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**WHITE PAPER ON SECTORS AND ACTIVITIES
EXCLUDED FROM THE
WORKING TIME DIRECTIVE**

White Paper on Sectors and Activities excluded from the Working Time Directive

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White Paper on Sectors and Activities excluded from the Working Time Directive

INTRODUCTION

1. The aim of this White Paper is to find the best ways of ensuring the protection of the health and safety, with regard to working time, of workers currently excluded from the Working Time Directive (93/104/EC).
2. The White Paper is in three parts. The first part sets out the background and an analysis of the current situation. The second part sets out the options. In the third part the Commission sets out its views on the way forward in this matter, subject to comments received on this White Paper.
3. The White Paper has been prepared following informal consultation with the social partners on the basis of a Working Document of the Commission Services.

PART ONE : BACKGROUND AND ANALYSIS

The Community Charter of the Fundamental Social Rights of Workers

4. The Community Charter of the Fundamental Social Rights of Workers contains provisions in relation to working time and holidays. Thus point 7 refers to the approximation of conditions as regards the duration and organisation of work. Point 8 refers to the right of every worker to a weekly rest period and to annual paid leave, while point 19 states that every worker must enjoy satisfactory health and safety conditions in his working environment.

The Working Time Directive

5. The Council of Ministers adopted Directive 93/104/EC on certain aspects of the organisation of working time on 23 November 1993. It was based on Article 118A of the EC Treaty. This requires Member States to "*pay particular attention to encouraging improvements, especially in the working environment, as regards the health and safety of workers ...*".
6. The essential aims are to ensure that workers are protected against adverse effects on their health and safety caused by working excessively long hours,

inadequate rest or disruptive working patterns. The Directive provides in particular (Articles 3 to 8) for :

- a minimum daily rest period of 11 consecutive hours a day;
- a rest break where the working day is longer than 6 hours;
- a minimum rest period of 1 day a week;
- a maximum working week of 48 hours on average including overtime;
- 4 weeks' annual paid holiday; and that
- night workers must not work more than 8 hours in 24 on average.

7. The Directive contains a number of further provisions relating to the protection of the health and safety of night workers and shift workers. It also requires measures to be taken so that the organisation of work according to a certain pattern takes account of the general principle of adapting work to the worker.

8. The Directive makes extensive provisions for flexibility in the application of the principles of the directive to specific situations. In particular, the Directive provides for derogations from all the main provisions except the annual leave provision, in a wide range of circumstances. These include "in the case of activities where the worker's place of work and his place of residence are distant from one another or where the worker's different places of work are distant from one another"; "in the case of activities involving the need for continuity of service or production"; "where there is a foreseeable surge of activity"; and "in the case of accident or imminent risk of accident". In addition derogations from the same provisions are allowed in respect of any activity, by means of collective agreement or agreements between the two

sides of industry. These derogations are allowed normally "provided that the workers concerned are afforded equivalent periods of compensatory rest". In the case of the provision for a maximum working week of 48 hours on average, the derogations allow the "reference periods" over which the average can be calculated to be extended up to 6 months in all cases where derogations are allowed and up to 12 months by means of collective agreement or agreements between the two sides of industry.

9. Member States were required to implement the Directive by 23 November 1996.

Public Safety

10. While it is workers' specific health and safety which is quite properly the subject matter of this White Paper, the Commission wishes to underscore the benefits that the general public may derive from adequate working time arrangements in all sectors. This is particularly the case with regard to transport activities and doctors in training, where fatigue brought by excessive hours of work may constitute a direct risk to the welfare and safety of others. The EC Treaty foresees specific Community action in areas where required for ensuring a high level of transport safety. Where such action relates to working (driving) times consistency with measures protecting the workers' health and safety must be ensured.

The Problem

The nature and extent of the exclusion

11. The Commission's original proposal for a Directive on working time covered all economic sectors and

activities. The Council decided, however, to exclude certain sectors and activities from the scope of the Directive. The precise wording regarding the scope of the Directive is: *"This Directive shall apply to all sectors of activity ... with the exception of air, rail, road, sea, inland waterway and lake transport, sea fishing, other work at sea and the activities of doctors in training"* (Article 1 paragraph 3).

12. The sixteenth recital to the Directive states : *"whereas, given the specific nature of the work concerned, it may be necessary to adopt separate measures with regard to the organization of working time in certain sectors or activities which are excluded from the scope of this Directive"*.

13. Thus the exclusions were considered by the Council to be directly related to the type of work involved, and not because of any suggestion that health and safety as regards working time was sufficiently protected in those sectors and activities. A common feature of all these sectors, apart from doctors in training, is that key workers typically are required to spend time away from home as an integral part of their duties.

14. The way in which the exclusions are drafted has been interpreted as implying that all workers in the transport and sea fishing sectors are excluded from the scope of the Directive, even those who perform sedentary tasks. The Commission considers that this should be clarified, as there is no objective reason why "non-mobile" employees should be treated differently in comparison to employees carrying out similar tasks in other industries. The test should relate to the nature of the activity, not to a definition of the "sector" in which the employee works.

15. In the case of "other work at sea" and "doctors in training", the reference, either implicitly or explicitly, is to

"activities", so the problem of defining the work involved does not arise.

Self employed

16. Self-employed workers are not covered by Directive 93/104/EC. While self-employment is common in certain excluded sectors, for example in the road and inland waterways sectors, it is also prevalent in many other sectors, already covered by the Directive, for example the construction industry. The argument that special treatment should continue to be applied in certain sectors, simply because of the high proportion of self-employed workers cannot therefore be sustained. This does not mean to say that self-employed workers are excluded from all Community legislation. For example, in the economically most important excluded sector, road transport, self-employed workers are covered by the existing regulations on driving time.

17. However, while the objective is to protect health and safety, the Commission is sensitive to the effect of possible distortions of competition and the imperatives of ensuring transport safety, and this is why an integrated approach to the implementation of the Community's transport and social policies is favoured in this White Paper.

Employment in the excluded sectors

18. The total employment, including self-employment, in all the sectors and activities excluded from the Directive, is about 5.6 million (about 4% of total employment in the EU¹). Of these 3.5 million are in the Road Transport industry. In addition there are some 3 million

¹ Source: Employment in Europe 1996

workers in "own account"² road transport, which is not excluded from the Directive. Estimates of total employment in the different sectors and activities are set out in the Annex. More detailed information is to be found in the sector-by sector analysis (see paragraphs 29 to 66 below).

Legal and Contractual Situation in the Member States

19. There have been significant changes in national legislation since the Directive was adopted in 1993. These reflect in part the measures taken by Member States to implement the Directive and partly moves towards greater flexibility in working time arrangements, often combined with reductions in working time. A study of legal and contractual limitations to Working Time in the European Union has recently been prepared by the European Foundation for Living and Working Conditions³.

20. The extent to which employees are already covered by general or sector specific working time legislation varies enormously both between Member States and between sectors. All Member States have some legislation which provides some protection in respect of working time in respect of some categories of workers. But there is no apparent uniformity or consistency. In some cases general working time laws apply to some (or all) of the sectors and activities excluded, in other cases there are specific legal rules applying to the sector. In most countries, legislation is complemented by collective agreements. There is, however,

² Mostly in chemicals, oil products, agri-food, construction and the gross/retail trade

³ Legal and Contractual Limitations to Working Time in the European Union, published by the Office for Official Publications of the European Communities and Peeters Publications

legislation in most Member States providing minimum periods of annual leave, in respect of most sectors.

Action at Community Level

21. In negotiations with the European Parliament during the Second Reading, the Commission undertook to take initiatives in respect of the sectors and activities excluded from the Directive. For example, the Commission's Communication to the European Parliament⁴ stated the Commission's intention *"to take appropriate initiatives as soon as possible in respect of the different sectors excluded from the scope of the Directive. The preparatory work for the implementation of these initiatives is being undertaken in the context of the Joint Sectoral Committees for the sectors concerned (where they exist)."*

22. In the Medium Term Social Action Programme 1995-97, the Commission stated that *"discussions with the social partners and/or studies will continue on how best to ensure that the activities and sectors excluded from the directive on the organisation of working time are appropriately covered If necessary, the Commission will consider bringing forward proposals to complete the Directive in 1996-1997"*.

23. In its Resolution on the Medium-Term Social Action Programme 1995-1997, the European Parliament expressed *"the wish that the Commission in its forthcoming Work Programme for 1996, will put forward detailed legislative proposals on ... working time directives for those sectors excluded from the Working Time Directive, as well as social dialogue actions"*. In its Resolution on a reduction and adaptation of working time, the Parliament also called on the

⁴ SEC(93) 1054 of 7 July 1993

Commission ... to encourage the two sides of industry to consult ... at European level with a view to concluding flexible agreements on reducing and adapting working time particularly in sectors currently excluded from the directive on working hours.

24. In its Common Transport Policy Action Programme 1995-2000 the Commission indicated its intention to launch sector-specific initiatives on working time in various transport modes once the outcome of discussions between the social partners has become sufficiently clear⁵. In its Resolution on this Action Programme the European Parliament endorsed the need to submit legislative proposals on working time in transport, in particular in areas where social partners did not reach agreement.

Joint Committees and Studies

25. In the five transport sectors and the sea fishing sector discussions between the social partners are organised in the form of Joint Committees at Community level.

26. The Commission requested the Joint Committees to provide joint descriptions of the existing situation with regard to working time arrangements in these sectors and to give their recommendations on how to adapt the principles of the Directive with regard to their area of work.

27. On 16 June 1995 Commissioners Flynn and Kinnock met all five Joint Committees in the transport sectors. At this meeting there was widespread agreement that there was no justification for excluding "non-mobile" workers from the scope of EC legislation on working time and that this needed to be put right.

28. The Commission arranged for factual studies to be undertaken of the

⁵ See COM(95)302 final.

working time arrangements in respect of "other work at sea" and "doctors in training" to provide the basis for the analysis which follows, in respect of these activities.

Sector-by-sector analysis and assessment

29. The following paragraphs analyse the specific features and issues relating to the regulation of working time in each sector and activity, including, in particular, the level of employment, and the discussions in the relevant Joint Committee or the views of the social partners. This analysis is followed in each case by an assessment of the possibilities for legislation on working time in the sector, including any obstacles which might arise from the simple extension of the Working Time Directive to cover workers in the sector concerned.

Road Transport

30. Road transport is by far the largest sector not covered by the Directive. Precise figures are difficult to establish. However, it has been estimated⁶ that road transport activities provide a total of 6.5 million jobs in the EU. A significant number of these are self-employed. There are about 1.2 million jobs in passenger transport, some 2.1 million in road haulage for hire or reward and 3 - 3.5 million in own account transport (mostly in chemicals, oil products, agri-food, construction and the gross/retail trade). It should be noted, however, that own account transport workers are already covered by the Directive.

31. This is the only industry where there is relevant Community legislation. In particular, Regulation 3820/85 provides for maximum daily driving periods of nine

⁶ Road Transport in the European Union: Aspects of the Organization and Enforcement of Working and Driving Time Regulations

hours which may be extended twice in any one week to 10 hours, breaks of at least 45 minutes for each period of four-and-a-half hours driving, and daily rest periods of eleven hours which may be reduced to a minimum of nine consecutive hours not more than three times in any one week (on condition that compensatory rest be given in the following week). But there are important differences between this Regulation and the Working Time Directive. The provisions of Regulation 3820/85 have as their objective not only the protection of the health and safety of workers, but they also primarily aim to harmonise the conditions of competition between all types of road transport operators as well as to improve road safety and working conditions in general. Given its direct link with road safety, the Regulation applies not only to employees but also to self-employed drivers.

32. Nevertheless, Regulation 3820/85 does not stipulate maximum hours for activities other than driving, such as loading and unloading which can form an important part of the daily working time of drivers but which are not covered by the Regulation. This may in certain circumstances lead to extremely long overall working times. Furthermore there are many exclusions and possibilities for further exceptions from the Regulation. As a result, a variety of rules is currently applicable in the Community leading to significant distortions of competition. This means that the road haulage sector can be subject to industrial relations problems which have already led to serious disruptions in the provision of transport services, affecting considerably the free movement of goods, services and persons. These shortcomings need to be phased out by appropriate Community action.

33. Employers have argued that a better application of existing rules would be preferable to new rules, whereas trade unions stress the need to cover all working time. Discussions in the Joint Committee were

resumed towards the end of 1996, but there appears to be little common ground between the two sides.

34. *The provision for consecutive daily rest in the Working Time Directive might be considered to be the most difficult rule to apply to mobile workers involved in long-distance road transport. However, there are already similar provisions in Regulation 3820/85, and this is the most appropriate instrument to deal with the issue of daily and weekly rest for mobile workers. Moreover, there does not appear to be any sector-specific argument why the provisions on paid leave and health assessment for night workers in the Working Time Directive, as well as guarantees of adequate rest and a maximum number of hours worked per year should not apply to all mobile workers in the sector. The full provisions of the Working Time Directive should apply to all non-mobile workers. As a complement to any general action taken with regard to the protection of the health and safety of workers in respect of working time, the Commission intends to propose in early 1998 important amendments to Regulation 3820/85. These amendments would, inter alia, integrate new provisions on the maximum daily, weekly and fortnightly limits to be placed on driving and loading/unloading activities into the Community's legislative system on driving time in road transport. They will also seek to achieve uniformity as far as checking rules and procedures are concerned.*

Rail Transport

35. Almost one million people were employed in rail transport in the 15 Member States of the EU in 1995. A study undertaken for the European Commission by the Committee (now Federation) for Transport Workers' Unions in the European Community⁷ shows that in 1992, 19% of

⁷ Social Aspects of the Common Transport Policy: Study of the Working and Social

employees worked as drivers and other train crew, 31% as traffic/maintenance staff (goods porters, semi-skilled workers, shunters for train coupling in stations and/or private sidings, terminal installations, containers etc.) and 50% were operational and station staff.

36. A specific feature of the industry is the intermittent nature of some of the work, particularly in rural areas. Thus the intensity of activity is determined by the frequency of the trains. This can give rise to problems of calculation of "working time" in some cases. There are also problems in applying the Directive to long-distance train drivers and accompanying staff. While these activities, and working conditions in general, are covered by a series of collective agreements at national level, the absence of any Community level framework will present growing problems as liberalisation and competition with new entrants gathers momentum.

37. The Joint Committee on Railways reached agreement on 18 September 1996 that the provisions of the Working Time Directive should be applied to all workers in the industry, including mobile workers, with appropriate adjustments to the derogations. A condition of the agreement is that similar provisions should be applied to other transport sectors at the same time. A further condition is that existing conditions concerning working time should be applied through legislation to all new entrants to the industry. This arises from fears that health and safety standards with regard to working time might otherwise fall as the industry is opened up to competition.

38. *Rail seems to be a sector where existing agreements between social partners work satisfactorily. In the light of the agreement within the Joint Committee, there are no objective reasons for continuing the exclusion in respect of this sector. In addition the Commission will monitor developments closely in this industry with a view to assessing the need for supplementary specific action.*

Urban Transport

39. While not mentioned specifically in Directive 93/104, this "sector", which covers aspects of rail and road transport, is excluded from the Working Time Directive. It is also excluded to a large extent from Regulation 3820/85 (regular passenger services with an operating radius of 50km or less), which may affect the safety of passengers. The Commission services have received representations from the UITP (Union Internationale des Transports Publiques) representing the interests of urban passenger transport, which are different from those of road or rail sectors as such. In formulating any proposals, the Commission will take account of their concerns.

Inland Waterways

40. Approximately 45,000 people work in the inland waterway transport sector; 35,000 of them are employees and the rest are small operators, owners of between one to three vessels. Nowadays there is a perceptible general upward trend in the number of small operators due to the sale by the big companies of their vessels to their employees. In the case of the small operators with only one vessel, who make up the great majority of the small operators, their vessel is both their means of making a living as well as their permanent home. However, those operating on the Rhine are currently subject to provisions on crew's rest periods, its composition and vessel navigation time. The link between these measures and working time is that the

small operator, in as much as he is a member of the crew, is subject to regulations on an obligatory rest period and vessel navigation times.

41. The two sides in the Joint Committee for inland waterways decided to enter into negotiations with a view to reaching a Community-level agreement on working time within the industry. The draft agreement, submitted by the workers' side, generally followed fairly closely the provisions of the Working Time Directive. It did, however, contain different provisions relating to daily rest, providing for 10 hours consecutive rest, as compared with 11 in the Directive. These negotiations broke down in early 1995, because the employers did not accept that the principle of working time should apply to the category of the small operator.

42. *The extension of the provisions of the Directive to employees in this sector ought not to pose insuperable problems. For, although the basic provision on daily rest periods provided for in the Working Time Directive could pose problems, the Directive does allow derogations from the relevant Article, both by collective agreement and where the worker works away from home. The Commission intends to submit a proposal to the Council in 1998, containing provisions, inspired by the Rhine Convention, which would apply to all Member States.*

Air Transport

43. It is estimated that there are approximately 375,000 employees working for air transport companies in the 15 Member States of the EU. About 20% of these are flight crews and the remainder ground staff, including maintenance and ticketing staff.

44. Flight time limitations are necessary, because it has long been recognised that serious performance degradation could occur as a result of flight

crew fatigue. Aviation presents combinations of factors that influence fatigue not encountered in other professions. Personnel are required to evaluate situations, take decisions and perform well under stress during long work periods, sometimes at night and after crossing many time zones. It is therefore necessary to protect such personnel not only against short-term fatigue but also from the possible effects of fatigue built up over the course of time.

45. Agreement has been reached in the Joint Committee on Air Transport that the provisions of the Working Time Directive should apply to ground staff (some 80% of all employees). Further discussions in the Joint Committee have concentrated on the application of the principles of the Working Time Directive to flight crews. These have been hampered by disagreements over the inter-relationship between these discussions and parallel discussions within the Joint Aviation Authorities (JAA) on the limitation of flying duty periods for flight and cabin crews.

46. *The agreement that the provisions of the general Directive should be extended to ground staff constitutes a considerable step forward. With regard to flight personnel, the only substantive problem with extension of the Directive might concern the provisions with regard to daily rest and rest breaks, though with the possibilities for derogations provided by the Directive these should not prove insuperable. As a complement to any general action taken with regard to the protection of the health and safety of workers in respect of working time, the Commission is also considering specific proposals, for reasons of operational safety, for a uniform Flight Time Limitation scheme.*

Sea Transport

47. The number of seafarers employed in the EU flagged fleet is estimated⁸ to total about 162,000. Of these, about 129,000 (80%) are nationals of the Member State concerned and 33,000 are non-nationals, mostly from third countries.

48. Long working hours at sea are common. However, a systematic approach to limitation of these hours has hitherto been difficult because of competition from ships flying the flags of third countries. Indeed the decline in employment in the EU-registered fleet - by over 30% between 1985 and 1995 - has been a major preoccupation of both ship-owners and seafarers over recent years. For this reason, and because this is a global industry, there has been concern, within the Joint Committee, to reach agreement in the international organisations, before tackling intra-Community issues.

49. Agreement was reached in the International Maritime Organisation in 1995 on the adoption of the revised Standards of Training, Certification and Watchkeeping (STCW) Convention in relation to minimum rest periods for watchkeepers. This provides for minimum daily rest periods of 10 hours per 24, which can be divided into no more than 2 periods, including one period of at least 6 consecutive hours; and for weekly rest periods of not less than 70 hours. The Commission has submitted a formal proposal to the Council amending Directive 94/58/EC on the minimum level of training of seafarers. This proposal reflects the provisions of the 1995 STCW Convention in respect of minimum rest periods for watchkeepers in the deck and engine departments. This amended Directive is currently being discussed in the legislative bodies of the European Community and on

18 June 1997, the Council of Ministers reached a common position on it.

50. In October 1996, the International Labour Organisation (ILO) adopted a new Convention (N° 180) on hours of work in shipping. The strategy followed, in the lead-up to the adoption of Convention 180, was developed by the social partners. The Convention provides, in respect of seafarers on board ship, either maximum working hours (14 hours a day and 72 hours a week) or minimum rest periods (10 hours a day and 77 hours a week). The Conference decided on a mechanism which would allow for the provisions of Convention N° 180 to be enforced upon non-EU registered ships operating in EU waters by means of Port State Control. Since then, the social partners have emphasised that it is very important for the strategy that Member States should ratify this Convention. They have also agreed in principle that there is a need for a specific Community instrument on working time in the maritime sector. On that basis, the Commission will, as it has previously indicated, rapidly make a proposal for a Directive. This will take account of the provisions of ILO Convention N° 180 and, subject to further discussion of the details, elements of the Working Time Directive.

51. *Much progress has been made. The Commission welcomes the agreement in the Joint Committee and looks forward to receiving its detailed recommendations. The Commission also hopes that Member States will ratify ILO Convention 180, so that minimum standards with regard to maximum working time or minimum rest can be enforced internationally.*

Sea Fishing

52. There are about 270,000 sea-going fishermen in the EU Member States⁹. In

⁸ TecEcon: Study on the maritime professions in the European Union

⁹ Number of fishermen (full and part-time) (all EU Member States). Figures are for 1993.

addition there are relatively small numbers of non-mobile land-based workers in the sea fishing sector, whose activities are directly related to the landing of catches and who are not covered by the Directive. There are also substantial numbers of other land-based workers who are closely related to sea fishing, e.g. port workers and workers in the fish processing industry, but these are already subject to the provisions of the Working Time Directive.

53. Both sides in the Joint Committee for this sector provided the Commission with their separate opinions. These were very different from one another. The employers expressed their opposition to any Directive on working time in the sector, given the specific nature of the industry and the principle of subsidiarity. Particular problems cited included the large number of self-employed workers, the financial consequences for share fishermen and the diverse nature of the industry in Europe. The trade unions, on the other hand, argued that action is necessary to protect fishermen from long working hours; that the exclusion from Directive 93/104/EC was unnecessary; and that suitable derogations could have been provided. They submitted detailed textual proposals. Discussions resumed earlier this year, with a view to reaching a common position.

54. *The Commission hopes that the social partners will reach a common position. However, in the absence of agreement, sector-specific provisions could be proposed for sea-going personnel, covering daily and weekly rest periods. In addition, the provisions on paid leave and health assessment for night workers in the Working Time Directive, as well as guarantees of adequate rest and a maximum number of hours worked per year, could be applied to all sea-going personnel in the*

sector. The full provisions of the Working Time Directive should apply to all non-mobile workers, with suitable further provision for derogations, if necessary.

Other Work at Sea

55. The number of employees working offshore fluctuates seasonally. The best estimate available is that the overall population of workers engaged in "other work at sea" in the EU is approximately 45,000. Of these, most are employed on offshore operations, but some 10,000 are employed in marine contracting work (including saturation diving) and at the high season there are some 3000 personnel engaged in seismic surveying work in European waters. The main EU countries involved are the UK (with well over half the EU employment in the sector), Denmark, Netherlands and Italy.

56. According to the study undertaken for the Commission¹⁰ virtually all offshore work in the North Sea is based around a 12-hour working shift. Some managerial personnel and specialists may work according to the daily requirements of the job, rather than to fixed hours. The duration of the period offshore is typically two weeks, but varies somewhat according to the country and employer. In the field of marine contracting in the UK, the arrangements regarding the period offshore are made according to the anticipated duration of the task. If a task is anticipated to take up to about five weeks it is probable that the same crew will remain working for the duration of the job.

57. There is legislation, often supplemented by collective agreements, containing at least basic provisions concerning hours of work or minimum

except Greece (1990) and Ireland (1991).
Source: OECD, Member States

¹⁰ Coshape Ltd: The Working Hours in 'Other Work at Sea' in the Context of Directive 93/104/EC, 1995

rest periods offshore in Denmark, Italy and the Netherlands. In the UK there is no specific legislation on hours of work, but each operator is required to prepare a safety case in respect of each installation and an assessment of the risks to the health and safety of their employees. Working time should be included in both the safety case and the risk assessment.

58. According to the Coshape report (prepared in 1995), overtime of 6 to 16 hours per week (over and above the 12 hour daily shift) was not unusual in Denmark. In the Netherlands, where overtime was worked offshore there had to be compensatory rest during the time offshore. In the UK the amount of overtime actually worked varied according to company and activity. In most cases significant overtime work was unusual during routine operations and was limited to about 4 hours a week, though in some instances it was over double this figure. For managerial personnel, overtime of 2 to 3 hours a day was commonplace; in Italy shift patterns and overtime working were very varied. The Coshape study concluded that the existing shift patterns appear to be the most appropriate way of organising working time offshore and that the scope for change is significantly limited.

59. There is no EC level social dialogue in this sector. Trade unions wish for negotiations at EC level, or, failing that, a specific Directive. The employers' organisations, on the other hand, have been reluctant to take part in any EC social dialogue and indeed the main organisations state that they are not mandated to do so. They consider that the industry is well regulated and that there is no justification for EC legislation in this sector. A particular concern is to maintain the 2 x 12 hour x 14 day shift pattern and an annualised calculation of working hours.

60. *Any proposal needs to allow shift systems based on 2 shifts x 12 hours x 14 days to continue and to give adequate*

recognition to the international and seasonal nature of the industry's working patterns by allowing an annualised calculation of working hours. Indeed the working patterns of these workers are in many ways analogous to those of "mobile" transport workers, in that they work away from home. They should therefore be treated similarly to such workers. In particular, some of the activities could be covered by similar arrangements to those proposed for maritime transport.

Doctors in Training

61. The exclusion refers to "doctors in training". In general, in Member States, the concept of "doctor in training" contains two important features: the persons concerned have completed their basic (undergraduate) medical training; and they are preparing for a recognised higher medical qualification. The length of the training period varies from country to country and it is not clear in some Member States when this period of training comes to an end. Employed doctors "not in training" are, by definition, covered by the Working Time Directive, subject to the flexibility provided by the Directive, as described in paragraph 8 above.

62. It is estimated that there are over 270,000 junior hospital doctors (corresponding roughly to the concept of "doctors in training") throughout the EU. However, almost half of these are in Germany, where national legislation on working time already applies.

63. There was an apparent problem relating to the employment status of doctors in training. In some countries, they have a special status, which is neither self-employed, employee, nor trainee. However, on further investigation, it would appear that in the vast majority of countries, they are considered to be "employees" for the purpose of employment law.

64. A specific feature of the employment of doctors in training relates to "on-call" duty. The study undertaken for the Commission in 1994¹¹ showed that the treatment of "on-call" duty varies considerably in individual Member States. A high number of weekly hours and excessively long periods of continuous duties are expected of doctors in training in several countries, and generally arise through the imposition of night or weekend cover on to a typical weekly working pattern. "Unless there are specific provisions for proper breaks, or other restrictions on the hours that are worked, many rostering systems mean that a doctor in training is working without proper rest for 32 hours routinely, and in excess of 70 hours in the more extreme cases." The report concluded that although the weekly hours worked by doctors in training were highly variable, they routinely exceeded 55 hours a week in many countries.

considering how to extend the Directive, the Commission will take into account the potential impact on the provision and quality of health care.

65. There is a clear risk therefore to the health and safety of a considerable number of trainee doctors. To the extent that these doctors are directly involved in medical procedures and medical decisions affecting patients, the safety of such patients could also be put at risk.

66. *The "on-call" issue for doctors in training should be dealt with at national level. However, the current wording of the Directive does, in fact, allow Member States to define working time in a restrictive way, while allowing a wider definition. There would, therefore, appear to be no practical legal problem in extending the provisions of the Directive to doctors in training, just as they already apply to other employed doctors, while adjusting the existing derogations to allow the Member States to deal with the treatment of "on call duty". In*

11. Coshape Ltd: The Working Hours of Doctors in Training in the context of Directive 93/104/EC

PART TWO : OPTIONS

Criteria for action

67. Before making proposals, it is necessary to establish the criteria against which the preferred policy option needs to be judged. In the case of action in respect of workers not covered by the Working Time Directive, the following criteria would appear to be appropriate.

68. The action proposed would need :
- a) to ensure adequate protection for the health and safety of workers with regard to working time;
 - b) to allow adequate operating flexibility to firms;
 - c) to take account of any impact on employment;
 - d) not to place unreasonable burdens on firms, in particular small firms, and to take account of specific characteristics of sectors such as share fishing and the heterogeneous nature of sea fishing;
 - e) to respect the principle of subsidiarity;
 - f) to respect the principle of proportionality.

69. In addition it is also necessary to ensure as far as possible that action taken, or indeed failure to take action, takes account of European competitiveness and public safety requirements and does not lead to distortions of competition within the internal market and between competing modes of transport.

Policy Options

70. The analysis in Part One has shown that there is a problem to be solved, i.e. that in all sectors and activities excluded

there are some workers who have no protection against working long hours or no guarantee of adequate rest. Having identified the policy options to resolve this problem, the Commission must ensure that the chosen solution meets the criteria set out in paragraph 68.

71. Four broad policy approaches to the problem can be considered :

- a non-binding approach;
- a purely sectoral approach;
- a differentiated approach;
- a purely horizontal approach.

Option 1: Non-binding Approach

72. Under this approach, the Commission would either issue one or more Recommendations or propose Council Recommendations. This would mean keeping the current exclusions from the Directive, if this is justified in a particular sector. The essential message would be to urge Member States and the social partners to take the necessary measures to ensure that all workers, whatever their status, have adequate rest and do not work excessively long hours. Most employers' organisations who commented during the informal consultation process on this White Paper favoured this approach, including some, particularly those representing the off-shore industry, who argued that the exclusion in respect of their sector should continue. The trade unions were strongly opposed to the non-binding approach.

Option 2: Purely sectoral approach

73. Hitherto, the main approach has been, both within the Joint Committees and in the studies, to seek to find working time arrangements, inspired by the Working Time Directive, which would strike the right balance, on a sector-by-sector basis, between the protection of the health and safety of workers, public safety requirements and operating flexibility needs. This approach appeared until relatively recently, to be unlikely to produce results in the Joint

Committees. But there is now some progress in at least two sectors: sea and rail transport. This is the approach advocated by the European Trade Union Confederation (ETUC).

Option 3: Differentiated approach

74. The third option is to differentiate between those activities which can be accommodated under the Working Time Directive and those which require specific measures. This would entail:

- extending the full provisions of the Working Time Directive to all non-mobile workers. Appropriate adjustment of the existing derogations would be made to take account, notably of the need for continuity of service and other operational requirements¹²;
- extending to all mobile workers and those engaged in “other work at sea” the provisions of the Working Time Directive on 4 weeks’ paid annual leave and health assessments for night workers; and providing a guarantee of adequate rest and for a maximum number of hours to be worked annually;
- introducing or modifying specific legislation for each sector or activity concerning the working time and rest periods of mobile workers and those engaged in “other work at sea”.

Option 4: Purely horizontal approach

75. The fourth option would be to propose a purely horizontal measure, which did not address the sector-specific aspects of the working time question. Such a proposal might contain the following features:

a) clarification of Directive 93/104/EC to ensure that all the provisions of that Directive apply to non-mobile workers;

b) to provide for basic minimum protection in respect of working time, such as a guarantee of adequate rest and 4 weeks’ paid annual leave, for all other workers not covered by Directive 93/104/EC.

¹² including, for example, the ‘on-call duty’ of trainee doctors, and quayside activities in the sea fishing sector directly related to the landing of catches.

PART THREE : THE WAY FORWARD

Proposed Course of Action

76. The assessment in Part One leads to three conclusions.

77. The first is that there is a health and safety problem which must be rectified given that there are workers in all the excluded sectors who have no protection against risks to their health and safety through having to work excessively long hours. Furthermore it is not justifiable on objective grounds to exclude any sector totally.

78. The second conclusion is that there is no reason to treat "non-mobile" workers differently from other workers already covered by the Directive.

79. The third conclusion is that in order to ensure minimum health and safety protection, the basic principles of the Working Time Directive should apply to all workers, and that there is no justification for complete exclusion of any of the sectors provided that public safety and operating flexibility requirements can be met in an appropriate way.

80. The Commission continues to believe that agreements between the social partners would be the best solution. Such agreements could be implemented either in accordance with the procedures and practices specific to management and labour or through legislation at EC level. The Commission notes, however, that in the sectors where agreement has already been reached (rail and sea transport), the social partners are advocating a legislative solution.

81. In the light of these considerations, the Commission's preliminary view is that the most practical approach would be to initiate the legislative process in accordance with Option 3. This approach guarantees the protection of health and safety while allowing for sufficient flexibility to take

account of the operational considerations which were at the root of the exclusion in the first place.

82. On the other hand, the Commission believes - in the light of the analysis of the sectors - that the non-binding approach (Option 1) would not be appropriate, as it gives no guarantee that the health and safety requirements will be addressed in regard to all workers. The purely sectoral approach (Option 2) would make it very difficult to achieve a coherent or equitable treatment of non-mobile workers, while the purely horizontal approach (Option 4) would fail to provide the health and safety protection required by mobile workers. Furthermore, Options 1 and 2 could in themselves lead to distortions of competition.

83. How does this proposed course of action (Option 3) measure up against the criteria established in Part Two above ?

84. The first test is to ensure adequate protection for the health and safety of workers with regard to working time. The options envisaged are based on the Working Time Directive, which itself seeks to establish minimum standards.

85. The Working Time Directive allows considerable flexibility to firms (see paragraph 8 above). Similar flexibility should be allowed in any new proposal. Careful consideration will also be given to the views of employers to ensure adequate additional flexibility under any new proposals.

86. With regard to employment, it is most important that action at European level should either help to create or preserve jobs or at least should not harm the employment situation and the competitiveness of European firms. Widely different views are held on the effect of reducing working time on employment. These are discussed in the

Green Paper "Partnership for a new organisation of work"¹³. However, the Working Time Directive already permits longer working hours than are commonly worked in practice in most Member States. Furthermore, the Commission firmly believes that minimum standards with regard to the protection of the health and safety of workers are important for the good functioning of the internal market.

87. Similar arguments apply in relation to the issue of placing burdens on firms, particularly small and medium sized firms. It is necessary to avoid excessive regulation and adding unnecessary burdens. But, while the Working Time Directive is complex, the basic provisions, as set out in paragraph 6 above, are very simple. Indeed, most of the complexity arises from the flexibility the Directive allows to Member States to cater for particular cases and national traditions.

88. With regard to respect of the principle of subsidiarity, the Commission now has the benefit of the Judgment of the European Court of Justice in the application by the United Kingdom for annulment of the Working Time Directive. In this Judgment¹⁴, the Court notes that "*once the Council has found that it is necessary to improve the existing level of protection as regards the health and safety of workers and to harmonise the conditions in this area while maintaining the improvements made, achievement of that objective through the imposition of minimum requirements necessarily presupposes Community-wide action*". There is, in fact, no objective difference, in terms of subsidiarity, between the sectors excluded from the Working Time Directive and those included. It has to be concluded therefore that there can be no

objection to legislative action with regard to subsidiarity.

89. Turning to the principle of proportionality, the Court has consistently held that, in order to establish whether a provision of Community law complies with the principle of proportionality, it must be ascertained whether the means which it employs are *suitable for the objective pursued* and whether they do not *go beyond what is necessary* to achieve it. It is necessary, therefore, to determine whether the intensity of the Community action taken by means of the Directive goes beyond what is necessary to achieve the objective of protecting the health and safety of workers. Again, the ECJ concludes in the case of the Working Time Directive that they do not. As any proposals for directives in the excluded sectors will not go beyond the provisions of the Working Time Directive, it seems to the Commission that the principle of proportionality would also be satisfied.

¹³ Com (97) 128

¹⁴. Judgment of the Court, 12 November 1996 in Case C-84/94: United Kingdom v Council of the European Union.

CONCLUSION

90. In the light of the foregoing considerations, the Commission considers that a pragmatic approach should be taken in order to ensure at EC level the protection of the health and safety, with regard to working time, of workers in the sectors and activities currently excluded from the Working Time Directive.

91. Subject to consideration of the views expressed on this White Paper, the Commission proposes to proceed on the basis of Option 3 (see paragraph 74). Under this option a distinction would be made between those activities which can be accommodated under the Working Time Directive and those which require specific measures. This would entail:

- extending the full provisions of the Working Time Directive to all non-mobile workers. Appropriate adjustment of the existing derogations would be made to take account notably of the need for continuity of service and other operational requirements;
- extending to all mobile workers and those engaged in "other work at sea" the provisions of the Working Time Directive on 4 weeks' paid annual leave and health assessments for night workers; and providing a guarantee of adequate rest and for a maximum number of hours to be worked annually;
- introducing or modifying specific legislation for each sector or activity concerning the working time and rest periods of mobile workers and those engaged in "other work at sea".

92. With regard to such sectoral measures, the Commission hopes that it will be possible to proceed on the basis of agreement between the social partners. With regard to possible specific measures in respect of sea fishing (if the discussions on a common policy do not succeed) and other

work at sea, the Commission would welcome views from employers and trade unions in the sea-fishing and off-shore sectors as to whether they would wish arrangements similar to those for sea transport (see paragraphs 47 - 51 above) to apply in their industry.

93. In its Communication concerning the application of the Agreement on social policy,¹⁵ the Commission stated that it would follow the consultation procedures set out in that Communication on all measures with major social implications, irrespective of the legal base of the proposal. Therefore the Commission is sending this White Paper to the social partners for consultation. The Commission will, of course, subsequently consult management and labour on the content of any proposal envisaged.

94. The Commission would also welcome views from other recipients of this White Paper on the course of action proposed. Any comments should be sent (reference V/D2 - WP) by 31 October 1997 to:

European Commission
DGV/D2
rue de la Loi / Wetstraat 200
1049 Brussels

95. Comments can also be sent by e-mail to:

dg5-workingtime@bxl.dg5.cec.be

96. After that date, the Commission will adopt its final position with due regard to all the views of the social partners and other recipients of the White Paper.

This document is accessible at the following address:
internet <http://europa.eu.int/>

The DGV homepage is accessible through the following path:

Welcome, Policies, Employment and Social Policies, on which page there is a link to DGV.

¹⁵ Com(93) 600

TOTAL EMPLOYMENT¹⁶

Road Transport	3 500 000 ^{17 18}
Rail Transport	965 000 ¹⁹
Inland Waterways	45 000 ²⁰
Air Transport	375 000 ²¹
Sea Transport	160 000 ²²
Sea Fishing	270 000 ²³
Other work at sea	45 000 ²⁴
Doctors in training	<u>270 000²⁵</u>
Total	<u>5 630 000</u>

N.B. *These are "ball-park" figures*, for further explanations see sector-by sector analysis in paragraphs

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16. All EU Member States
17. Excludes workers in "own account transport" which is not excluded from the Working Time Directive.
18. Source: Road Transport in the European Union: Aspects of the Organization and Enforcement of Working and Driving Time Regulations, 1995
19. Source: Main statistical results for UIC Member Railways, 1995
20. Source : DGVII estimates, 1996
21. Source :Flight International World Airline Directory, figures for 1996
22. Source: TecnEcon: Study on the maritime professions in the European Union, 1996
23. Number of fishermen (full and part-time) (all EU Member States). Figures are for 1993, except Greece (1990) and Ireland (1991). Source: OECD, Member States
24. Source: Coshape Ltd: The Working Hours in 'Other Work at Sea' in the Context of Directive 93/104/EC, 1995
25. Source: Permanent Working Group of European Junior Hospital Doctors, 1996