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NOTE

from : General Secretariat

to : Council (EPSCO)

No. Cion prop. : 9554/05 SOC 244 SAN 94 TRANS 108 MAR 84 CODEC 441 –
COM(2005) 246 final

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**

**- Political agreement
= Finnish Presidency Proposal**

COMMON GUIDELINES

Consultation deadline for Bulgaria and Romania: 31.10.2006

I. INTRODUCTION

1. On 24 September 2004, the Commission submitted to the Council the above-mentioned proposal for a Directive. This proposal aims to amend Directive 2003/88/EC¹ concerning certain aspects of the organisation of working time.

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. 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 SIMAP¹ and Jaeger² 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.
3. The proposed legal basis being Article 251 of the Treaty, the Council is required to act by qualified majority, in accordance with the co-decision procedure with the European Parliament.

II. BACKGROUND

4. At its meeting on 7 December 2004, the Council (EPSCO) reached a very broad measure of agreement on two key issues of the proposal for a Directive, i.e. the extension to twelve months of the reference period for calculating the maximum weekly working time (48 hours) and the provisions on on-call time and compensatory rest. The Council also held a general discussion on the opt-out question on the basis of a Dutch Presidency compromise proposal.

¹ 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.

² 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.

5. Given the differing views expressed by delegations on the opt-out provision during the Council's discussion, the Luxembourg Presidency undertook to take the discussions forward by focusing on certain points which, for lack of time, had not been dealt with in detail earlier. These discussions resulted in an initial general picture, the salient points of which were presented in a Presidency report to the Council (EPSCO) at its session on 3 March 2005.
6. The European Parliament and the Economic and Social Committee delivered their Opinions on 10 and 11 May 2005, respectively.
7. The Commission presented its amended proposal to the Council (EPSCO) on 2 June 2005. The Council gave a mandate to Coreper to examine the amended proposal with a view to reaching agreement as soon as possible.
8. Under the UK Presidency, good progress was made on a number of issues of the draft Directive concerning "on-call time", the reconciliation of work and family life, compensatory rest and the reference periods, on the basis of the Commission's amended proposal. However, while significant progress could also be made in identifying possible elements for an agreement, it was not possible to reach overall agreement at that stage given the differences in labour market situations in the Member States and the complexity of the new provisions.
9. Under the Austrian Presidency, the Council held extensive discussions on the draft Directive on the basis of an overall Presidency compromise proposal and of Presidency questions to the Ministers. While the discussion contributed to identifying more clearly the possible elements of a solution to the opt-out issue, it was still not possible to reach an overall agreement.

III. FINNISH PRESIDENCY'S COMPROMISE PROPOSAL

10. Given the pressing need to reach agreement on the draft Directive, the Finnish Presidency undertook to give priority treatment to this dossier with a view to reaching such an agreement at the extraordinary meeting of the Council (EPSCO) on 7 November. In this context, it has held wide-ranging consultations with all delegations, representatives of the European Parliament, the Commission and all relevant interested parties.

11. In the light of these consultations, the Presidency came to the conclusion that a possible way forward could be based on the following key elements:
 - In Member States which make use of the option to allow individual contractual arrangements on working time pursuant to Article 22(1), it would be necessary, in order to avoid risks to the health and safety of workers, to limit the possibility of cumulative use of that option with the provision for flexibility provided by Article 19(b) of the Directive;

 - Taking into account the aim to protect the health and safety of the worker, the use of the option under Article 22(1) should be subject to specific measures as set out in Article 22(1a). Such use should also be subject to a report by the Commission to the Council, based on a specific monitoring by the Commission, in cooperation with the Member States and social partners at Community level. Furthermore, in view of the exceptional nature of Article 22(1), the decision to make use of this provision should be re-examined by the Member States concerned, in collaboration with the social partners at the appropriate level, with a view to the gradual ending of the use of this option.

12. The Presidency therefore submitted an overall compromise proposal along these lines to the Permanent Representatives Committee with a view to preparing the ground for reaching a political agreement in Council (EPSCO) on 7 November. Further to a preliminary exchange of views in the Committee on 25 October, the Presidency, with a view to further clarifying the text, submitted a slightly amended proposal to the Permanent Representatives Committee at its meeting on 31 October, as set out in doc.14676/06.
13. All delegations entered scrutiny reservations on the Presidency's compromise proposal. The Slovenian delegation further entered a parliamentary scrutiny reservation and the German delegation a linguistic reservation.

IV. OUTCOME OF THE PERMANENT REPRESENTATIVES COMMITTEE'S PRELIMINARY EXCHANGE OF VIEWS

14. On a preliminary basis and, subject to further scrutiny, most delegations considered the Presidency's compromise proposal as a good basis for discussions. They expressed both appreciation for the Presidency's considerable efforts and their readiness to adopt a constructive attitude with a view to reaching a compromise solution. The Commission representative shared those views and urged delegations to reach an overall compromise agreement in view of the increasingly pressing need for a common solution to the issues raised by the European Court of Justice in the SIMAP and Jaeger judgements.
15. Most delegations welcomed the approach put forward by the Presidency which they considered very constructive, in particular with regard to the role given to the social partners.

However, with the exception of a couple of delegations, which were already able to accept the Presidency's text at this stage, delegations identified a number of elements which, in their view, still needed to be addressed in the Council's discussions.

16. In this spirit, the need was stressed for a solution which would ensure legal certainty and could be applied by all Member States. It was also highlighted that any such solution should take into consideration the co-decision procedure as well as the need to protect workers' health and safety. On the other hand, some delegations felt that meeting the Lisbon objectives required that working time should not be reduced and that workers' needs in terms of income levels and pension contributions should also be taken into account.
17. In this respect, particular attention was drawn to the following elements:
- the issue as to whether the Member States' choice between the use of the 12 months' reference period and the use of the opt-out would have to be made horizontally so that any such choice would cover all sectors, thus excluding any sectoral differentiation: the Presidency confirmed that the option would be applicable to all sectors;
 - the issue as to whether any subsequent changes in the option chosen would be possible, for instance in the case of new political developments: the Presidency indicated that this would be a matter for national legislation;
 - the relationship between Articles 22a and 19a: the Presidency stressed that the 12-months' reference period might still be used in the framework of the opt-out, subject to a collective agreement or agreement between the social partners. In the absence of such a collective agreement, the reference period would be limited to six months.
 - the absence of any final date for the use of the opt-out, which a number of delegations still considered necessary, while other delegations expressed concerns about the notion of the "gradual ending of the use" of the opt-out in Article 24a;

- the monitoring clause (Article 24a): in particular, the date when Member States should report to the Commission (several delegations suggesting that it should be 3 years as from the entry into force of the Directive instead of two years), the nature of the information to be given to the Commission, the relationship between Article 24a (3) and (4), the concepts of "excessive working hours" and of "gradual ending" and the relationship between them;
- the fact that any Council statement as attached to the Presidency proposal might be superfluous, as the text of Article 24a already clearly suggests that agreement to end the opt-out cannot be reached;
- in the framework of the use of the opt-out, the level of the cap on weekly working time in certain sectors (in particular the healthcare services, seasonal activities in agriculture, tourism, police and the judiciary);
- the specific situation of workers who perform offshore work.

V. CONCLUSION

In view of the outcome of the Permanent Representatives Committee's preliminary exchange of views, the Council (EPSCO) is invited to explore, on the basis of the Presidency's text, possible ways of reaching an overall compromise solution at its session, on 7 November 2006.
