on the progress of work regarding the draft directive amending Directive 2003/88/EC concerning certain aspects of the organisation of working time.