

Procedure file

Basic information	
COD - Ordinary legislative procedure (ex-codecision procedure) Directive	2004/0209(COD) Procedure rejected
Organisation of working time	
Subject 4.15.03 Arrangement of working time, work schedules	

Key players			
European Parliament	Former committee responsible		
	EMPL Employment and Social Affairs PSE CERCAS Alejandro 25/06/2008		
	EMPL Employment and Social Affairs PSE CERCAS Alejandro 07/10/2004		
	Former committee for opinion		
	ITRE Industry, Research and Energy IND/DEM LUNDGREN Nils 15/12/2004		
FEMM Women's Rights and Gender Equality			
Council of the European Union	Council configuration	Meeting	Date
	Employment, Social Policy, Health and Consumer Affairs2930		09/03/2009
	Employment, Social Policy, Health and Consumer Affairs2916		16/12/2008
	General Affairs	2888	15/09/2008
	Employment, Social Policy, Health and Consumer Affairs2876		09/06/2008
	Employment, Social Policy, Health and Consumer Affairs2837		05/12/2007
	Employment, Social Policy, Health and Consumer Affairs2733		01/06/2006
	Employment, Social Policy, Health and Consumer Affairs2699		08/12/2005
	Employment, Social Policy, Health and Consumer Affairs2663		02/06/2005
	Employment, Social Policy, Health and Consumer Affairs2644		03/03/2005
	Employment, Social Policy, Health and Consumer Affairs2627		06/12/2004
Employment, Social Policy, Health and Consumer Affairs2606		04/10/2004	
European Commission	Commission DG	Commissioner	
	Employment, Social Affairs and Inclusion	ŠPIDLA Vladimír	

Key events			
22/09/2004	Legislative proposal published	COM(2004)0607	Summary

04/10/2004	Debate in Council	2606	
25/10/2004	Committee referral announced in Parliament, 1st reading		
06/12/2004	Debate in Council	2627	Summary
03/03/2005	Debate in Council	2644	Summary
20/04/2005	Vote in committee, 1st reading		Summary
26/04/2005	Committee report tabled for plenary, 1st reading	A6-0105/2005	
10/05/2005	Debate in Parliament		
11/05/2005	Results of vote in Parliament		
11/05/2005	Decision by Parliament, 1st reading	T6-0175/2005	Summary
31/05/2005	Modified legislative proposal published	COM(2005)0246	Summary
02/06/2005	Debate in Council	2663	Summary
08/12/2005	Debate in Council	2699	Summary
01/06/2006	Debate in Council	2733	Summary
07/11/2006	Debate in Council		Summary
05/12/2007	Debate in Council	2837	Summary
15/09/2008	Council position published	10597/2/2008	Summary
22/09/2008	Committee referral announced in Parliament, 2nd reading		
05/11/2008	Vote in committee, 2nd reading		Summary
11/11/2008	Committee recommendation tabled for plenary, 2nd reading	A6-0440/2008	
15/12/2008	Debate in Parliament		
16/12/2008	Debate in Council	2916	Summary
17/12/2008	Decision by Parliament, 2nd reading	T6-0615/2008	Summary
09/03/2009	Parliament's amendments rejected by Council		Summary
17/03/2009	Formal meeting of Conciliation Committee		
29/04/2009	Final decision by Conciliation Committee		Summary
04/05/2009	Debate in Parliament		

Technical information

Procedure reference	2004/0209(COD)
Procedure type	COD - Ordinary legislative procedure (ex-codecision procedure)
Procedure subtype	Legislation
Legislative instrument	Directive

Legal basis	Treaty on the Functioning of the EU TFEU 153-p2-a2
Stage reached in procedure	Procedure rejected
Committee dossier	CODE/6/71917

Documentation gateway

Committee of the Regions: opinion		CDR0329/2004 OJ C 231 20.09.2005, p. 0069-0072	14/04/2004	CofR	
Legislative proposal		COM(2004)0607	22/09/2004	EC	Summary
Document attached to the procedure		SEC(2004)1154	22/09/2004	EC	Summary
Committee opinion	FEMM	PE355.757	30/03/2005	EP	
Committee opinion	ITRE	PE355.711	20/04/2005	EP	
Committee report tabled for plenary, 1st reading/single reading		A6-0105/2005	26/04/2005	EP	
Text adopted by Parliament, 1st reading/single reading		T6-0175/2005 OJ C 092 20.04.2006, p. 0111-0292 E	11/05/2005	EP	Summary
Economic and Social Committee: opinion, report		CES0527/2005 OJ C 267 27.10.2005, p. 0016-0021	11/05/2005	ESC	
Modified legislative proposal		COM(2005)0246	31/05/2005	EC	Summary
Commission response to text adopted in plenary		SP(2005)2482/2	16/06/2005	EC	
Council statement on its position		12555/2008	03/09/2008	CSL	
Council position		10597/2/2008	15/09/2008	CSL	Summary
Commission communication on Council's position		COM(2008)0568	18/09/2008	EC	Summary
Committee draft report		PE413.930	03/10/2008	EP	
Committee recommendation tabled for plenary, 2nd reading		A6-0440/2008	11/11/2008	EP	
Text adopted by Parliament, 2nd reading		T6-0615/2008	17/12/2008	EP	Summary
Commission opinion on Parliament's position at 2nd reading		COM(2009)0057	05/02/2009	EC	Summary

Additional information

National parliaments	IPEX
European Commission	EUR-Lex

Organisation of working time

PURPOSE : to make some amendments to the Working Time directive (Directive 2003/88/EC).

PROPOSED ACT : Directive of the European Parliament and of the Council.

CONTENT : this review of some of the provisions of Directive 2003/88/EC, with a view to a possible modification, is imposed by the Directive itself. The latter contains two provisions prescribing review of:

- the derogations to the reference period for the application of Article 6 (maximum weekly working time);
- the possibility of not applying Article 6 if the worker gives his agreement to carry out such work (the "opt-out").

In addition, the Commission analyses the effects of certain case law, in particular of the rulings in the SIMAP and Jaeger 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.

The Commission has consulted the social partners, who remain divided on the issues of the opt-out and the derogations to the reference period.

The principal points of the amended proposal are as follows:

- as regards in particular the individual opt-out from the 48-hour average weekly limit, the proposal introduces a dual 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 under national legislation and/or practice. In other cases, opt-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 Directive introduces a maximum duration of working time for any one week, unless otherwise provided by collective agreement.
- the opt-out is maintained for companies with no collective agreement in force and no collective representation of the workers that is capable of concluding a collective agreement or an agreement between the two sides of industry on the issue (essentially micro and small enterprises). Moreover, the possibility of fixing a one-year reference period will simplify the management of employees' working time, while allowing a better adaptation to fluctuations in demand.
- the proposal establishes 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;
- the definitions of "working time" and of "rest period" remain unchanged. This proposal inserts two new definitions: "on-call time" and "inactive part of on-call time", which are added to the existing definitions. These two new definitions aim to introduce a concept into the Directive which is not strictly speaking a third category of time, but a mixed category incorporating, in different proportions, the two concepts of "working time" and of "rest period". The proposed notion of "on call time" covers situations in which the worker must stay at the workplace;
- the proposal defines the arrangement applicable to on-call time and more specifically to the inactive part of on-call time. The inactive part of on-call time is not considered "working time", unless otherwise stipulated by national law or, in conformity with national law and/or practice, by collective agreement or agreement between the two sides of industry. As regards the periods during which the worker carries out his activities or duties, they must be regarded entirely as working time within the meaning of the Directive;
- with regard to reference periods, the standard reference period would remain 4 months. However, Member States could extend this period up to one year, subject to the consultation of concerned social partners and to the encouragement of social dialogue in this matter. It is also specified that the duration of the reference period can under no circumstances be higher than the duration of the employment contract;
- the proposal removes the possibility of derogating from the four-month reference period. Since national law can establish a reference period of up to one year, it is no longer necessary to allow for this derogation of up to six months;
- the proposal establishes periods of daily and weekly rest of, respectively, 11 consecutive hours per period of 24 hours and of 24 hours plus the 11 hours of daily rest for each seven-day period. It is, however, possible to derogate from these two provisions. In such cases, workers must, in principle, be granted an equivalent period of compensatory rest. This modification aims to clarify that the periods of compensatory rest have to be granted within a reasonable time and, in all the cases, within a time limit not exceeding 72 hours for daily rest;
- it establishes the conditions to be met by Member States who make use of the possibility not to apply Article 6 (maximum weekly working time). If Article 6 is not to apply, this must be authorized by a collective agreement or an agreement between the social partners at the appropriate level. It must be emphasised that this condition is not applicable when a collective agreement is not in force and there is no collective representation of the workers within the undertaking or the business that is empowered, in accordance with national law and/or practice, to conclude a collective agreement or an agreement between the two sides of industry on the issue. In such cases, the individual worker's consent, in accordance with the established conditions, is sufficient.

The authorisation by collective agreement or agreement between the two sides of industry is necessary, but not enough. In any case, a worker's individual consent is necessary.

Concerning individual consent, the conditions are as follows: the worker's agreement has to be given in writing, it cannot be given at the beginning of the employment relationship or during any probation period, its validity is limited, an absolute maximum limit of weekly working hours is fixed and the obligation of keeping registers is imposed.

Organisation of working time

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 a 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.

Organisation of working time

The Council made progress on a number of key issues of the proposal for a Directive of the European Parliament and the Council amending Directive 2003/88/03 concerning certain aspects of the organisation of working time, presented by the Commission in September 2004.

It is recalled that the Commission proposal is essentially aimed at:

a) introducing legal certainty, following the recent European Court of Justice judgments concerning the definition of "working time", by introducing the concepts of "on-call time" and "inactive part of on-call time" into the Directive.

b) reviewing the provisions of Directive 2003/88/EC concerning:

- the possibility of and conditions for derogating from the reference period for the application of the maximum weekly working time;

- the possibility of and conditions for derogating from the maximum weekly working time, if the worker so agrees ("opt-out provision").

The first issue concerns the possibility of extension of the reference period for the calculation of the maximum working week (48 hours) from 4 to 12 months.

While the standard reference period should remain 4 months, as in the current Directive, the Council agreed on a provisional basis on an option being given to the Member States to extend it to 12 months on the grounds of objective or technical reasons or reasons concerning the organisation of work, subject to compliance with the general principles of protection and health of workers and provided there is consultation of the social partners concerned.

The second issue on which the Council made progress concerns "on-call time", i.e. the period during which a worker has to be available at the workplace in order to be in a position to carry out his activity or duties, at the employer's request.

The Council had to take account of the European Court of Justice's judgments in the SIMAP and Jaeger cases in which the Court ruled that (doctors') periods of actual inactivity when on-call must be regarded as work within the meaning of Directive 2003/88/EC.

Against this background, the Council reached a broad measure of agreement, on the basis of compromise texts suggested by the Presidency, on three new definitions to be inserted into the Directive :

- "on-call time",

- "inactive part of on-call time" (i.e. a period during which the worker is on-call, but not required by his employer to carry out his activity or duties) and

- "workplace" ?, as well as a new Article, which would provide that the period during which the worker carries out his activity or duties during on-call time will have to be regarded as working time, while the inactive part of on-call time should not be regarded as working time, unless national law, a collective agreement or an agreement between the two sides of industry, decides otherwise.

The Council also reached a broad measure of agreement on a third issue, concerning "compensatory rest", which has to be granted in cases where a derogation is made to the Directive's provisions on daily or weekly rest. It examined a Presidency suggestion according to which compensatory rest should be afforded within 72 hours or within a reasonable period (with a maximum of 7 days) to be determined by national laws, regulations or administrative provisions or collective agreements or agreements between the two sides of industry.

The Council also held an in-depth policy debate on the so-called "opt-out provision", i.e. the possibility to derogate from Article 6 of Directive 2003/88/EC (which limits the average weekly working time to 48 hours), on the basis of compromise proposals put forward by the Presidency.

Although a significant majority of Member States considered the Presidency suggestions to be a good basis for discussion, agreement on this issue could not be reached.

It is recalled that the Commission proposal envisaged amending an Article of the Directive, with a view to giving precedence to collective agreements and to limiting the individual opt-out to cases where there is no collective agreement in force and no workers' representation empowered to conclude such an agreement, such an individual opt-out being moreover subject to strict conditions. In the light of this debate, the Council instructed the Permanent Representatives Committee to continue its work on this proposal, pending receipt of the European Parliament's opinion, with a view to an agreement being reached at the earliest possible date.

Organisation of working time

Pending the European Parliament's opinion, the Council was briefed by the Presidency on progress of work on the draft Directive amending Directive 2003/88/EC concerning certain aspects of the organisation of working time.

The draft Directive was discussed in detail in the Council meeting on 7 December 2004, when a degree of consensus was noted concerning the extension of the reference period for calculating the maximum weekly working time and the provisions on on-call time and compensatory rest.

The main issue still outstanding is that of the conditions for applying the option of derogating from the provisions concerning maximum weekly working hours (opt-out). The Presidency summarised the state of play in the technical discussions which had been in progress since the beginning of the year with regard to recourse to an opt-out.

Organisation of working time

The committee adopted the report by Alejandro CERCAS (PES, ES) amending the proposal under the 1st reading of the codecision procedure:

- the definitions of "on-call time" and "inactive part of on-call time" in Article 2 were clarified;
- in contrast to the Commission, MEPs said that the entire period of any time spent on-call, including the inactive part, should be regarded as working time. However, they added that Member States could allow inactive parts of on-call time to be calculated in special ways in order to comply with the maximum weekly average working time;
- it should be made clear that workers who have more than one employment contract are covered by the directive. An individual's working time must therefore be calculated as the sum of the periods worked under each of the contracts;
- working hours must be organised in such a way as to enable employees to reconcile work with family life: workers must be informed well in advance of any change in the working time pattern and have the right to request a more flexible organisation of working time;
- although MEPs agreed with the Commission's proposal that the reference period over which the average working week is calculated could be extended from 4 to 12 months, they imposed more stringent conditions for this option: either the workers concerned should be covered by collective agreements or the employer must inform and consult with the workers and/or their representatives and take measures to prevent any health and safety risks;
- whereas the Commission was proposing to maintain the right of individual workers to opt out of the maximum 48-hour working week, while tightening up the conditions relating thereto, the committee said that the individual opt-out should be scrapped three years after the new directive enters into force;
- the Commission should report to Parliament and the Council every five years on the implementation of the directive and put forward proposals to amend it where necessary "in order to take account of developments in health and safety at the workplace and the reconciliation of family and working life".

Organisation of working time

The European Parliament requests the right of individual workers to opt out of the maximum 48-hour working week to be scrapped 3 years after the new working hours directive enters into force (Amendment 20 adopted with 378 votes in favour, 262 against with 15 abstentions). They also want hours "on-call" to count as working time in most cases. Parliament took these decisions when it adopted a legislative report by Alejandro CERCAS (PES, ES) by 355 votes to 272 against, with 31 abstentions. (Please refer to the summary dated 20/04/2005).

Members thus disagree with the proposal put forward by the European Commission, which would keep the individual opt-out while tightening

up the conditions for its application. Again in contrast to the Commission, MEPs want the entire period of any time spent on-call, including the "inactive part", to be regarded as working time. But it was decided that Member States could allow inactive parts of on-call time to be calculated in special ways in order to comply with the maximum weekly average working time. MEPs also clarify the definitions of "on-call time" and "inactive part of on-call time."

MEPs agree in general with the Commission's proposal to extend the reference period over which the average working week is calculated from 4 to 12 months, but Members want to strengthen the conditions. According to the rapporteur, extending the reference period meets reasonable concerns regarding the flexibility of regulations, but it has to be guaranteed that it's implemented reasonably with checks and a guarantee of protection of health and safety. That's why Members demand that either a collective agreement is necessary, or, in cases where workers are not covered by collective agreements, workers have to be consulted in an appropriate way and measures have to be taken to prevent any health and safety risks.

In further amendments to the Commission's text, MEPs decided that working hours should be organised in such a way as to give employees the opportunity for life-long learning. They also want to achieve the right balance between reconciling work and family life and the need for more flexible organisation of working time. And they want to make it clear that workers who have more than one employment contract are covered by the directive, so another amendment spells out that an individual's working time must be calculated as the sum of the periods under each of the contracts.

An amendment proposed by the GUE/NGL aiming to reject the Commission proposal was rejected by 531 votes against, 82 for and 29 abstentions.

It should be noted that the British labour MEPs voted in favour of the amendments, against the position taken by their government within the Council. For its part, the Commission reaffirms its position which remains unchanged on the issue of 'opt out' as well as on 'on call'. It did suggest that it would study the European Parliament's vote before examining the common position.

Organisation of working time

The Commission is prepared to accept all the amendments set out below, which, it thinks, improve the proposal and maintain its aims and political viability, taking account of the positions already expressed by the Member States to the Council;

The main amendments adopted concern the following issues:

- citing the conclusions of the Lisbon European Council;
- a reference to increasing the rate of employment amongst women;
- addition of a reference to compatibility between work and family;
- a reference to the Charter of Fundamental Rights;
- aggregation of hours in cases involving several employment contracts;
- the deletion of Article 16b(2) and replacing it with another Article (Article 19) including measures aiming to amend the reference period. Member States shall have the option, subject to compliance with the general principles relating to the protection of the safety and health of workers, of allowing, for objective or technical reasons, or reasons concerning the organisation of work, the reference period to be set at a period not exceeding 12 months: by collective agreement or agreement between the social partners; by legislative or regulatory provision, provided that the Member States take the measures necessary to ensure that: the employer informs and consults the workers and/or their representatives in good time concerning the introduction of such a reference period; the employer takes the measures necessary to avoid or overcome any risk relating to health and safety that could arise from the introduction of such a reference period.
- the modification of compensatory rest time shall no longer automatically be 72 but shall be set by a collective agreement;
- introduction of a provision concerning the validity of opt-out agreements signed prior to the entry into force of this Directive.

By contrast, the Commission cannot accept at this stage the other amendments proposed by the Parliament. Some of them do not constitute an improvement to the Directive or are not acceptable from a strictly legal point of view. Others might, in the Commission's view, disrupt the balance of the initial text and make it more difficult to obtain an agreement or a sufficient majority in the Council.

The Commission is conscious of its role in the codecision procedure as an intermediary between the two arms of the Community legislature.

Among the amendments not accepted by the Commission it should be noted that, with regard to amendment No 20 (on the individual opt-out), the Commission has clearly indicated that, while unable to accept it as it is, it is prepared to explore a possible compromise on this question which is dividing the co-legislators.

Furthermore, with regard to the amendment concerning on-call time, the Commission also pointed out that it shares the concerns of the European Parliament with regard to the health and safety of workers who are regularly on call and that it would add a provision to ensure that inactive periods of on-call time are not taken into account with regard to the daily and weekly rest period.

Organisation of working time

The Council examined an amended proposal for a Directive submitted by the Commission on 31 May 2005, the aim of which is to amend Directive 2003/88/EC on the organisation of working time¹, following the opinion delivered by the European Parliament at first reading on 11 May 2005.

The aim of the Commission proposal is to improve legal certainty with regard to regulating working time, particularly in the light of the case law of the Court of Justice relating to inactive periods of on-call time in certain professions, particularly the medical profession.

The main amendments which the proposal for a Directive will introduce into Directive 2003/88/EC concern:

- ? extending the reference period for calculating maximum weekly working time to 12 months;
- ? introducing definitions of "on-call time" and "inactive periods of on-call time";
- ? conditions for applying the opt-out from the provisions relating to maximum weekly working time.

Following the Council's discussions, the President drew the following conclusions in an oral statement:

? Most Member States have not had time to look in detail at the amended proposal as submitted by the Commission on 31 May. It has therefore not been possible to arrive at final conclusions today.

? The main point under discussion was the opt-out. There are two extreme positions: on the one hand those Member States which are calling for freedom of choice, stressing the need for economic growth and hence asking for the opt-out, and on the other those which feel that extending the reference period for calculating weekly working time to one year gives enough flexibility to make it possible to envisage a definite end to the opt-out. Between these positions there are many variations. The delegations have also expressed their willingness to find a viable compromise, in view of the urgency of finding a Community solution to the question of how to treat inactive periods of on-call time, following the Court of Justice judgments in the SIMAP and JAEGER Cases.

? The President noted that a solution acceptable to both the Council and the Parliament might depend, inter alia, on further consideration of two types of problem: firstly, problems in the health sector and secondly problems arising from the fact that in many Member States employees had several work contracts simultaneously.

? The President took note of the Commission's willingness to take account of these two aspects by However, many delegations expressed doubts about the absence of objective criteria for extending the time limit and stressed the need to take a decision which would respect Member States' interests. The President also noted that the Commission was willing to look for a compromise.

? In view of the problem of lack of time coupled with the political will to continue the debate, the Council instructed Coreper to monitor the discussions and inform the Council accordingly.

Organisation of working time

The Council held extensive discussions on the proposal for a European Parliament and Council directive aimed at amending Directive 2003/88/EC concerning certain aspects of the organisation of working time, on the basis of a set of compromise texts tabled by the Presidency.

The Presidency acknowledged the positive spirit which prevailed during the discussions and noted that significant progress had been made in identifying possible elements for an agreement. However, the Presidency regretted that, given the differences in labour market situations in the Member States and the complexity of the new provisions, it was not possible to reach overall agreement at that stage.

the key issues still to be resolved relate to the opt-out provision as well as to the question of whether the maximum weekly working time is calculated per contract or per worker.

Organisation of working time

Following its earlier debate in December 2005, the Council again held lengthy and extensive discussions on a modified proposal for Directive of the European Parliament and of the Council aimed at amending Directive 2003/88/EC concerning certain aspects of the organisation of working time, on the basis of compromise texts tabled by the Presidency concerning the controversial issue of the opt-out.

All delegations and the Commission welcomed the Presidency's determination to achieve an overall agreement in view of the need for a common solution to the challenges resulting from the Simap-Jaeger judgements.

However, in spite of the progress made in identifying possible elements for an agreement, and given the differences in the labour market situations and in Member States' views on the possible need and conditions for maintaining the opt-out, it was not possible to reach overall political agreement at this stage.

To recall, the objectives of the Commission amended proposal are twofold:

- 1) to take into account the European Court of Justice's case law, in particular rulings in the SIMAP and Jaeger 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;
- 2) to review some of the provisions of Directive 2003/88/EC concerning the possibility of not applying the maximum weekly working time (48 hours) if the worker gives his agreement to carry out such work (the "opt-out" provision).

The key issues still to be resolved relate to the opt-out provision as well as to the question of whether the maximum weekly working time is calculated per contract or per worker.

Organisation of working time

The Council met to seek political agreement on the draft directive aimed at amending Directive 2003/88/EC concerning certain aspects of the organisation of working time, on the basis of a set of compromise texts tabled by the Presidency and by the delegations. All delegations and the Commission welcomed the Presidency's determination to achieve an overall agreement.

However, given the differences in the labour market situations and in Member States' views on the necessity of and conditions for maintaining the opt-out, the Presidency regretted that it was once again impossible to attain a qualified majority in favour of any of the options tabled.

The Commission regretted the absence of an agreement, and announced that it would reflect on future action.

The objectives of the Commission proposal were twofold:

- to avoid any consequences of the European Court of Justice's case law, in particular rulings in the SIMAP and Jaeger cases, which held that on-call duty performed by health professionals and other workers, when they are required to be physically present at their places of work, must be regarded as working time;
- to review some of the provisions of Directive 2003/88/EC concerning the possibility of not applying the maximum weekly working time (48 hours) if the worker gives his agreement to carry out such work (the "opt-out" provision).

The key issue that was still to be resolved concerned the opt-out provision and the possible phasing-out of its use.

Organisation of working time

The Council sought to reach political agreement on two draft directives, the first one aimed at amending Directive 2003/88/EC concerning certain aspects of the organisation of working time, the second one aimed at establishing working conditions for temporary agency workers (see [COD/2002/0072](#)).

In July 2007, the Presidency announced that it would consult with different Member States in order to evaluate the conditions for balanced solutions concerning the legislative files under discussion in the Council, namely the two above mentioned draft directives.

After extensive bilateral consultations with different Member States and the Commission, the Presidency decided to present compromise proposals for both directives. In the past, both draft directives had been discussed separately, but the Presidency considered they were linked since they deal with central aspects of the regulation of contemporary labour markets.

Given the difficulties in finding separate solutions for each of the files, the Presidency decided that there would be added value in working on a simultaneous and integrated solution, thus allowing Member States to find a balance between the two directives that would be acceptable from the political point of view.

This joint approach was widely accepted by a large majority of Member States, in the Council. The connection between the two directives, and more specifically the proposals presented by the Presidency, was considered a solid and viable basis for negotiation towards an agreement on both.

The Presidency explored different solutions, within the balanced framework underlying the proposals, to reach an enlarged consensus that would be politically desirable.

Bearing in mind the fact that this linked proposal was still very recent, as well as the sensitive nature of these directives for some Member States and the importance of exploring all attempts to reach as broad an agreement as possible before the final decision was taken, the Council agreed that the best option at this moment was to postpone a decision, in order to further pursue the dialogue.

Nevertheless, the Presidency noted that a vast majority of Member States had spoken in favour of an integrated solution for the directives, building an overall equilibrium between the two. Thus, and respecting the dominant orientation within the Council, the Presidency stressed that this openness to dialogue and consensus sought only to strengthen the conditions for a solution that reflected the position of a clear and strong majority. The proposals presented are a major step forward, because they now open up an appropriate way of reaching a solution on these files. There is a real margin for political decision in 2008, building on the solid basis for progress that the Council has just established. The forthcoming presidencies and the Commission might proceed with efforts to achieve a positive and final outcome on both directives, given the importance of the issues at stake and the specific needs of many Member States.

Progress on the 'working time' Directive: Directive 2003/88/EC establishes minimum requirements concerning the organisation of working time, inter alia in respect of daily and weekly rest periods, breaks, maximum weekly working time, annual leave and certain aspects of night work, shift work and patterns of work.

The objective of the draft amending Directive currently under examination is twofold:

- ? Firstly, it would prevent some of the consequences of the European Court of Justice's case law, in particular of the rulings in the SIMAP and Jaeger cases, which held that any on-call duty performed by a doctor, as long as he or she is required to be physically present in the hospital 'even if he or she spends his or her time resting' must be regarded as working time. It is currently impossible for Member States to apply European case law strictly, without a huge impact on their medical structures and economies. To avoid those negative effects, the draft Directive would introduce a definition of "inactive part of on-call time";
- ? Secondly, to review some of the provisions of Directive 2003/88/EC concerning the possibility of not applying the maximum weekly working time (48 hours) if the worker agrees to work longer hours (the "opt-out" provision).

With a view to achieving agreement, the Portuguese Presidency tabled a set of proposals, built on previous Presidencies' compromise texts. The Presidency text provided for the possibility of the opt-out clause, with some elements being taken into account to guarantee the protection of health and safety of workers, in particular:

- ? the opt-out clause would be seen as an exception, the working week of a maximum of 48 hours being the general rule in the EU;
- ? implementation of the opt-out must be laid down by collective agreement, agreement between the social partners or by national law;
- ? employers and employees must consider other flexibility provisions 'such as the longer reference period when counting working time' before making use of the opt-out provision;
- ? it would not be possible for a Member State to make use of both the longer reference period and the opt-out clause;
- ? an employee who refuses to work more than the average working time must not suffer as a result;
- ? an agreement signed at the beginning of the working contract would be null and void;

- ? a weekly limit of working hours would be set for workers who agree to the opt-out clause;
- ? there must be follow-up by the national authorities;
- ? a specific evaluation must be conducted at European level of the provisions concerning the opt-out and the implementation of longer reference periods; taking into account this evaluation, the Commission may, if appropriate, submit a proposal to revise the Directive.

Organisation of working time

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 or 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.

Organisation of working time

The common position includes a number of aspects which differ from the Commission's amended proposal. In particular, it does not take up several amendments proposed by Parliament, although the Commission's amended proposal had incorporated a significant number of Parliament's proposals.

The main points of divergence between the Commission's amended proposal and the Council common position are as follows:

Application per-worker of the working time limits and rest periods required by the Directive: the Commission considers that, given the need to ensure that the health and safety objectives of the Working Time Directive are fully effective, Member States' legislation should already provide for appropriate measures to ensure that the Directive's limits on average weekly working time and daily and weekly rest are, as far as possible, respected per-worker, in the case of workers working concurrently under two or more employment relationships which come within the scope of the Directive. Despite Parliament's proposed amendment, it was not possible to reach any agreement on including any specific provision that these rules should be applied per-worker. The Commission considers that this issue would be suitable for review separately from the present legislative proposal.

On-call time: under the amended proposal, a distinction is made between 'active' and 'inactive' periods of on-call time at the workplace. The Commission proposed that active periods of on-call time (periods where workers were effectively carrying out their duties in response to a call) would always be considered as working time. Conversely, inactive periods would not be considered as working time unless national law or collective agreements so provided. However, inactive periods could never be counted as rest time. The common position makes no change regarding 'active' on-call time, but would allow 'inactive' periods to be treated either as working time or as rest time, according to national law or to collective agreements.

Reconciliation of work and family life: under the amended proposal, Member States would take the necessary measures to 'ensure' that employers are obliged to examine workers' requests for changes to their working hours, taking account of both sides' needs for flexibility. The common position provides instead that Member States shall 'encourage' employers to examine such requests, subject to additional qualifications. However, the proposed text would still bring an overall improvement in working conditions, since the Directive contains no specific provisions on reconciliation, and the proposed text would also introduce a new obligation for Member States to ensure that employers inform workers in due time of any substantial changes to the organisation of working time.

The future of the 'opt-out': the future of the opt-out was the single most controversial point during the prolonged and difficult Council discussions during the first reading. The amended proposal envisaged that the 'opt-out' would be repealed three years after the proposed

Directive entered into force, while stronger protective conditions would also apply in the meantime to workers who agreed to opt out. The common position does not provide for repeal of the opt-out. Instead, it expands the increased protection already proposed by the Commission, to give a new four-point framework for the opt-out:

1. more explicit limits;
2. a range of more stringent practical conditions to protect workers;
3. a future review of the opt-out based on detailed national reports;
4. a provision which obliges Member States to choose between using the opt-out and being able to average working time over a longer period (up to 12 months) by legislation.

The Commission's view remains that the opt-out is a derogation from the fundamental principle of a 48-hour maximum working week, which can present risks to workers' health and safety, both in the short and in the long term. For this reason, the Commission has consistently proposed to substantially strengthen the safeguards protecting workers who agree to use the opt-out.

Some of the proposed changes to the treatment of inactive on-call time are expected to ease the difficulties experienced by certain Member States in providing the necessary trained staff either in the short or medium term (due to structural factors, or to labour flows between Member States and to third countries.) The review which is provided for under new Article 24a will allow the Commission to take stock of the impact of these changes on Member States' actual use of the opt-out, and will also provide much more detailed information on the actual use of the opt-out than is presently available.

Maximum working time, for workers who opt out of the 48-hour limit: the Commission considered that the lack of a specific upper limit for opted-out workers posed a particular risk of abuse. The amended proposal would set a new explicit limit for opted-out workers, of 55 hours in any week, unless collective agreements or agreements between the social partners provided otherwise. The common position takes a different approach. The limit for opted-out workers would be 60 hours (on average over 3 months) unless collective agreements or agreements between the social partners provide otherwise; or 65 hours (on average over 3 months), if inactive periods of on-call time were considered as working time and if no collective agreements applied. The Commission recognises that the limits proposed by the common position do represent an advance on the present lack of any specific upper limit for workers who agree to opt out. The Commission also considers it justified to allow a slightly higher limit where inactive on-call time is recognised as working time.

Conclusion: the Commission is aware that the common position differs in some respects from its amended proposal. In some instances, the changes reinforce the level of protection provided to workers. The Commission believes that the present situation regarding on-call time and compensatory rest still urgently requires clarification through legislative change. The Commission is also very conscious of the advantages for the overall protection of workers which flow from the Council's decision to link a political agreement on this amending proposal with a political agreement on the proposed new Directive on temporary agency work ([COD/2002/0072](#)). This approach has allowed two key proposals to finally move into second reading, after a very long period of political blockage.

Overall, in view of the strongly divergent positions of Member States within the Council during the very protracted and difficult first reading on amendment of the Working Time Directive (almost four years), the Commission has supported the overall agreement, having regard to the urgent need to clarify the legal situation and thus to allow more coherent application of the Directive across all Member States.

Organisation of working time

The Committee on Employment and Social Affairs adopted a recommendation for the second reading in a report drafted by Alejandro CERCAS (PES, ES) amending the Council's common position on a directive of the European Parliament and of the Council amending Directive 2003/88/EC concerning certain aspects of the organisation of working time.

The main amendments adopted are as follows:

On-call time: according to MEPs, all on-call time, including the inactive part of it, should be considered as working time. However, inactive parts of on-call time may, by collective agreements or other agreements between the two sides of industry or by means of laws or regulations, be calculated in a specific manner in order to comply with the maximum weekly average working time laid down in Article 6 of the common position, subject to compliance with the general principles relating to the protection of the safety and health of workers.

Calculation of working time: in order to protect workers' health, MEPs consider that working time should be calculated per person and not per contract. As people may have more than one contract. Thus, where a worker has more than one contract of work, measures be taken to ensure that the worker's working time is defined as the sum of the periods of time worked under each of the contracts.

Reconciliation of work and family life: the Member States should ensure, in consultation with the social partners:

- that employers inform workers well in advance of any change in the pattern of working time, and - workers have the right to request changes to their hours and patterns of work, and
- that employers have the obligation to consider such requests fairly, having regard to the flexibility needs of employers and employees. An employer may refuse such a request only if the organisational disadvantages for the employer are disproportionately greater than the benefit to the worker.

Derogations: derogations to the directive should be limited to safeguard its health and safety principles, which should apply regardless of the position of the persons concerned. Members also insist that compensatory rest periods follow work periods, as laid down by the Court of Justice.

Limitations on derogations to the reference periods: according to the common position, the Member States have the option, while respecting the general principles of the protection of the health and safety of workers, to allow that, for objective or technical reasons or reasons relating to the organisation of work, the reference period should be extended to a period not exceeding twelve months. The MEPs specify that this may only be agreed by legislative or regulatory provision, following consultation of the social partners at the appropriate level, in cases where workers are not covered by collective agreements or other agreements between the two sides of industry, provided that the Member State concerned takes the necessary measures to ensure that:

- the employer informs and consults with workers and/or their representatives about the introduction of the proposed working time

pattern and alterations thereto;

- the employer takes the necessary measures to prevent and/or remedy any health and safety risks that may be related to the proposed working time pattern.

Maximum weekly working time (Article 6): Members propose that the Member States can decide not to apply Article 6 during a transitional period ending 36 months after the entry into force of the directive, provided that they take the necessary measures to ensure the effective protection of the safety and health of workers.

Opt-out: according to the common position, the limit for workers who have opted out would be 60 hours (an average calculated over a three-month period) unless otherwise provided for in a collective agreement or an agreement between the social partners, or 65 hours, calculated as an average over a period of three months, in the absence of a collective agreement and when the inactive part of on-call time is regarded as working time. Members consider that a 60- or 65-hour working week is too long and, for this reason, deleted this provision.

Organisation of working time

The French Presidency briefed Ministers on the main results of the Parliament's second reading which took place on 17 December 2008.

With a conciliation procedure in prospect, the Presidency stressed the importance of reaching

agreement with Parliament swiftly, for reasons of both legal certainty and social protection, since the Directive currently in force allows Member States to authorise a working week of up to 78 hours.

The main differences between Parliament's second reading and the common position adopted by the Council on 15 September 2008 relate to on-call time, the non-participation clause and compensatory rest.

- With regard to on-call time, the Council draws a distinction between active on-call time and the inactive part of on-call time. The inactive part of on-call time (any period during which the worker has the obligation to be available at the workplace but is not required by his employer to actually carry out his activity or duties) is not regarded by the Council to be part of working time, unless national law or, in accordance with national law and/or practice, a collective agreement or an agreement between the social partners provides otherwise.
- With regard to weekly working time, the Council argues for a standard limit of 48 hours a week, including overtime and active on-call time, calculated as over a reference period. Member States may, however, decide to allow this limit to be exceeded (non-participation clause) provided that they ensure the effective protection of the health and safety of workers and subject to the express, free and informed consent of the worker concerned. Use of the clause must be subject to appropriate safeguards and close monitoring. A recital refers to the Charter of Fundamental Rights and in particular every worker's right to a limitation of their maximum working hours. The special ceiling for workers who choose not to participate is in general 60 hours, calculated as an average over a period of three months (which may be exceeded under a collective agreement) or 65 hours, calculated as an average over a period of three months (only when the inactive part of on-call time is regarded as working time and in the absence of a collective agreement).
- With regard to compensatory rest, the Council provides that where there are derogations to the provisions applicable to daily rest periods, breaks, weekly rest periods, night work and reference periods, compensating rest periods must be granted within a reasonable period, to be determined by national legislation or a collective agreement or an agreement concluded between the social partners.

Organisation of working time

The European Parliament adopted a legislative resolution amending the common position of the Council for adopting a directive of the European Parliament and of the Council amending Directive 2003/88/EC concerning certain aspects of the organisation of working time.

The recommendation for second reading had been tabled for consideration in plenary by Alejandro CERCAS (PES, ES), on behalf of the Committee on Employment and Social Affairs.

The main amendments to the common position, adopted in plenary, are as follows:

On-call time: according to the Council common position, the inactive part of on-call time shall 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 provides otherwise. According to the Parliament, the entire period of on-call time, including the inactive part, shall be regarded as working time. However, inactive parts of on-call time may, by collective agreement or other agreement between the two sides of industry or by means of law or regulation, be calculated in a specific manner in order to comply with the maximum weekly average working time laid down in Article 6, subject to compliance with the general principles relating to the protection of the safety and health of workers

Calculation of working time: in order to protect the health of workers, MEPs consider that the calculation of working time should be made per person and not per contract. Therefore, in the case of workers with more than one employment contract, and for the purposes of the implementation of this Directive, the worker's working time shall be the sum of the periods of time worked under each of the contracts.

Balancing work and family life: the Member States shall ensure, in consultation with the social partners, that:

- employers inform workers well in advance of any change in the pattern of working time; and
- workers have the right to request changes to their hours and patterns of work, and employers are required to consider such requests fairly, having regard to the flexibility needs of employers and employees. An employer may refuse such a request only if the organisational disadvantages for the employer are disproportionately greater than the benefit to the worker.

Derogations: derogations to the Directive should be limited to safeguarding its health and safety principles, which should apply regardless of the position of the persons concerned. MEPs also state that compensatory rest shall follow periods of time spent on duty, as indicated by the Court of Justice.

Limitations on derogations to the reference periods: according to the common position, the Member States have the option, while respecting the general principles of the protection of the health and safety of workers, to allow that, for objective or technical reasons or reasons relating to the organisation of work, the reference period should be extended to a period not exceeding twelve months. The Parliament specifies that this may only be agreed by legislative or regulatory provision, following consultation of the social partners at the appropriate level, in cases where workers are not covered by collective agreements or other agreements between social partners, provided that the Member State concerned takes the necessary measures to ensure that:

- the employer informs and consults with workers and/or their representatives about the introduction of the proposed working time pattern and alterations thereto;
- the employer takes the necessary measures to prevent and/or remedy any health and safety risks that may be related to the proposed working time pattern.

Maximum weekly working time: Article 6 of Directive 2003/88/EC provides that the maximum weekly working time shall not exceed 48 hours, including overtime. However, an opt-out clause permits a Member State to not apply the maximum weekly working time if the worker accepts to work longer. At present, 15 Member States employ this clause. In an amendment adopted by 421 votes to 273, with 11 abstentions, the Parliament proposes the abolition of this clause, 36 months after the entry into force of the revised directive.

In any event, Member States wishing to use this option should take the necessary measures to ensure that:

- no employer requires a worker to work more than 48 hours over a seven-day period, calculated as an average for the reference, unless he has first obtained the worker's agreement to perform such work. This agreement shall be valid for a period not exceeding six months and shall be renewable;
- an agreement given at the time of the signature of the individual employment contract or during any probationary period is null and void.

Opt-out and the working week: according to the common position, the limit for workers who have opted out would be 60 hours (an average calculated over a three-month period) unless otherwise provided for in a collective agreement or an agreement between the social partners, or 65 hours (calculated as an average over a period of three months) in the absence of a collective agreement and when the inactive part of on-call time is regarded as working time. Members consider that a 60-65 hour working week is too long and, for this reason, deleted this provision.

Organisation of working time

The Commission can accept, in full or in part, 15 of the 22 amendments adopted by the European Parliament at second reading.

Overall, the position of the Parliament and the Common Position of the Council differ on several significant issues. However, the Commission remains convinced of the urgent importance of adopting the amending proposal before the end of the present legislative mandate. It believes that a sustainable basis for agreement will need to provide a carefully balanced solution, which strengthens overall protection for workers' health and safety, while at the same time allowing greater flexibility for both workers and employers in the practical organisation of working time.

In this context, this opinion describes the Commission's position towards the amendments voted by the Parliament, and sets out concrete proposals with the aim of helping the Council and the Parliament to reach such a basis for agreement.

On-call time (inactive parts of on-call time): the Commission is able to support the Parliament's amendment, but is prepared to explore a possible overall compromise on the issues covered by this amendment, which at present are dividing the co-legislators. The Commission accepts the third part of the amendment, which states that the inactive part of on-call time shall not be counted towards minimum rest periods required by the Directive. It can also accept in substance the first, second and fourth parts of the amendment, so that periods of inactive on-call time would be regarded as working time, but could be counted in a specific way when calculating working time.

In particular, the Commission considers that the second part of the amendment could, in principle, make a valuable contribution to an overall solution regarding on-call time which would be acceptable both to Parliament and to Council, subject to some reformulation of the text so that the experience in the sector concerned, and compliance with the general principles of protecting workers' health and safety, are both included as relevant criteria.

Compensatory rest (timing of compensatory rest): under the Parliament's amendment, compensatory rest would be taken 'following' time on duty, rather than 'within a reasonable period' afterwards, as under the Common Position or under the Commission's amended proposal. The Commission can accept in principle the proposed change regarding the timing of compensatory rest, but believes that reformulation is needed, in order to provide some additional flexibility.

In order to reach a compromise on this issue, a possible approach is that equivalent compensatory rest would, as a general rule, be taken following the period of duty concerned. However in specified sectors or activities, and for duly justified reasons, national laws or collective agreements could provide for equivalent compensatory rest to be taken within a 'reasonable period', which must be clearly defined, by taking account of the objective of protecting workers' health and safety, and of relevant experience in the sectors or activities concerned.

Reference period: this provision allows Member States to extend the reference period (for calculating limits to average weekly working time) to a maximum of 12 months by legislation. The Commission can accept the Parliament's amendment, the effect of which is: (i) to limit the use of this option to workers who are not covered by collective agreements or agreements between the social partners; (ii) and to provide that in such cases the Member State must ensure that employers inform and consult workers about introducing such a work pattern, and that they take the necessary measures to deal with any resulting health and safety risks.

The Commission can also accept the amendment deleting the obligation to choose between the opt-out and extension of the reference period. This amendment would delete Article 22a of the common position, which was meant to provide an incentive for Member States not to use the opt-out, or to discontinue their use of the opt-out.

Reconciliation of work and family life: the Commission can partly accept this amendment. It can accept that employers should inform workers 'well in advance' rather than 'in due time' about changes to work patterns, but considers that the change proposed by the Common Position (to

inform only of 'substantial' changes) is a reasonable one, and should not be deleted.

However, the Commission does not accept the second and third parts of the amendment which would create a right for workers to request changes to their work patterns in order to facilitate reconciling work and family life and states that employers could refuse such requests only in limited circumstances.

Opt-out:

- the opt-out: the Commission cannot accept this amendment, which would have the effect of terminating the possibility for Member States to allow use of the opt-out, three years after the amending proposal enters into force. While being in principle supportive of the eventual phasing out of the opt-out, the Commission does not consider that present conditions allow for the phasing-out of the opt-out. The Commission considers, in view of an overall compromise, that all provisions pertaining to the opt-out have to be assessed together with the review clause;
- period for validity of individual opt-out: the Commission cannot accept this amendment, which provides that where a worker agrees to opt out of the 48-hour limit to average weekly working time, that agreement shall be valid for a period not exceeding six months (rather than one year, under the common position);
- no opt-out during probationary period: the Commission accepts this amendment, the effect of which is that a worker could not validly agree to opt-out during any probationary period;
- deletes limits to working time of opted-out workers: the Commission accepts the amendment, which would delete the upper limits proposed by the common position (60 hours per week, or 65 hours in some situations, on average) for the working time of workers who agree to opt-out;
- exclusion of certain short-term workers: the Commission can partly accept this amendment. If the opt-out is to remain, then short-term workers should be able to use it;
- **deletion of review clause: this amendment is closely related to the outcome of the amendment on the future of the opt-out. The Commission can accept this amendment in principle. However, in the event that the opt-out remains, the Commission believes that a review clause is indispensable.**

Organisation of working time

The Council decided not to approve all of the European Parliament's amendments and consequently to convene the Conciliation Committee in accordance with Article 251(3) of the EC Treaty.

Organisation of working time

The Conciliation Committee decided that it was not possible to reach an agreement on the proposed directive on working time. This decision, which was adopted by an overwhelming majority within the EP delegation on the Committee (15 votes to 0, with five abstentions), brought to an end nearly five years of negotiations.

Parliament and Council could not find a compromise on three crucial points: the opt-out, on-call time and multiple contracts.

The main stumbling block was the opt-out clause, which Parliament had wanted to become exceptional and temporary. However, the Council had been unwilling to put an end to the opt-out.

Parliament had also sought to defend the position upheld in rulings by the European Court of Justice, whereby on-call time should be regarded as working time. It felt that the proposals from the Commission and the Council on this issue represented a step backwards compared with ECJ rulings.

Finally, no substantive agreement could be reached on the issue of multiple contracts. For workers covered by more than one employment contract, Parliament considered that working time should be calculated per worker and not per contract.

As no compromise could be found in conciliation, the proposal now lapses and the current directive remains in force. The Commission may, if it so chooses, draft a new proposal from scratch which would again have to be submitted to Parliament for scrutiny. It should be noted that this was the first time that no agreement had been reached at the conciliation stage since the entry into force of the Amsterdam Treaty which significantly extended the scope of the codecision procedure.