

10 October 2005

AMENDED COMMISSION PROPOSAL FOR A REVISED WORKING TIME DIRECTIVE

SUMMARY

If the EU is to make a success of its growth and jobs strategy, the priority should be the creation of new jobs and integration of more people in labour markets. The amended Commission proposal for a revised working time directive would create further obstacles to achieving this objective.

UNICE is deeply concerned with the Commission's amended proposals to remove the opt-out and to allow the possibility to set a reference period of up to 12 months only by way of derogation and under tight conditions. Nevertheless, it has noted that the proposals regarding compensatory rest provide a good basis for discussions.

European employers call on the Council, the Commission and the European Parliament to ensure an effective revision of the working time directive in order to deal with the ECJ ruling on on-call time, while preserving overall working time flexibility.

The revised working time directive should:

- ensure that inactive part of on-call time is not considered as working time,
- average the reference period for calculating weekly working time over 12 months as a general rule, with a possibility to extend it beyond 12 months by collective agreement;
- explicitly make provision for opt-outs to be available by two independent means: either by collective agreement or by individual consent as opposed to a combination of both.

Regarding the working time for workers with more than one contract, UNICE agrees that the awareness of workers could be raised on the issue of multiple contracts, but it warns that this can under no circumstances imply that an employer would become responsible for what is happening in another company since he does not have any means to fulfil his responsibility.

With respect to the new article on reconciliation of work and family life, while European employers are in favour of this aim, they believe this issue should not be tackled in the context of the working time directive based on article 137.2 of the Treaty (i.e. protection of the health and safety of workers). This is best achieved through non-legislative measures. The European social partners have therefore recently adopted a framework of actions on gender equality. This framework of actions entails follow-up actions by social partners in Member States. Further measures are therefore neither necessary nor desirable.

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I. Introduction

1. On 31 May 2005, the European Commission published an amended proposal for a revised working time directive to take into account the EP report adopted on 11 May 2005. This amended proposal:
 - takes on board the EP amendments regarding the reference period for calculating the weekly working time, compensatory rest, aggregation of hours in cases involving several employment contracts and the reconciliation of work and family life;
 - goes a long way towards meeting the EP demand on the opt-out.

II. General comments

2. If the EU is to make a success of its growth and jobs strategy, the priority should be the creation of new jobs and integration of more people in labour markets. The amended Commission proposal for a revised working time directive would create further obstacles to achieving this objective.
3. UNICE is deeply concerned with the amended Commission proposals to remove the opt-out and to allow the possibility to set a reference period of up to 12 months only by way of derogation and under tight conditions. Nevertheless, it has noted that the proposals regarding compensatory rest provide a good basis for discussions.
4. European employers are in favour of an effective revision of the directive to:
 - ensure that inactive part of on-call time is not considered as working time,
 - average the reference period for calculating weekly working time over 12 months as a general rule, with a possibility to extend it beyond 12 months by collective agreement;
 - explicitly make provision for opt-outs to be available by two independent means: either by collective agreement or by individual consent as opposed to a combination of both.

III Specific comments

Reference period for calculating weekly working time

5. The Commission deletes article 16(b) which implies abolishing the standard reference period for calculating weekly working time set at EU level. Nevertheless, the Commission amends article 19 setting limitations to derogations from reference period to allow Member States to set a reference period of up to 12 months by collective agreement or by law, and makes this possibility subject to tighter conditions compared to the initial proposal (i.e. information and consultation of workers and/or their representatives and an obligation for employers to make a health and safety risk assessment). This is illogical. Without a standard reference period at EU level, it does not make sense to reason in terms of derogations by law or collective agreements.
6. In UNICE's view, the EU text should establish a 12-month reference period as a general rule with a possibility to extend it by collective agreement. This would:
 - reflect the fact that a 12-month reference period is the dominant pattern in practice;
 - respond to the needs of a growing number of companies in various sectors, which are faced with important business-related fluctuations of activity such as seasonal variations;
 - reduce the burden of administration of working in companies, especially SMEs;
 - make it easier for companies and workers to agree on individualised working time arrangements, for example to reconcile work and family life whether or not this is covered by collective agreement;
 - support employment in periods of fluctuating demand.

Opt-out

7. In the light of the EP amendments, the Commission radically changes its position by proposing the removal of the opt-out after a period of three years from the date of implementation of the revised directive. Some flexibility is given to Member States which already use the opt-out by giving them the possibility to ask for an extension of the 3-year period for reasons of labour market arrangements. The Commission would decide whether or not to grant the extension.
8. For UNICE such a solution is unacceptable. The flexibility of the opt-out is essential for companies and should be retained as an option for all Member States. The opt-out should be available by two independent means: either by collective agreement or by individual consent as opposed to a combination of both.

9. In addition, the conditions attached to the application of the opt-out are further tightened: workers would not be able to work more 55 hours in any given week (instead of 65 hours suggested initially by the Commission). This would significantly reduce the usefulness of the opt-out and would wipe out the flexibility it should bring.

On-call time

10. In its initial proposal the Commission suggested dealing with the consequences of the ECJ court cases on on-call time in the cases Simap/Jaeger by foreseeing that the inactive part of on-call time should not be regarded as working time unless otherwise decided by law or collective agreement. In its first reading report, the EP requested that as a rule at the EU level the entire period of on-call including the inactive part should be regarded as working time. In its amended proposal, the Commission does not accept the EP amendment, but it dilutes its initial proposal by adding a new provision which foresees that the inactive part of the on-call should not be included in the calculation of the daily rest and weekly rest periods. This means that the inactive part of on-call time would be considered neither as working time nor as rest time.
11. Furthermore, the Commission adds a new provision establishing that the inactive part can be calculated as an average number of hours or as a proportion of the on-call time.
12. While UNICE welcomes the latter provision which can help to reduce the administrative burden of managing the inactive parts of on-call, it insists that the new provision establishing that the inactive part of on-call time should not be counted as a rest period should be deleted for the following reasons. Firstly, it does not bring a solution to the problems which some sectors are facing after the ECJ rulings on Simap/Jaeger and important economic consequences by increasing costs would still exist. Secondly, it would lead to uncertainty as how the inactive part of on-call time would be qualified when transposing these provisions in Member States. Finally, it would introduce unnecessary complications in the organisation of working schedules.

Workers with more than one contract

13. The Commission explains that it took on board the EP amendment foreseeing that in the case of workers with more than one work contract, the sum of the time worked under each contract should not exceed the 48-hour maximum limit by adding the following sentence in recital 2 of its amended proposal: "These minimum requirements apply to all workers as defined in Article 3a of Directive 89/391/EEC". This directive establishes employers' obligations to ensure the safety and health of workers in every aspect related to the work.
14. UNICE agrees that the awareness of workers could be raised on the issue of multiple contracts, but it warns that this can under no circumstances imply that an employer would become responsible for what is happening in another

company since he does not have any means to fulfil his responsibility. Moreover, the enforcement of such system would create problems for Member States.

Reconciling work and family life

15. In line with the request by the EP, the amended proposal includes a new article on compatibility of work and family life. This article foresees that Member States should encourage the social partners to conclude agreements aimed at improving compatibility between work and family life. They should also take measures to ensure that employers inform workers in good time of any changes in the pattern or organisation of working time, that workers may request changes to their working hours and patterns, with an obligation for employers to examine requests taking into account employers' and workers' needs for flexibility. This issue should not be tackled in the context of the working time directive based on article 137.2 of the Treaty (i.e. protection of the health and safety of workers).
16. European employers are in favour of reconciliation of work and family life and agree that mutually acceptable flexible working arrangements can play a useful role. However, this is best achieved through non-legislative measures. The European social partners have therefore tackled this issue in the EU social dialogue and recently adopted a framework of actions on gender equality. This framework of actions entails follow-up actions by social partners in Member States. Further measures are therefore neither necessary nor desirable.

Compensatory rest

17. The Commission takes on board the EP amendments asking for compensatory rest to be granted within a reasonable period to be determined by national legislation or a collective agreement and not within 72 hours as foreseen in the initial Commission proposals.
18. UNICE welcomes this amendment. Referring the responsibility to specify what constitutes a reasonable period takes into account that the fact that, currently, such period differs from country to country. Moreover, the 72-hour rule initially proposed by the Commission would not be feasible for certain activities such as those operating on shift patterns (security services, maintenance of lifts, technical installations, heating systems, off-shore activities, etc.) or for cases such as the performing arts sector, media or broadcasting.

IV. Conclusions

19. The amended Commission proposal places further unnecessary constraints on companies. UNICE calls on the Council, the Commission and the European Parliament to ensure an effective revision of the working time directive in order to deal with the ECJ ruling on on-call time by ensuring that inactive part of on call is not considered as working time, while preserving overall working time flexibility.