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PARLIAMENT, THE COUNCIL, THE EUROPEAN ECONOMIC AND SOCIAL
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Reviewing the Working Time Directive

**(first-phase consultation of the social partners at European Union level
under Article 154 of the TFEU)**

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1. INTRODUCTION

The aim of this Communication is to seek the views of the social partners at European Union level, in accordance with Article 154 of the TFEU, on the possible direction of EU action regarding the Working Time Directive¹.

In 2004, the Commission put forward a proposal to amend the Directive², following wide consultations. However, in April 2009, the Council and the Parliament concluded that they could not reach agreement on the proposal, despite two readings and a conciliation process.

This negative outcome creates a difficult situation for several Member States and for social partners at national level. There is insufficient legal clarity on how to interpret a number of issues left unresolved by the lack of decision by the co-legislators. There are also substantial difficulties for some Member States in implementing some aspects of the acquis. As a result, in a number of Member States, serious doubts arise on the conformity of national law or practice with EU law. In the Commission's view, the present situation is clearly unsatisfactory: it does not ensure that workers' health and safety is being effectively protected across the European Union in line with EU law, nor that sufficient flexibility is afforded to businesses and workers in the organisation of working time.

Various institutional actors have expressed concern about the prospect of maintaining such a situation for an indefinite period. The Commission considers it necessary to review the Working Time rules in the EU, and believes that it has a special obligation to do so. It intends to undertake such a review, based on an impact assessment with a strong social dimension and a full-scale consultation of the social partners.

A key issue to address is the scope of any such review. One option would be to concentrate on the aspects of the Directive that proved most problematic during the 2004–2009 negotiations, and try again to reach solutions that the co-legislators could now agree with. But by doing this, the Commission would miss an opportunity to re-assess the Directive in the light of the fundamental changes that have taken place in working patterns since it was originally conceived, and of the prospective needs of workers, businesses and consumers in the 21st century.

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, 18.11.2003, p. 9).

² Original proposal COM(2004) 607: amended proposal COM(2005) 246.

The Commission therefore plans a comprehensive review of the Directive, which will start with a thorough evaluation of its provisions, in order to identify current or potential issues relating to their application, and will then consider options for addressing such issues. The Commission invites the social partners to reflect broadly on the implications of the fundamental changes described below, and on the kind of working time regulation the EU needs in order to cope with the challenges of the 21st century — social, economic, technological and demographic.

2. WORKING TIME: TRENDS AND PROSPECTS

The current Directive codifies two previous directives, the most important of which was adopted in 1993, on the basis of a proposal made by the Commission in 1990³.

Over the last twenty years, fundamental changes have occurred in the world of work, and they have had a clear impact on the overall length and distribution of working time. The key trends are:

- A general reduction in total working time: average weekly working hours in the EU have decreased from 39 hours in 1990 to 37.8 hours in 2006⁴;
- A polarisation of working time between groups of workers. Part-time workers, most of them voluntary, increased their share in the workforce from 14 % in 1992 to 18.8 % in 2009; however, 10 % of all employees still work more than 48 hours a week and nearly 7 % of all employees work in multiple jobs⁵;
- A progressive de-standardisation of individual working time, with increasing variation of working times throughout the year or the working life, along with more flexible practices in companies (flexitime, annualisation of working hours, time banks, time credits, etc.).

These developments reflect the influence of multiple structural changes such as the shift from manufacturing to services, and the rise in productivity due to technological progress and an increasingly competitive business environment. Also the growth of female participation in employment and the increasing individualisation of lifestyles (with the emergence of a greater variety of preferences as regards the distribution of time between work and leisure) have influenced developments. For the future these structural changes will probably accelerate as the global economy completes the transition from an industry-based to a knowledge-based economy. New jobs are being created in analytical, scientific and technical occupations, i.e. workers actively involved in the creation and diffusion of knowledge. This transition is affecting not only the types and quality of jobs available in the economy and the skills it requires; it is also affecting the way work is organised. Improved information and communication technologies may reduce the need for physical presence at a centralised work location and promote more mobile and autonomous types of work (tele-working, nomadic working).

³ Proposal for a directive concerning certain aspects of the organisation of working time — COM(90) 317, 20.9.1990.

⁴ 37.2 hours excluding the 10 Member States that joined the EU in 2004. Despite the influence of the economic cycle, weekly hours worked by full-time employees has also shown a slightly declining tendency over the same period. (Eurostat data).

⁵ 4th European Working Conditions Survey.

For a growing number of ‘knowledge workers’, work may be assessed not on the number of hours worked, but on the originality and quality of the product delivered. Such workers may enjoy extensive autonomy over the organisation and location of their work, raising questions about the application of normal working time rules. However, the new knowledge-based economy is also producing many jobs in routine production services (call centres, data treatment), entailing repetitive tasks under close supervision. In these cases, high levels of work intensity and stress can be found, which may require regulation in the interests of workers’ health and safety, just as in traditional industrial activities.

Increasingly, working time management is becoming an important element of businesses’ competitive strategies. Cutting average costs in manufacturing and extending opening hours in services both mean that total production time has to be longer. Adapting to variations in consumer demand and to seasonal cycles calls for more varied distribution of production time. New forms of working-time flexibility have been and will continue to be implemented as a result, such as the organisation of rosters and shifts to allow organisational flexibility, and the adoption of flexible work schedules⁶.

More recently, in the current crisis, working-time flexibility has become a key instrument for many businesses to adapt to sharply declining demand. Short-time working schedules have been introduced, often with partial wage compensation or in combination with training, and some Member States took policy measures to provide financial support for such practices.

In parallel with these business-led transformations, there is a growing awareness that working-time flexibility can help workers to reconcile their work and private life. Now that we have a more diversified EU workforce, flexible work schedules may provide workers with more opportunities to adapt working time to individual needs. Under certain circumstances, it may also enhance equal opportunities for employment and career progress, and facilitate access to employment for disadvantaged categories of job seekers⁷.

But we must also recognise that some forms of working-time flexibility can lead to intensification of work, with effects on health and safety, worker satisfaction, organisational productivity, and opportunities for training. A staffing deficit may emerge, particularly in highly skilled professions, making work more attractive for those able to earn higher salaries, and exerting upward pressure on the working time of scarce skilled workers.

The ageing of our societies may also impact on the way workers allocate their time between work and leisure increasing the desire for a better work-life balance with a resulting backlash against the long-hours culture.

3. REGULATION OF WORKING TIME

In each country, mandatory working time regulation is a complex mix of general and sectoral rules founded in statutory law and collective agreements. International regulation in this area is extensive, and historically has exerted a decisive influence on the progressive reduction of

⁶ ‘Working time in the EU and other global economies’, European Foundation for the Improvement of Living and Working Conditions, 2008.

⁷ Ibidem.

the hours worked by employees⁸. ILO standards (of which there are 39 different ones) continue to play a very significant role worldwide, particularly in countries with poorer working conditions. The basic principles on which working time regulation is based are set out in Article 31 of the EU Charter of Fundamental Rights⁹.

EU Directive 2003/88/EC sets minimum standards for maximum weekly working time, daily and weekly rest periods, work breaks and paid annual leave, as well as night work and reference periods for calculating weekly rest and maximum weekly working time. The Directive is fairly detailed in its provisions, in line with its stated goal of protecting the health and safety of workers. However, it also provides for flexibility in the actual organisation of working time:

- Member States may adapt EU rules to their national circumstances (for instance, the maximum weekly working time has been set below 48 hours in many countries);
- There is substantial scope for flexible working arrangements through collective bargaining (for instance, the annualisation of working time);
- There are many derogations and exceptions from the general provisions (for instance, on the timing of compensatory rest, or the individual opt-out from the 48-hour rule).

The regulation of working time has traditionally pursued health and safety objectives, and reforms have often assumed that technical progress would inevitably lead to more time for leisure. The usual justification for working time regulation is the need to offset the negative effects of the overwork that might result from unregulated individual transactions.

More recently however, the focus of the debate has changed, and the organisation of working time has increasingly been perceived as crucially important for improving productivity, enhancing competitiveness, supporting work-life balance, and confronting the growing diversity of preferences and working patterns. So the question arises: has regulation of working time kept pace with these developments? Or are reforms needed to adapt the current rules to the needs of companies, workers and consumers in the 21st century?

In 2004, the Commission proposed¹⁰ amending Directive 2003/88/EC with three precise objectives:

- To clarify the application of the Directive in situations of on-call time, following the Court of Justice’s interpretation in the *SIMAP*, *Jaeger*, and *Dellas* cases.
- To allow the reference period for the averaging of weekly working time to be extended by national legislation to a maximum of twelve months.

⁸ The first ILO convention — the Hours of Work (Industry) Convention issued in 1919 — sets the standard of an eight-hour working day and a 48-hour working week.

⁹ ‘Article 31 Fair and just working conditions
1. Every worker has the right to working conditions which respect his or her health, safety and dignity
2. Every worker has the right to limitation of maximum working hours, to daily and weekly rest periods and to an annual period of paid leave.’.

¹⁰ Original proposal COM(2004) 607; amended proposal COM(2005) 246.

- To review the individual opt-out from the 48-hour limit to average weekly working time (this review was expressly required by Article 22 of the Directive).

This approach largely reflected problems left unsolved by the existing legislation or jurisprudence. However, in the course of the 2004–2009 debate, other issues were added, either by the Parliament or by the Council, such as the reconciliation of work and family life, and the treatment of special situations such as 'autonomous workers' and workers with more than one concurrent job. These latter issues are related to the structural developments mentioned above.

4. OBJECTIVES OF A COMPREHENSIVE REVIEW

The fundamental changes that are occurring in the world of work call for an adaptation of the regulatory framework at both EU and national level. Such a comprehensive review should be shaped by a set of policy objectives which are able to attract broad consensus among stakeholders.

The protection of workers' health and safety must continue to be seen as the primary goal of any working time regulation, since the legal basis for the Directive is Article 153(1a) 'improvement of the working environment to protect workers' health and safety'.

However, other goals should be considered. EU working-time arrangements play a very important role in improving the balance between work and family life, by providing workers with the time they need for managing their family responsibilities, and allowing them to influence the allocation of their working time. Account should also be taken of other EU legislation contributing to this objective, such as the directives on maternity leave, parental leave, and part-time work.

Working time regulation can also have a significant effect on businesses' ability to respond more flexibly to changing external circumstances. Making production times, and opening hours, more flexible can create competitive cost advantages for businesses. Working-time flexibility is also important for individual workers, so that they can adjust their time schedules to fit in better with each stage of their life, and with their individual preferences.

Finally, in line with the EU's better regulation agenda, it is important that the regulation of working time at EU and national level can achieve its objectives without adding unnecessary administrative burdens for enterprises, especially SMEs.

5. KEY ISSUES ARISING IN THE APPLICATION OF THE DIRECTIVE

A comprehensive review of the Directive should start by analysing the impact of emerging changes in working patterns on the application of the current Directive, and identifying which of its provisions need to be adapted, simplified or clarified. To a large extent, these difficulties in applying the Directive may reflect the need for a more fundamental adaptation of the present rules.

(a) Working hours

Average weekly working hours in the EU are below the 48-hour limit and falling. However, it is clear that some groups of workers continue to work longer average hours, which range very widely from 49, to over 80, hours per week.

New work patterns can make workers more autonomous and more mobile, raising questions about the application or appropriateness of working time limits. Moreover, in some sectors or professions, longer hours may be considered necessary (in the short term, or even on a long-term basis) to ensure competitiveness, respond to seasonal fluctuations or shortages of skilled labour, or guarantee essential 24-hour public services.

This 48-hour limit has already been extended in some cases, within options allowed by the Directive: notably, the derogation for so-called autonomous workers, and the individual ‘opt-out’. Use of the opt-out has increased substantially in recent years across the EU. Today, five Member States use the opt-out in all sectors of the economy; another ten Member States use it in certain sectors, mostly those where on-call time is prevalent.

There is also the particular issue of workers with more than one contract, who may work in excess of 48 hours for the same or different employers¹¹.

Several stakeholders consider that workers should not be prevented from working beyond the 48-hour average, if they wish to earn additional income, or achieve more rapid career progression. Conversely, it has been argued that a legal restriction is necessary in order to protect workers’ health and safety, since individual workers cannot always make free choices on working time limits, due to their inferior bargaining position vis-à-vis employers. In addition, long working hours are likely to adversely affect productivity, creativity and employment generation, as well as reconciliation of work and family life.

(b) On-call time

In some sectors or professions, working hours include periods of ‘on-call time’, where the worker is obliged to remain present at the workplace and ready to work if called upon to do so, but is not required to remain constantly attentive, and may sleep or relax if not called upon.

On-call time is particularly common in 24-hour healthcare services, residential care and emergency services, such as police and fire-fighters. Levels of actual activity during on-call

¹¹ 0.6% of workers in the EU *both* work more than 48 hours a week on average, *and* work in multiple jobs (4th EWCS, 2005).

time vary widely between sectors and between Member States. In some situations workers may have to maintain high levels of activity over long periods with little or no opportunity to rest. In others, they may very rarely be called to work in practice, but are still subject to the constraints of remaining present at the workplace.

This particular type of working-time flexibility required by the functioning of permanent services creates the delicate problem of how to calculate working hours and rest periods in cases of ‘on-call time’ under the Directive. Long hours spent at the workplace can have detrimental effects on workers’ health and safety, as well as on compatibility between work and family life. Therefore it is often argued that all on-call time at the workplace should be considered as working time, and that no part of it should ever be counted towards minimum rest periods. In the SIMAP-Jaeger-Dellas cases, the Court of Justice ruled that the Directive should be interpreted as determining that on-call time periods must be counted hour-for-hour as working time.

On the other hand, it has been stressed that counting on-call periods 100% as working time, while at the same time setting a 48-hour limit, can have very damaging consequences for the functioning and financing of services that need special flexibility in order to function on a 24-hour basis. It is argued for instance that in certain Member States, the costs of health services would increase dramatically, adding to other challenges such as the increasing cost of medical products and the effects of population ageing. Shortages of some skilled medical workers already make it extremely difficult for some Member States to recruit or retain enough specialised personnel.

Alternative options have been considered to avoid these consequences. Some of these options would require changes to the *acquis*. For example, inactive periods of on-call time at the workplace could be disregarded when calculating working time. Or inactive periods could be calculated less than 100% as working time, proportionate to the level of attention required (the so-called equivalence system).

(c) Flexibility on the averaging of weekly working hours

Flexibility in the distribution of hours worked over time is an important competitive factor particularly for those sectors that are subject to fluctuations in their activity cycles.

The Directive already allows for some flexibility — when calculating the 48-hour limit to working time, the weekly hours worked are averaged over a ‘reference period’. Normally the reference period may not exceed 4 months, but derogations allow for up to 6 months in certain activities, or (by collective agreement only) up to 12 months in any activity.

However, concerns about the restrictions on extending the 4-month basic reference period have been raised by businesses operating in sectors or countries where there is no tradition of collective bargaining, and more generally, by SMEs. They consider that they are put at a disadvantage by these restrictions, and that the need for working-time flexibility is not correlated with the industrial relations model or the size of the undertaking.

These rules could be made more flexible by allowing national law to fix a reference period of up to 12 months. This would certainly help companies to adjust opening or production times to the variations in activity caused by seasonal or economic cycles.

On the other hand, longer reference periods may be seen as encouraging long-hours working over a prolonged period, and accordingly, as provoking undesirable effects on health and safety and for reconciliation between work and family life. Some type of protective condition may be necessary in order to avoid this outcome.

(d) Flexibility on the timing of minimum daily and weekly rests

Another important issue is the flexibility left for businesses to determine when the minimum daily and weekly rest periods required by the Directive should take place.

The Directive currently allows some or all of a minimum rest period to be delayed, subject to the condition that all missed minimum rest hours must be fully compensated afterwards. According to the jurisprudence of the Court of Justice, such compensatory rest hours should be taken as soon as possible; in any event, any missed daily rest should be taken immediately after an extended shift.

Some stakeholders argue that minimum rest (whether daily or weekly) should always be taken promptly; or, at the very least, delayed to the minimum extent possible and fully compensated immediately. They point to the potential health and safety risks posed by overtired workers to themselves and to others, and to the impairments in functioning capacity and productivity which can result from missed rest.

On the other hand, greater flexibility in the timing and organisation of compensatory rest may help businesses to organise work, particularly when providing 24-hour services in remote areas, or facing shortages of skilled workers. In some cases, such flexibility can also help workers to reconcile work and family life, or match their individual preferences.

6. NEXT STEPS

This Communication constitutes the first phase of consultation provided for in Article 154(2) TFEU. In this phase, the Commission is looking for the social partners' views on whether action is needed at European Union level on the Working Time Directive, and on the scope of such an initiative.

The Commission will examine the views expressed during this first phase, and will then decide whether EU action is advisable. If the Commission decides that it is, it will launch a second-phase consultation of the social partners at EU level. That phase will cover the content of any proposal for action, in accordance with Article 154(3) TFEU.

In parallel with these consultations, the Commission will carry out an extensive impact assessment, including an examination of the legal application of the Directive in the Member States and a study of the social and economic aspects that are pertinent for a comprehensive review of the Directive. The impact assessment will not, of course, prejudice the outcome of the consultations. The Commission intends to publish the results of its impact assessment in time to inform the institutional debates on any legislative proposal.

The questions on which the Commission proposes to consult the social partners are as follows:

- (a) How could we develop balanced and innovative proposals regarding the organisation of working time that move beyond the unsuccessful debates of the last conciliation process? What is your long-term vision for the organisation of working time in a modern setting?
- (b) What impact do you think that changes in working patterns and practices have had on the application of the Directive? Have any particular provisions become obsolete, or more difficult to apply?
- (c) What is your experience to date on the overall functioning of the Working Time Directive? What has been your experience regarding the key issues identified in section 5 of this paper?
- (d) Do you agree with the analysis contained in this paper as regards the organisation and the regulation of working time in the EU? Are there any further issues which you consider should be added?
- (e) Do you consider that the Commission should launch an initiative to amend the Directive? If so, do you agree with the objectives of a review as set out in this paper? What do you consider should be its scope?
- (f) Do you think that, apart from legislative measures, other action at European Union level would merit consideration? If so, what form of action should be taken, and on which issues?
- (g) Do you wish to consider initiating a dialogue under Article 155 TFEU on any of the issues identified in this consultation? If so, on which ones?