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**COMMUNICATION FROM THE COMMISSION TO THE EUROPEAN
PARLIAMENT, THE COUNCIL, THE EUROPEAN ECONOMIC AND SOCIAL
COMMITTEE AND THE COMMITTEE OF THE REGIONS**

**Review of the operation of the provisions with regard to workers on board seagoing
fishing vessels contained in Directive 2003/88/EC**

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1. INTRODUCTION

This Communication reviews the operation of Article 21 of Directive 2003/88/EC of the European Parliament and of the Council of 4 November 2003 concerning certain aspects of the organisation of working time¹ (hereinafter ‘the Directive’) concerning workers on board seagoing fishing vessels flying the flag of a Member State (hereafter ‘SFVs’), as required by Article 25 of the Directive. The Directive is construed in a restrictive way, meaning that only those provisions concerning exclusively workers on board SFVs (and not any other workers) are analysed.

Article 21 of the Directive excludes workers on board SFVs from the scope of Articles 3 to 6 and 8. As a consequence, the general provisions of the Directive governing daily rest, breaks, weekly rest periods, maximum weekly working time and the length of night work do not apply to them. Article 21 lays down specific rules applicable to such workers regarding: entitlement to adequate rest and limitation of the maximum working time, including specific limits of maximum working time and minimum rest (paragraph 1 in fine, 2 and 3); entitlement to an uninterrupted rest not split into more than two periods, with a maximum interval between two consecutive periods of rest (paragraph 4); possibility of allowing, under certain circumstances, exceptions to the limits set in paragraph 1, 3 and 4 (paragraph 5); work necessary for the immediate safety of the vessel or giving assistance to vessels or persons at distress at sea (paragraph 6); finally, the option to synchronise annual leave entitlement with the period during which fishing vessels are not allowed to operate (paragraph 7).

The Commission carried out an examination based on the responses of the Member States and the social partners at European level to a questionnaire prepared for this purpose.² It also used information available from other sources, such as independent expert reports.

The questionnaire comprised 21 specific questions grouped into three sections on: (i) the structure and organisation of sea fishing sector; (ii) the specific provisions applicable to workers on board SFVs laid down in Article 21 of the Directive; and (iii) other provisions of the Directive applicable to workers on board SFVs.

The main findings are summarised in sections 3 to 9 of this document.

¹ OJ L 299, 18.11.2003, p. 9–19.

² 25 Member States responded (no response has been received from Belgium and Ireland). The Czech Republic and Slovakia have not transposed Article 21 since operation of SFVs is not allowed under their flags. Luxembourg has no SFV registered under its flag. The social partners consulted (ETF, Europeche) submitted a joint response.

2. ILO CONVENTION ON WORK IN THE FISHING SECTOR

On 14 June 2007, the ILO General Conference adopted Convention 188 concerning Work in the Fishing Sector (hereinafter 'ILO 188'). Articles 13 and 14 of the Convention contain provisions on '*Manning and hours of rest*', referring to matters covered by the Directive. Article 6 of ILO 188 states that: '*Nothing in this Convention shall affect any law, award or custom, or any agreement between fishing vessel owners and fishers, which ensures more favourable conditions than those provided for in this Convention*'.

Ratification of ILO 188, which also regulates coordination of social security systems, under exclusive EU competence, was authorised by a Council Decision.³ The Decision recommended prompt ratification of ILO 188 by the Member States, preferably before 31 December 2012.

On 1 June 2010, the social partners of the SSDC Sea Fisheries initiated negotiations to incorporate aspects of ILO 188 into EU law via a social partners' agreement.⁴ Such an agreement, if reached, could contain provisions concerning the organisation of working time on board SFVs. The social partners expressed their position on this in their response to the consultation. The social partners '*do not wish any change at EU level, other than those introduced by ILO Convention 188*'.

3. PERSONAL AND MATERIAL SCOPE OF APPLICATION (ARTICLE 21.1 FIRST SUBPARAGRAPH)

Article 21 of the Directive applies to all workers on board a SFV flying the flag of a Member State. The concept of a '*worker*' is limited to those with an employment contract or relationship, according to national legislation. Article 2 defines '*working time*' as '*any period during which the worker is working, at employer's disposal and carrying out his activity or duties, in accordance with national laws and/or practice*'.

The impact of legislation concerning workers on board SFVs differs very notably from one Member State to another. Some Member States do not have a fishing fleet (Austria, Czech Republic, Hungary, Luxembourg, Slovakia), while others have a very sizeable fleet of SFVs. Five Member States have no access to the sea. In some Member States, the practical experience of operating Article 21 of the Directive is limited, because the transposing national legislation is not applied due to lack of workers and/or fishing vessels (Hungary). Finally, broadly speaking, fleets in the Mediterranean comprise smaller vessels, while in the Atlantic they comprise larger vessels, which also alters the symmetry of impact.

The total employment in the fisheries sector in the EU-27 (measured in full-time equivalent) was estimated at 141.110 in 2007⁵.

Several Member States reported unawareness of the exact number of fishermen working on SFVs flying their flag. This is due mainly to the fact that not all workers on fishing vessels are

³ 2010/321/: Council Decision of 7 June 2010 authorising Member States to ratify, in the interests of the European Union, the 2007 Work in Fishing Convention of the International Labour Organisation (Convention No 188).

⁴ Under Article 155.2 TFEU.

⁵ European Commission, Facts and figures on the Common Fisheries Policy, 2010 Edition

employees and a high proportion of small fishing vessels are manned by self-employed fishermen (a good example is Greece, where 16576 fishing vessels out of the total of 17253 are coastal and they operate with static gear). Moreover, fishing is often a secondary activity, particularly in small-scale coastal fishing (highlighted by Germany and Finland). In Sweden, vessels are not subject to a signing-on requirement, which means the requisite statistical information is not available.

Furthermore, the statistical information gathered is not comparable between the Member States due to major methodological differences. For instance, some Member States estimate their population on board fishing vessels using corrected minimum manning levels while others use employment statistics or social security information.

The consequences of classifying share-fishermen⁶ as employees or self employed by the national legislation merit particular consideration. Where share fishermen are considered to be self employed, the national legislation implementing the Directive normally does not apply to them (this is the situation in the UK and Malta). However it does apply to all share fishermen considered to be employees (as they are in France, Germany and Spain). The use of the share system has certain contractual consequences, such as the predominant use of fixed term contracts to synchronise as much as possible the receipt of pay and/or shares with the duration of an employment contract (Denmark). Furthermore, it usually incentivises long working hours (Portugal).

In its *Report on the practical implementation of Health and Safety at Work Directives 93/103/EC (fishing vessels) and 92/29/EEC (medical treatment on board vessels)*⁷ the Commission stated that *'the 'shared-wage' system on most small vessels may lead to longer working hours, more time spent on board and greater exertion. Effective prevention measures are not likely to be a priority under such working conditions and this lack may lead to more occupational illnesses and disorders'*.

In view of the situation, some Member States consider that extending the scope of the current working time regulation to self employed fishermen could help improve the situation. The benefits would, according to them, be clear, as the scope of the working time regulation would cover most small vessels (Malta) and share fishermen, who receive a different legal treatment in different Member States (France), depending on their classification as self-employed or employees.⁸

The scope of ILO 188 covers self-employed fishermen and thus ratification of the Convention by the Member States could imply including them in the scope of all or part of the provisions on working time (as highlighted by France, Denmark, Poland and UK).

⁶ The traditional system of remuneration in the fishing industry is sharing the catch or a share of income less costs, or a share-plus-wage system (source: ILO: *Fishermen's conditions of work and life, Geneva, Doc. CFI/4/1988/1*). In order to maximise their share of the proceeds, fishermen tend to operate with as few crew members as possible.

⁷ COM(2009) 599 final.

⁸ Spain has an interesting hybrid legal figure called 'economically-dependent self-employed'. It is characterised by a practically exclusive link to the client. The law provides a series of specific rights such as rest periods or guarantees on cancellation of contract.

4. LIMITATION OF WORKING TIME AND GUARANTEE OF REST (ARTICLE 21.1 SECOND SUBPARAGRAPH)

Article 21.1 second subparagraph obliges the Member States to take all measures needed to guarantee the rest and limit working time of workers on board SFVs to an average of 48 hours per week, calculated over a reference period not exceeding 12 months.

Specific provisions regulating the working time of workers on board SFVs remains warranted. The position of the social partners is clear. They defended the need of specific working time legislation for the sector. They insist, in their joint response to the consultation, that *'it would be improper to make use of a directive to impose the same working time restrictions to both offshore and onshore fisheries' workers*. In their opinion, *'it is inappropriate to try and implement measures which would overlook the specificities of our sector'*. Furthermore, they stress that *'working time on board fishing vessels should not be limited any further'* as *'it would serve neither the fishermen's interests nor the employers' ones'*.

Several Member States have adopted specific legislation regulating the working time of workers on board SFVs, either under regulations for seafarers (Bulgaria, Estonia, Finland, Poland, Sweden) or water transport (Hungary) and/or under specific instruments (Germany, France, Malta, Poland, Spain, Lithuania). In other Member States, general labour legislation applies without any specificity to them (Austria, Czech Republic, Slovakia, and Slovenia). This situation does not conflict with the Directive provided that the applicable legislation guarantees at least the same level of protection as Article 21 of the Directive.

15 Member States used law to transpose the Directive, and only one country used administrative provisions (Denmark). Only Austria and Italy used collective agreements (however, it seems that the general working time legislation continues to apply in a subsidiary way). In several Member States, collective agreements in the fishing sector do not exist or are unusual.

5. MAXIMUM WORKING TIME AND/OR MINIMUM REST TIME CRITERION (ARTICLE 21.2 – 21.4)

According to Article 21.2, the option to limit the maximum working time and impose a minimum rest within a reference period can only be exercised within the limits of Article 21(1) second subparagraph (see above).

France, Sweden and Portugal highlighted practical problems in estimating and monitoring actual working time on board, as well as the possibility of easily circumventing the limits. In view of this, they claim that a reference period of 12 months proposed by the Directive is very difficult to apply in practice. In order to overcome this difficulty, the French law proposes as an alternative solution an annual limit of 225 days at sea,⁹ instead of a 48 hours limit of working time over a reference period not exceeding one year.

Articles 21.2 and 21.3 of the Directive gives the Member States an option of either limiting working hours or defining minimum rest periods within a given reference period. Article 21.4

⁹ The limit of 225 days at sea is regarded by the preparatory documents for the French act as an equivalent of 35 hours per week, which is the legal working time limit in France. There is the option of a derogation of up to 250 hours at sea, equivalent to 48 hours per week.

further limits the possibility of splitting hours of rest into more than two periods and sets a limit of maximum 14 hours between two consecutive periods of rest.

Most Member States define minimum rest periods either as the sole criterion (Denmark, Finland, France, Malta, Netherlands and Sweden) or in combination with a limited working time (Austria, Bulgaria, Germany, Spain, Hungary, Lithuania, Portugal, Greece). In Denmark, maximum working time is usually regulated by collective agreements or individual employment contracts, while the minimum rest periods are set by legislation.

All the countries which reported using the rest period as an exclusive criterion for workers on board SFVs have specific legislation applicable to fishermen (or seafarers and fishermen). A rest period is not always used by these countries as a criterion in the general working time legislation, which is applicable to workers in other occupations.

The Netherlands considers that the minimum rest criterion is the '*best suited to work systems in the fishing industry*'. In Germany, even though both criteria are used, a collective agreement may provide, under certain conditions, for maximum working hours to be exceeded but not for minimum rest periods to be reduced.

Only Estonia and Romania reported using maximum working time as an exclusive criterion regarding workers on board SFVs.

Catching and subsequent processing of products are highly dependant on not always foreseeable meteorological and technical constraints related to the operation of fishing gear and maritime safety. This justifies a call for flexibility of working time expressed by the social partners. It has also been reported that in some situations, working hours are exceeded in practice (Germany).

It should be highlighted that ILO 188 uses the minimum rest time as the sole criterion limiting the working time of workers on board SFVs.¹⁰ France, Poland and Denmark made reference to this in their responses to the consultation.

Only France reported practical problems with applying Article 21.4. It proposed allowing for a further subdivision of rest periods of six hours as a potential solution, which could only be implemented via collective agreements.

6. EXCEPTIONS (ARTICLE 21.5 – 21.6)

According to Article 21.5 of the Directive, Member States may allow for exceptions to the limits laid down in paragraph 1, second subparagraph, and paragraphs 3 and 4. Two requirements need to be fulfilled in order to do so: (i) the exceptions must be in accordance with the general principles of health and safety protection; and (ii) can only be granted for objective or technical reasons or for reasons concerning the organisation of work. There needs to be a specific reason and the exception should be proportional to it. The same Article recommends that such exceptions may give place to 'more frequent or longer leave periods or the granting of compensatory leave'.

¹⁰ This contrasts with the Maritime Labour Convention, 2006, which keeps the alternative between maximum working time and minimum rest as the criterion regarding the working time of seafarers.

Five Member States reported that they had not used the option of exceptions (Austria, Estonia, Finland, Portugal and Romania).

Denmark, Germany, France and Poland allow for exceptions linked to fishing or fish processing conditions (when a ship is directly involved in fishing activities and/or operates on the fishing grounds). A compensatory rest is provided for in these cases (except in Poland).

In other Member States, exceptions are granted in a wide range of different situations not directly linked to fishing or fish processing. In all cases, they are considered as permanent by the Member States that grant them, and they are not likely to be lifted in the short to medium term. Some examples are briefly mentioned below.

In the Netherlands, the exception is *ratione personae* and it applies to skippers, managerial and support staff on board SFVs.

In Malta, the exception refers to coastal fishing, but its impact is limited due to the fact that all fishermen in Malta are self-employed.

Spanish legislation allows in general terms for a reduction of rest time on fishing vessels. No specific reasons are provided. Furthermore, the provision seems to replace the general rule governing fishing vessels rather than constitute an exception applicable under certain, strictly defined circumstances.

Bulgaria applies to the fishing sector its general legislation governing overtime. Working time allowed under this legislation may in some cases exceed the limits set by the Directive. However, an annual limit of overtime is set (150 hours) and circumstances under which it is allowed are strictly defined.

Generally, exceptions are introduced by law. However, in some Member States (e.g. Germany, Hungary or Sweden), they can also be introduced by collective agreements.

Article 21.6 concerns the right of the master of an SFV to require workers on board to perform any hours of work necessary for the immediate safety of the vessel, persons on board or cargo, or for the purpose of giving assistance to other vessels or persons in distress at sea. No problems regarding the application of this provision were reported.

7. ANNUAL LEAVE (ARTICLE 21.7)

Article 7 of the Directive concerns the annual leave entitlement and covers workers on board SFVs. The only specific regulation applicable exclusively to workers on board SFVs is in Article 21.7, which allows the Member States to stipulate that workers on board SFVs not allowed operating in a specific period exceeding one month of the calendar year must take annual leave within this period.

12 Member States stated that they had not used this option (Austria, Bulgaria, Denmark, Spain, Estonia, Finland, France, Germany, Hungary, Netherlands, Poland and Portugal). Only Malta and Romania declared that they had used the provision. However, in Malta, its practical impact is insignificant due to the fact that all fishermen are self employed.

8. GENERAL PROVISIONS OF THE DIRECTIVE APPLICABLE TO WORKERS ON BOARD SFVs (IN PARTICULAR, NIGHT WORK)

Article 21.1 excludes the application of Article 8 on the ‘Length of night work’ of the Directive to workers on board SFVs. Articles 9 to 11 (on health assessment and transfer to day work, guarantee for night-time working and notification of regular use of night workers) remain applicable to them.

It is therefore necessary to assess whether a specific regulation of the length of night work performed by night workers on board SFVs is warranted.

A number of Member States decided to apply their general legislation concerning night work to workers on board SFVs (Spain, Portugal, Romania, Bulgaria, Finland, Hungary, Netherlands), even though some Member States have specific legislation regulating other aspects of working time on board SFVs.

Other Member States stated that there was no indication of any adverse effects of the current lack of regulation regarding the length of night work on the health and safety of workers (Germany, Lithuania). Some fishing methods require operation during night time. Poland stated that stricter provisions on night work on board SFVs ‘would be strongly opposed by the workers themselves’. Finally, the UK points out that fishermen are hunter gatherers and it would be impractical to constrain their activities with the conventional framework applied to land based workers with regard to night work.

It was underlined that it would be justified to focus on the medical supervision of fishermen called upon to work at night (France).

Even though some fishing methods require work during night time, workers on board SFVs cannot always be considered ‘night workers’ in terms of Article 2.4 of the Directive, which requires a certain proportion of working time to be performed during night time.

Note that specific rules apply to young workers under Directive 94/33/EC.¹¹

9. GENERAL ASSESSMENT

Member States and the social partners consulted by the Commission were requested to give their overall assessment of Article 21 of the Directive, stating in particular whether its provisions remain appropriate, in particular as far as health and safety are concerned. The main conclusions are summarised below:

- (1) Special provisions concerning workers on board SFVs contained in Article 21 of the Directive should continue to apply. The article was considered to be appropriate by 12 Member States and the social partners were strongly in favour of maintaining a specific regulation concerning workers on board SFVs. However, the social partners stated that ‘*the clear limitations laid down in Article 21 of the current Directive concerning workers on board fishing vessels must be considered adequate*’.

¹¹ Its practical implementation was recently analysed by the Commission in Report (SEC (2010) 1339).

- (2) Although not all the Member States stated their position, nine indicated that they considered the current personal scope of application of the Directive to be adequate.
- (3) Some Member States raised doubts as to whether the criterion of maximum working time was adequate, in view of the particular work patterns in the fishing industry and the difficulty of control and enforcement. The difficulty in precisely determining the actual working hours on board is considered to be the most frequent inspection problem. Moreover, the inspection is usually carried out in ports only. According to some Member States, monitoring rest periods is less difficult to carry out in practice.
- (4) Compliance with the uninterrupted six hours of breaks poses practical problems in some Member States.
- (5) It is generally accepted that Article 8 concerning the length of night work should not apply to workers on SFVs. Specific legislation covering the length of night work of workers on board SFVs was not considered warranted either.
- (6) The scope for granting exclusions from the general working time patterns set for workers on SFVs was considered a necessary mechanism of flexibility.

10. CONCLUSIONS

- (1) With full respect for the autonomy of the social partners, the Commission will continue to follow the negotiation process concerning incorporation of aspects of ILO 188 into EU law via a social partners' agreement in order to identify, in close cooperation with the social partners, any potential areas in which EU action is necessary or warranted. It will tie in any such action with the current revision of the Directive.
- (2) As a result of the consultation, the Commission has identified a number of areas requiring further attention. These are:
 - (a) The situation of the self-employed, who usually work on small vessels and are frequently share-fishermen, deserves a special focus, particularly in the context of ratification and implementation of ILO 188 by the Member States.
 - (b) The information provided by the Member States is not sufficient to ascertain whether the reference period not exceeding 12 months referred to in Article 21.1 second subparagraph is always provided and respected.
 - (c) ILO 188 only refers to minimum rest as a criterion to limit working time, while the Directive allows for alternative use of either minimum rest or maximum working time. Therefore the Member States could either implement the minimum rest criterion alone or both maximum working time and minimum rest in order to comply with both instruments. This solution is compatible with this Directive, as long as any provisions of the latter which are more favourable for the workers are respected. The right to uninterrupted periods of rest is particularly important (as no similar provision exists in ILO 188) and should be respected.

- (d) Special attention should be paid to the medical supervision of seafarers working during night periods.
 - (e) In one case (Spain) the exception from working time rules is not justified under any of the circumstances listed in Article 21.5. Exceptions should be proportional to the circumstances justifying them and should not cover the whole scope of the provision. The Commission will pay particular attention to verifying that the use of exceptions granted under Article 21.5 of the Directive respects these principles.
- (3) In a broader context, the Commission notes that the prime objective of the Community strategy 2007-2012¹² on health and safety at work, supported by the Council Resolution of 25 June 2007¹³, remains the continued improvement of working conditions, notably through a sizeable reduction in work accidents and occupational diseases. In order to achieve this goal, the correct and effective implementation of EU health and safety legislation must be reinforced while supporting SMEs, particularly in 'high-risk' sectors, such as construction, agriculture, fishing and transport. For this purpose, the Commission, through the new PROGRESS programme and in cooperation with the Advisory Committee, is currently preparing non-binding practical guides on the correct application of the Directives, particularly in the fisheries sector (for vessels less than 15 metres in length).

¹² Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions — Improving quality and productivity at work: Community strategy 2007- 2012 on health and safety at work [COM(2007) 62 final of 21 February 2007].

¹³ Council Resolution of 25 June 2007 on a new Community strategy on health and safety at work (2007-2012), OJ C 145, 30.06.2007, p. 1.