COMMON POSITION (EC) No 23/2008

adopted by the Council of 15 September 2008

with a view to the adoption of Directive 2008/…/EC of the European Parliament and of the Council of … amending Directive 2003/88/EC concerning certain aspects of the organisation of working time

(2008/C 254 E/03)

THE EUROPEAN PARLIAMENT AND THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty establishing the European Community, and in particular Article 137(2) thereof,

Having regard to the proposal from the Commission,

Having regard to the opinion of the European Economic and Social Committee [1],

Having regard to the opinion of the Committee of the Regions [2],

Acting in accordance with the procedure laid down in Article 251 of the Treaty [3],

Whereas:

(1) Article 137 of the Treaty provides that the Community is to support and complement the activities of the Member States with a view to improving the working environment to protect workers' health and safety. Directives adopted on the basis of the aforementioned Article are to avoid imposing administrative, financial and legal constraints in a way which would hold back the creation and development of small and medium-sized undertakings.

(2) Directive 2003/88/EC of the European Parliament and of the Council [4] 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.

(3) The third paragraph of Article 19 and the second subparagraph of Article 22(1) of Directive 2003/88/EC provide for a review before 23 November 2003.

(4) More than ten years after the adoption of Council Directive 93/104/EC [5], the initial Directive concerning the organisation of working time, it has become necessary to take into consideration new developments and demands from both employers and workers and provide the resources to meet the growth and employment objectives laid down by the European Council of 22 and 23 March 2005 in the context of the Lisbon strategy.

(5) The reconciliation of work and family life is also an essential element for achieving the objectives set by the European Union in the Lisbon strategy, particularly for increasing the rate of employment amongst women. The aim is not only to create a more satisfactory working environment, but also to respond better to workers' demands, in particular those with family responsibilities. A number of amendments contained in this Directive are intended to permit greater compatibility between work and family life.

(6) In this context, the Member States should encourage the social partners to conclude agreements at the appropriate level for improving the reconciliation of work and family life.

(7) There is a need to strengthen the protection of workers' health and safety and for greater flexibility in organising working time, particularly with regard to on-call time and, more specifically, inactive periods during on-call time, and also to strike a new balance between reconciling work and family life on the one hand and more flexible organisation of working time on the other.

(8) Workers should be afforded periods of compensatory rest in circumstances where rest periods are not granted. 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.

(9) The provisions on the reference period for maximum weekly working time must also be re-examined, with the objective of adapting them to the needs of employers and employees, subject to safeguards for the protection of workers' health and safety.

(10) Whenever the duration of the employment contract is less than one year, the reference period should not be longer than the duration of the employment contract.

(11) The experience gained in the application of Article 22(1) of Directive 2003/88/EC shows that the purely individual decision not to be bound by Article 6 thereof can be problematic with regard to the protection of workers' health and safety and the freedom of choice of the worker.

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[1] OJ C 267, 27.10.2005, p. 16.
[2] OJ C 231, 20.9.2005, p. 69.
[3] Opinion of the European Parliament of 11 May 2005 (OJ C 92 E, 20.4.2006, p. 292), Council Common Position of 15 September 2008 and Council Decision of … (not yet published in the Official Journal).
[4] OJ L 299, 18.11.2003, p. 9.
[5] OJ L 307, 13.12.1993, p. 1. Directive repealed by Directive 2003/88/EC.

(12) The option provided for in Article 22(1) is a derogation from the principle of a 48-hour maximum working week, calculated as an average over a reference period. It is subject to the effective protection of workers' health and safety, and to the express, free and informed consent of the worker concerned. Its use must be subject to appropriate safeguards to ensure that these conditions are complied with, and to close monitoring.

(13) Before applying the option provided in Article 22(1), consideration should be given to whether the longest reference period or other flexibility provisions provided by Directive 2003/88/EC do not guarantee the flexibility needed.

(14) In order to avoid risks to the health and safety of workers, the cumulative use in a Member State of both the flexible reference period provided by point (b) of the first paragraph of Article 19 and the option under Article 22(1) is not possible.

(15) In accordance with Article 138(2) of the Treaty, the Commission consulted management and labour at Community level on the possible direction of Community action in this field.

(16) Following this consultation, the Commission considered that Community action was advisable and further consulted management and labour on the content of the envisaged proposal, in accordance with Article 138(3) of the Treaty.

(17) Following this second phase of consultation, management and labour at Community level did not inform the Commission of their wish to initiate the process which could lead to the conclusion of an agreement provided for in Article 139 of the Treaty.

(18) Since the objective of this Directive, namely modernising Community legislation concerning the organisation of working time, cannot be sufficiently achieved by the Member States and can therefore be better achieved at Community level, the Community may adopt measures in accordance with the principle of subsidiarity as set out in Article 5 of the Treaty. In accordance with the principle of proportionality, as set out in that Article, this Directive does not go beyond what is necessary in order to achieve that objective.

(19) This Directive respects the fundamental rights and complies with the principles recognised by the Charter of Fundamental Rights of the European Union ([1]). In particular, it is designed to ensure full respect for the right to fair and just working conditions referred to in Article 31 of the Charter, and in particular paragraph 2 thereof, which provides that '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'.

([1]) OJ C 303, 14.12.2007, p. 1.

(20) The implementation of this Directive should maintain the general level of protection afforded to workers as regards health and safety at work,

HAVE ADOPTED THIS DIRECTIVE:

Article 1

Directive 2003/88/EC is hereby amended as follows:

1) In Article 2 the following points shall be inserted:

'1a. "on-call time" means any period during which the worker has the obligation to be available at the workplace in order to intervene, at the employer's request, to carry out his activity or duties;

1b. "workplace" means the place or places where the worker normally carries out his activities or duties and which is determined in accordance with the terms of the employment relationship or contract applicable to the worker;

1c. "inactive part of on-call time" means any period during which the on-call worker is on call within the meaning of point 1a but is not required by his employer to actually carry out his activity or duties;'.

2) The following Articles shall be inserted:

'*Article 2a*

On-call time

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.

The inactive part of on-call time may be calculated on the basis of an average number of hours or a proportion of on-call time, taking account of experience in the sector concerned, by collective agreement or agreement between the social partners or by national legislation following consultation of the social partners.

The inactive part of on-call time shall not be taken into account in calculating the daily or weekly rest periods laid down in Articles 3 and 5 respectively, unless otherwise provided for:

(a) in a collective agreement or an agreement between the social partners;

or

(b) by means of national legislation following consultation of the social partners.

The period during which the worker actually carries out his activity or duties during on-call time shall always be regarded as working time.

Article 2b

Reconciliation of work and family life

The Member States shall encourage the social partners at the appropriate level, without prejudice to their autonomy, to conclude agreements aimed at improving the reconciliation of work and family life.

The Member States shall ensure, without prejudice to Directive 2002/14/EC of the European Parliament and of the Council of 11 March 2002 establishing a general framework for informing and consulting employees in the European Community (*) and in consultation with the social partners, that employers inform workers in due time of any substantial changes in the pattern or organisation of their working time.

Taking into account workers' needs for flexibility in their working hours and patterns, the Member States shall, in accordance with national practices, also encourage employers to examine requests for changes to such working hours and patterns, subject to business needs, and to both employers' and workers' needs for flexibility.

(*) OJ L 80, 23.3.2002, p. 29.'.

3) Article 17 shall be amended as follows:

(a) in paragraph 1, the words 'Articles 3 to 6, 8 and 16' shall be replaced by 'Articles 3 to 6, Article 8 and Article 16(a) and (c)';

(b) in paragraph 2, the words 'provided that the workers concerned are afforded equivalent periods of compensatory rest' shall be replaced by 'provided that the workers concerned are afforded equivalent periods of compensatory rest within a reasonable period, to be determined by national legislation or a collective agreement or an agreement concluded between the social partners';

(c) in paragraph 3, in the introductory sentence, the words 'Articles 3, 4, 5, 8 and 16' shall be replaced by 'Articles 3, 4, 5, 8 and Article 16(a) and (c)';

(d) paragraph 5 shall be amended as follows:

(i) the first subparagraph shall be replaced by the following:

'5. In accordance with paragraph 2 of this Article, derogations may be made from Article 6 in the case of doctors in training, in accordance with the provisions set out in the second to the sixth subparagraphs of this paragraph.';

(ii) the last subparagraph shall be deleted.

4) In Article 18, in the third paragraph, the words 'on condition that equivalent compensating rest periods are granted to the workers concerned' shall be replaced by 'on condition that equivalent compensating rest periods are granted to the workers concerned within a reasonable period, to be determined by national legislation or a collective agreement or an agreement concluded between the social partners'.

5) Article 19 shall be replaced by the following:

'Article 19

Limitations to derogations from reference periods

Without prejudice to Article 22a(b) and by way of derogation from Article 16(b), 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 twelve months:

(a) by collective agreement or agreement between the social partners, as laid down in Article 18;

or

(b) by legislative or regulatory provision following consultation of the social partners at the appropriate level.

In making use of the option pursuant to point (b) of the first paragraph, Member States shall ensure that employers respect their obligations as laid down in Section II of Directive 89/391/EEC.'.

6) Article 22 shall be replaced by the following:

'Article 22

Miscellaneous provisions

1. Although the general principle is that the maximum weekly working time in the European Union is 48 hours and that in practice it is an exception for workers in the Union to work longer, Member States may decide not to apply Article 6 provided that they take the necessary measures to ensure the effective protection of the safety and health of workers. Implementation of this option, however, shall be expressly laid down by a collective agreement or an agreement between the social partners at the appropriate level or by national law following consultation of the social partners at the appropriate level.

2. In any event, Member States wishing to make use of this option shall take the necessary measures to ensure that:

(a) no employer requires a worker to work more than 48 hours over a seven-day period, calculated as an average for the reference period referred to in Article 16(b), unless he has first obtained the worker's agreement to perform such work. This agreement shall be valid for a period not exceeding one year and shall be renewable;

(b) no worker shall be subjected to any detriment by his employer because he is not willing to give his agreement to perform such work or because he has withdrawn his agreement for any reason;

(c) an agreement given at:

(i) the time of the signature of the individual employment contract; or

(ii) during the first four weeks of the employment relationship

shall be null and void;

(d) no worker who has given an agreement under this Article shall, over a period of seven days, work more than:

(i) 60 hours, calculated as an average over a period of three months, unless otherwise provided for in a collective agreement or an agreement between the social partners; or

(ii) 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 in accordance with Article 2a;

(e) every worker shall be entitled to withdraw, with immediate effect, his agreement to perform such work during the first six months after signature of a valid agreement or during and up to three months after the probation period specified in his contract is completed, whichever is longer, by informing his employer in due time in writing that he is doing so. Thereafter, the employer may require the worker to give, in writing, advance notice thereof, which shall not exceed two months in duration;

(f) the employer keeps up-to-date records of all workers who carry out such work and adequate records for establishing that the provisions of this Directive are complied with;

(g) 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 time;

(h) the employer provides the competent authorities at their request with information on cases in which agreement has been given by workers to work for more than 48 hours over a period of seven days, calculated as an average for the reference period referred to in Article 16(b), and adequate records for establishing that the provisions of this Directive are complied with.

3. Subject to compliance with the general principles relating to the protection of the safety and health of workers, where a worker is employed by the same employer for a period or periods that do not exceed ten weeks in total over a period of twelve months, the provisions of paragraph 2(c)(ii) and (d) shall not apply.'.

7) The following Article shall be inserted:

'*Article 22a*

Special provisions

When a Member State makes use of the option provided for by Article 22:

(a) the option set out under point (b) of the first paragraph of Article 19 shall not apply;

(b) that Member State may, by way of derogation from Article 16(b) and for objective or technical reasons or reasons concerning the organisation of work, allow, by means of laws, regulations or administrative provisions, the reference period to be set at a period not exceeding six months.

Such a reference period shall be subject to compliance with the general principles relating to the protection of the health and safety of workers, and shall not affect the three-month reference period applicable under Article 22(2)(d) to workers who have entered into a valid subsisting agreement under Article 22(2)(a).'.

8) Article 24 shall be replaced by the following:

'*Article 24*

Reports

1. Member States shall communicate to the Commission the texts of the provisions of national law already adopted or being adopted in the field governed by this Directive.

2. Member States shall report to the Commission every five years on the practical implementation of this Directive, indicating the viewpoints of the two sides of industry.

The Commission shall inform the European Parliament, the Council, the European Economic and Social Committee and the Advisory Committee on Safety and Health at Work thereof.

3. Every five years from 23 November 1996 the Commission shall submit to the European Parliament, the Council and the European Economic and Social Committee a report on the application of this Directive taking into account paragraphs 1 and 2.'.

9) The following Article shall be inserted:

'*Article 24a*

Evaluation report

1. By … (*):

(a) Member States which make use of the option under Article 22(1) shall inform the Commission of the reasons, the sector(s), activities and numbers of workers concerned, after consulting the social partners at national level. The report by each Member State shall give information on its effects on workers' health and safety as well as indicating the viewpoints of the social partners at appropriate level, and shall also be submitted to the social partners at national level;

(*) Six years after the date of entry into force of this Directive.

(b) Member States which make use of the option under point (b) of the first paragraph of Article 19 shall inform the Commission of the manner in which they have implemented this provision, and of its effects on workers' health and safety.

2. By … (*), the Commission shall, after consulting the social partners at Community level, submit to the European Parliament, the Council and the European Economic and Social Committee a report on:

(a) the use of the option under Article 22(1) and the reasons for that use, and

(b) other factors which may contribute to long working hours, such as the use of point (b) of the first paragraph of Article 19.

The report may be accompanied by appropriate proposals to reduce excessive working hours, including the use of the option under Article 22(1), taking into account its impact on the health and safety of the workers covered by this option.

3. The Council shall, on the basis of the report referred to in paragraph 2, evaluate the use of the options provided by this Directive and namely those laid down in point (b) of the first paragraph of Article 19 and Article 22(1).

Taking into account this evaluation, the Commission may, by … (**), if appropriate, submit a proposal to the European Parliament and the Council to amend this Directive, including the option laid down in Article 22(1).'.

Article 2

Member States shall lay down rules on penalties applicable in the event of infringements of national provisions implementing this Directive and shall take all necessary measures to ensure that they are applied. The penalties provided for must be effective, proportionate and dissuasive. Member States shall notify these provisions to the Commission by … (***). Member States shall notify to the Commission any subsequent amendments to those provisions in good time. They shall, in particular, ensure that workers and/or their representatives have adequate means of enforcing the obligations under this Directive.

Article 3

1. Member States shall bring into force the laws, regulations and administrative provisions necessary to comply with this Directive by … (***), or shall ensure that the social partners introduce the necessary provisions by way of an agreement, whereby the Member States must make all the necessary arrangements to enable them to guarantee at any time that the objectives of this Directive are being attained. They shall forthwith inform the Commission thereof.

When Member States adopt these measures, they shall contain a reference to this Directive or shall be accompanied by such reference on the occasion of their official publication. The methods of making such reference shall be laid down by Member States.

2. Member States shall communicate to the Commission the text of the provisions of national law which they adopt in the field covered by this Directive.

Article 4

This Directive shall enter into force on the day of its publication in the *Official Journal of the European Union*.

Article 5

This Directive is addressed to the Member States.

Done at …

For the European Parliament	*For the Council*
The President	*The President*
…	…

(*) Seven years after the date of entry into force of this Directive.
(**) Eight years after the date of entry into force of this Directive.
(***) Three years after the date of entry into force of this Directive.

STATEMENT OF THE COUNCIL'S REASONS

I. INTRODUCTION

On 24 September 2004, the Commission submitted a proposal for a Directive of the European Parliament and of the Council amending Directive 2003/88/EC concerning certain aspects of the organisation of working time ([1]). The proposal is based on Article 137(2) of the Treaty.

Acting in accordance with Article 251 of the Treaty, the European Parliament delivered its Opinion on first reading on 11 May 2005 ([2]).

The Economic and Social Committee delivered its Opinion on 11 May 2005 ([3]) and the Committee of the Regions on 14 April 2005 ([4]).

The Commission presented its amended proposal ([5]) on 2 June 2005, in which it accepted 13 of the 25 amendments adopted by the European Parliament.

On 9 June 2008, the Council reached a political agreement by qualified majority on a Common Position, in parallel to a political agreement by qualified majority on a Common Position regarding the Directive on working conditions for temporary workers. Five of the delegations which could not accept the text of the political agreement on the Working Time Directive entered a joint declaration in the Council Minutes ([6]).

In accordance with Article 251(2) of the EC Treaty, the Council adopted its Common Position by qualified majority on 15 September 2008.

II. OBJECTIVES

The objectives of the proposal are two-fold:

— First, to review some of the provisions of Directive 2003/88/EC (which last amended Directive 93/104/EC) in accordance with Articles 19 and 22 of that Directive. These provisions concern the derogations to the reference period for the application of Article 6 (maximum weekly working time) and the possibility not to apply Article 6 if the worker gives his agreement to carry out such work (the 'opt-out provision').

— Second, to take into account the European Court of Justice's case law, in particular the rulings in the SIMAP ([7]) and Jaeger ([8]) cases which held that on-call duty performed by a doctor when he is required to be physically present in the hospital must be regarded as working time. This interpretation of certain provisions of the Directive by the European Court of Justice, following several requests for preliminary rulings under Article 234 of the Treaty, had a profound impact on the concept of 'working time' and, consequently, on essential provisions of the Directive.

In particular:

— With the aim of ensuring an appropriate balance between the protection of workers' health and safety, on the one hand, and the need for flexibility for employers, on the other hand, the proposal establishes general principles of protection for on call workers both during active and inactive periods of on call time. Within this framework, the proposal provides that the inactive part of on-call time is not working time within the meaning of the Directive, unless national legislation, collective agreements or agreements between the social partners decide otherwise.

— The proposal aims to give employers and Member States greater flexibility in the organisation of working time, under certain conditions, by making the extension of the reference period for the calculation of the maximum weekly working time possible up to one year, thus allowing companies to deal with more or less regular fluctuations in demand.

([1]) OJ C 322, 29.12.2004, p. 9.
([2]) OJ C 92, 20.4.2006, p. 292.
([3]) OJ C 267, 27.10.2005, p. 16.
([4]) OJ C 231, 20.9.2005, p. 69.
([5]) OJ C 146, 16.6.2005, p. 13.
([6]) Doc. 10583/08 ADD 1.
([7]) Judgement of the Court of 3 October 2000 in case C-303/98, Sindicato de Médicos de Asistencia Publica (SIMAP) v. Conselleria de Sanidad y Consumo de la Generalidad Valenciana, ECR 2000, p. I-07963.
([8]) Judgement of the Court of 9 October 2003 in case C-151/02, Reference for a preliminary ruling: Landesarbeitsgericht Schleswig-Holstein (Germany) in the proceedings pending before that court between Landeshauptstadt Kiel and Norbert Jaeger, not yet published.

— The proposal allows for better compatibility between work and family life, in particular by the changes proposed with regard to Article 22.

— As regards the individual opt-out from the 48-hour average weekly limit, the proposal strengthens social dialogue, by involving social partners in any decision by a Member State to allow use of the opt-out by individual workers. Under this new system, a decision by a Member State to allow use of the opt-out must be implemented either through a prior collective agreement or agreement between social partners at the appropriate level, or by national law following consultation of the social partners at the appropriate level. It remains the case that no employer can oblige a worker to work more than the 48-hour average weekly limit, so the individual worker must also agree to use the opt-out. Reinforced conditions will also apply at Community level, to prevent abuses and to ensure that a worker who is considering using the opt-out, can make an entirely free choice. Furthermore, the proposal introduces a general principle according to which the maximum duration of weekly working time should be limited.

III. ANALYSIS OF THE COMMON POSITION

1. *General observations*

a) Commission's amended proposal

The European Parliament adopted 25 amendments to the Commission proposal. 13 of these amendments were incorporated into the amended Commission proposal in whole, in part of after being reworded (amendments 1, 2, 3, 4, 8, 11, 12, 13, 16, 17, 18, 19 and 24). 12 other amendments were, however, not acceptable to the Commission (amendments 5, 6, 7, 9, 10, 14, 15, 20, 21, 22, 23 and 25).

b) Council's Common Position

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

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

— No 12 (Article 2b: addition of a provision concerning compatibility between work and family life).

— No 13 (deletion of Article 16b(2) concerning the 12-months reference period).

— No 19 (Article 19: reference period).

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

— No 11 (aggregation of hours in cases involving several employment contracts), as taken into account in recital No 2 in the amended proposal, as recital No 3 of the current Directive provides that '*the provisions of Council Directive 89/391/EEC of 12 June 1989 on the introduction of measures to encourage improvements in the safety and health of workers at work remain fully applicable to the areas covered by this Directive without prejudice to more stringent and/or specific provisions contained therein*' and that its Article 1(4) also provides that the provisions of Directive 89/391/EEC are fully applicable to minimum periods of daily rest, weekly rest and annual leave, to breaks and maximum weekly working time as well as to certain aspects of night work, shift work and patterns of work.

— No 24 (provision concerning the validity of opt-out agreements signed prior to the entry into force of the Directive, Article 22 (1c)): the Council did not consider it necessary to incorporate this provision which has been taken on board in the Commission's amended proposal.

— No 25 (which provides that a copy of the Directive shall be sent to the governments and parliaments of the candidate countries).

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

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

2. ***Specific comments***

Provisions regarding on-call time

The Council agreed with the definitions of 'on-call time' and 'inactive part of on-call time' as suggested by the Commission in its original proposal and confirmed in its amended proposal.

The Council also agreed with the Commission on the need to add a definition of the term 'workplace' in Article 1(1)(1b) of the Common Position, in order to make the definition of 'on-call time' clearer.

With regard to the new Article 2a on on-call time, the Council concurred with the Commission on the principle that the inactive part of on-call time should not be regarded as working time unless national law or, in accordance with national law and/or practice, a collective agreement or an agreement between the social partners decides otherwise. The Council shares the Commission's view that the introduction of this new category should be of help in clarifying the relationship between working time and rest periods.

The Council also followed the Commission's approach with regard to the method of calculation of the inactive part of on-call time while providing that it may not only be established by collective agreement or agreement between the social partners but also by national legislation following consultation of the social partners.

The Council acknowledged as a general principle that the inactive part of on call time should not be taken into account in calculating the daily and weekly rest periods. However, the Council also considered appropriate to provide for the possibility of introducing some flexibility in the application of this provision through collective agreements, agreements between the social partners or by means of national legislation following consultation of the social partners.

Compensatory rest time

In relation to Articles 17(2) and 18(3) of the Directive, the Council can agree with amendments Nos 16 and 18 as reworded in the Commission's amended proposal.

The general principle is that workers should be afforded periods of compensatory rest in circumstances where normal rest periods cannot be taken. The determination of the length of the reasonable period within which equivalent compensatory rest is granted to workers should be left to the Member States, taking into account the need to ensure the safety and health of the workers concerned and the principle of proportionality.

Reconciliation of work and family life

The Council concurs with Parliament on the need to improve the reconciliation between work and family life. This concern appears quite clearly in recitals Nos 5, 6 and 7 as well as in Article 1(2), incorporating a new Article 2b, of the Common Position.

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

With regard to the new Article 2b, the Council took on board the text of the first paragraph in the Commission's amended proposal which states that '*The Member States shall encourage the social partners at the appropriate level, without prejudice to their autonomy, to conclude agreements aimed at improving reconciliation of work and family life*'.

The two other paragraphs draw inspiration from amendment 12 and are based on the Commission's amended proposal. The second paragraph further introduces references to Directive 2002/14/EC establishing a general framework for informing and consulting employees in the European Community, and to the consultation of the social partners. The third paragraph provides that Member States should encourage employers to examine workers' requests for changes to their working hours and patterns, subject to business needs and to both employers' and workers' needs for flexibility.

Reference period (Article 19)

The Council shares the European Parliament's views that the extension of the reference period should go hand in hand with an increased involvement of workers and their representatives and with any necessary preventive measures with regard to risks to workers' health and safety. It, however, considered that a reference to Section II of Directive 89/391/EEC ([1]), which lays down a number of provisions in this respect, would provide for appropriate guarantees in this regard.

Framework for the opt-out (Article 22)

The Council was unable to accept either amendment No 20, according to which Article 22 concerning the opt-out should be repealed 36 months after the entry into force of the Directive, or the Commission's amended proposal which provided for the possibility of extending this option after three years. While some delegations were in favour of the principle of putting an end to the use of the opt-out after a certain period, a majority of them were opposed to any such solution, without necessarily implying, however, that they would all make use of the opt-out at this stage.

In this context, after having examined different possible solutions, the Council eventually came to the conclusion that the only solution acceptable to a qualified majority of delegations would be to provide for the continuation of the opt-out, while introducing safeguards against abuse to the detriment of the worker.

In particular, Article 1(7) of the Common Position regarding Article 22a(a) of the Directive provides that the use of the opt-out cannot be combined with the option provided in Article 19(b). Furthermore, recital 13 states that, before implementing the opt-out, consideration should be given to whether the longest reference period or other flexibility provisions provided by the Directive do not guarantee the flexibility needed.

With regard to the conditions applicable to the opt-out, the Common Position provides that:

— the working week in the EU should remain at a maximum 48 h, in accordance with Article 6 of the current Directive, unless a Member State provides for an opt-out either through collective agreements, or agreements between the social partners at the appropriate level, or through national law following consultation of the social partners at the appropriate level, and the individual worker decides to use the opt-out. The decision therefore remains with the individual worker and he cannot be forced to work beyond the 48-hour limit;

— the use of this option is, moreover, subject to strict conditions which aim at protecting the worker's free consent, at introducing a legal limit to the number of hours worked per week in the context of the opt-out and at providing for specific obligations on employers to inform the competent authorities at their request.

With regard to the protection of the worker's free consent, the Common Position stipulates that the opt-out is only valid if the worker has given his agreement prior to performing such work and for a period not exceeding one year, renewable. The employer cannot, in any case, victimise a worker because he is not willing to give his agreement to perform such work or because he withdraws his agreement for any reason. Moreover, except in the case of short term contracts (see below), an opt-out can only be signed after the first four weeks of work and a worker cannot be asked to sign an opt-out upon signature of his contract. Finally, the worker is entitled within specific deadlines to withdraw his agreement to work under the opt-out.

The Common Position introduces legal limits to the number of hours allowed to be worked per week in the framework of the opt-out, which are not provided for under the current Directive. 60 hours per week, calculated as an average over a period of 3 months, would normally be the limit, unless otherwise provided for in a collective agreement or an agreement between the social partners. This limit could be increased to 65 hours, calculated as an average over a period of 3 months, in the absence of a collective agreement and when the inactive part of on-call time is regarded as working time.

([1]) OJ L 183, 29.6.1989, p. 1.

Finally, the Common Provision stipulates that employers must keep a record of the working hours of employees working in the framework of the opt-out. The records are placed at the disposal of the competent authorities which may, for reasons connected with the safety and/or health of workers, prohibit or restrict the possibility of exceeding the maximum weekly working hours. Moreover, the employer may be requested by the competent authorities to provide information on cases in which agreement has been given by workers to perform work exceeding 48 hours over a period of seven days, calculated as an average for the reference period referred to in Article 16(b).

The Common Position provides for specific conditions in the case of short-term contracts (where a worker is employed by the same employer for a period, or periods, that do not exceed 10 weeks in total over a period of 12 months): the agreement to use the opt-out can then be given during the first four weeks of an employment relationship and the legal limits to the number of hours allowed to be worked per week in the framework of the opt-out would not apply. However, a worker may not be asked to give his agreement to work in the framework of the opt-out at the time of signature of his employment contract.

The Common Position further provides that, when making use of the opt-out, a Member State may allow by means of laws, regulations or administrative provisions, for objective or technical reasons, or reasons concerning the organisation of work, the reference period to be set at a period not exceeding six months. This reference period should not, however, affect the three-month reference period applicable for the calculation of the 60 or 65 hours maximum weekly limit.

Monitoring, evaluation and review provisions

Article 1(9) of the Common Position regarding a new Article 24a of the Directive provides for detailed reporting requirements regarding the use of the opt-out and other factors which may contribute to long working hours, such as the use of Article 19(b) (12-months reference period). These requirements are intended to allow for close monitoring by the Commission.

More specifically, the Common Position provides that the Commission:

— will, no later than four years after the entry into force of the Directive, submit a report accompanied, if necessary, by appropriate proposals to reduce excessive working hours, including the use of the opt-out, taking into account its impact on the health and safety of the workers covered by this option. This report will be evaluated by the Council;

— may, taking this evaluation into account, and no later than five years after the entry into force of the Directive, submit a proposal to the Council and the European Parliament to revise the Directive, including the opt-out option.

IV. **CONCLUSION**

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