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DRAFT STATEMENT OF THE COUNCIL'S REASONS

Subject : **Common Position adopted by the Council on xx September 2008 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**

DRAFT STATEMENT OF THE COUNCIL'S REASONS

I. INTRODUCTION

On 24 September 2004, the Commission submitted 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 time¹. The proposal is based on Article 137(2) of the Treaty.

Acting in accordance with Article 251 of the Treaty, the European Parliament delivered its Opinion on first reading on 11 May 2005².

The Economic and Social Committee delivered its Opinion on 11 May 2005³ and the Committee of the Regions on 14 April 2005⁴.

The Commission presented its amended proposal⁵ on 2 June 2005, in which it accepted 13 of the 25 amendments adopted by the European Parliament.

On 9 June 2008, the Council reached a political agreement by qualified majority on a Common Position, in parallel to a political agreement by qualified majority on a common position regarding the Directive on working conditions for temporary workers. Five of the delegations which could not accept the text of the political agreement on the Working Time Directive entered a joint declaration in the Council Minutes⁶.

In accordance with Article 251(2) of the EC Treaty, the Council adopted its Common Position by qualified majority on xx September 2008.

¹ OJ C 322, 29.12.2004, p. 9.

² OJ C 92, 20.4.2006, p. 292.

³ OJ C 267, 27.10.2005, p. 16.

⁴ OJ C 231, 20.9.2005, p. 69.

⁵ OJ C 146, 16.06.2005, p. 13.

⁶ Doc. 10583/08 ADD 1.

II. OBJECTIVES

The objectives of the proposal are two-fold:

- First, to review some of the provisions of Directive 2003/88/EC (which last amended Directive 93/104/EC) in accordance with Articles 19 and 22 of that Directive. 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 provision");
- Second, to take into account the European Court of Justice's case law, in particular the rulings in the SIMAP⁷ and Jaeger⁸ 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. This interpretation of certain provisions of the Directive by the European Court of Justice, following 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.

In particular :

- 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 employers, on the other hand, the proposal establishes general principles of protection for on call workers both during active and inactive periods of on call time. Within this framework, the proposal provides 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.

⁷ Judgement of the Court of 3 October 2000 in case C-303/98, Sindicato de Médicos de Asistencia Pública (SIMAP) v. Conselleria de Sanidad y Consumo de la Generalidad Valenciana, ECR 2000, p. I-07963.

⁸ Judgement 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.

- The proposal aims to give employers and Member States greater flexibility in the organisation of working time, under certain conditions, by making the extension of the reference period for the calculation of the maximum weekly working time possible up to one year, thus allowing companies to deal with more or less regular fluctuations in demand.
- The proposal allows for better compatibility between work and family life, in particular by the changes proposed with regard to Article 22.
- As regards the individual opt-out from the 48-hour average weekly limit, the proposal introduces a dual system, combining the individual approach with collective bargaining. Under this system, the individual opt-out will require prior collective agreement or agreement among social partners, but only in those cases where such agreements are possible in accordance with national legislation and/or practice. In other cases, opting-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 proposal introduces a general principle according to which the maximum duration of working time for any one week should be limited.

III. ANALYSIS OF THE COMMON POSITION

1. General observations:

a) Commission's amended proposal

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 or after being reworded (amendments 1, 2, 3, 4, 8, 11, 12, 13, 16, 17, 18, 19 and 24). 12 other amendments were, however, not acceptable to the Commission (amendments 5, 6, 7, 9, 10, 14, 15, 20, 21, 22, 23 and 25).

b) Council's Common Position:

The Council could accept 8 of the 13 amendments, as wholly or partially incorporated into the Commission's amended proposal, namely amendments Nos 1 and 2 (recital No 4 citing the conclusions of the Lisbon European Council), 3 (recital No 5 making reference to increasing the rate of employment amongst women), 4 (recital No 7: addition of a reference to compatibility between work and family life), 8 (recital No 14 citing Article 31(2) of the Charter of Fundamental Rights), 16 (Article 17(2) concerning compensatory rest time), 17 (Article 17(5) first indent, correction of an error) and 18 (Article 18 (3) concerning compensatory rest time).

The Council also accepted, subject to redrafting, the principles underlying amendments:

- No 12 (Article 2b: addition of a provision concerning compatibility between work and family life);
- No 13 (deletion of Article 16b(2) concerning the 12-months reference period);
- No 19 (Article 19: reference period).

However, the Council did not deem it advisable to take up amendments:

- No 11 (aggregation of hours in cases involving several employment contracts), as taken into account in recital No 2 in the amended proposal, as recital No 3 of the current Directive provides that "*the provisions of 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 remain fully applicable to the areas covered by this Directive without prejudice to more stringent and/or specific provisions contained therein*" and that its Article 1(4) also provides that the provisions of Directive 89/391/EEC are fully applicable to minimum periods of daily rest, weekly rest and annual leave, to breaks and maximum weekly working time as well as to certain aspects of night work, shift work and patterns of work;

- No 24 (provision concerning the validity of opt-out agreements signed prior to the entry into force of the Directive, Article 22 (1c)): the Council did not consider it necessary to incorporate this provision which has been taken on board in the Commission's amended proposal;
- No 25 (which provides that a copy of the Directive shall be sent to the governments and parliaments of the candidate countries).

The Council was also not in a position to accept amendments 5, 6, 7, 9, 10, 14, 15, 20, 21, 22 and 23 for the reasons mentioned by the Commission in its amended proposal.

The Commission has accepted the Common Position agreed by the Council.

2. **Specific comments**

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 Article 1(1)(1b) of the Common Position, 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

In relation to Articles 17(2) and 18(3) of the Directive, the Council can agree with amendments Nos 16 and 18 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 recitals Nos 5, 6 and 7 as well as in Article 1(2), incorporating a new Article 2b, of the Common Position.

The Council agrees with amendments Nos 2 and 3 (concerning recitals Nos 4 and 5), as reworded in the Commission amended proposal.

With regard to the new Article 2b, the Council took on board the text of the first paragraph in the Commission's 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.*"

The two other paragraphs draw inspiration from amendment 12 and are based on the Commission's amended proposal. The second paragraph further 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 third paragraph 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/EC⁹, which lays down a number of provisions in this respect, would provide for appropriate guarantees in this regard.

⁹ OJ L 183, 29.6.1989, p. 1.

Framework for the opt-out (Article 22)

The Council was unable to accept either amendment No 20, 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. While some delegations were in favour of the principle of putting an end to the use of the opt-out after a certain period, a majority of them were opposed to any such solution, without necessarily implying, however, that they would all make use of the opt-out at this stage.

In this context, 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, Article 1(7) of the Common Position regarding Article 22a(a) of the Directive provides that the use of the opt-out cannot be combined with the option provided in Article 19(b). Furthermore, recital 13 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, in accordance with Article 6 of the current Directive, 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 Common Position 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.

Finally, 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 Article 16(b).

The Common Position 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

Article 1(9) of the Common Position regarding a new Article 24a of the Directive 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.

V. CONCLUSION

Bearing in mind the very tangible progress achieved in parallel with respect to the temporary agency workers Directive, the Council considers that its Common Position on the Working Time Directive represents a balanced and realistic solution to the issues covered by the Commission's proposal, given the wide differences in the Member States' labour market situations and in their views on the necessary conditions for accommodating such situations. It looks forward to a constructive discussion with the European Parliament with a view to reaching final agreement on this important Directive.
