

## CEEP response to the first stage consultation of the social partners by the European Commission on the reviewing of the Working Time Directive

### Executive summary

- CEEP welcomes the initiative taken by the European Commission to review the Working Time Directive.
- CEEP also welcomes the scope of this review. The Working Time Directive needs to be adapted to the labour market of the 21<sup>st</sup> century and therefore a comprehensive review of the Directive is necessary.
- The intention of the European Commission to carry out an impact assessment parallel to a two stage consultation is of strong concern for us. CEEP therefore asks the European Commission to wait for the answers of the Social Partners to the first and second stage consultations before launching such a procedure.
- The provisions of the Directive need to be revised to clarify the concept of working time, avoiding the categorical distinction between rest and working time introduced by the European Court of Justice. Therefore CEEP calls for the introduction in the working time directive of the inactive part of on-call time, accompanied by the clear provision that the latter is not to be counted as working time.
- Regarding the opt-out provisions, focus should be on preventing over-reliance upon it rather than a cessation and in our view the request to use the opt-out will be reduced if a definition of inactive working time is inserted in the Directive to ensure that such time does not count as working time.
- CEEP supports a global extension of reference period to 12 months, with the possibility of further extension by collective agreement.
- CEEP advocates the possibility to permit compensatory rest periods within “reasonable time”, to be defined by national law or collective agreement between the national social partners.
- The regulation of working time clearly falls within the remit of possible social partner negotiations at European level under Article 155 TFEU and CEEP believes that a negotiated solution would better meet the needs of employers as well as workers.

## **Introduction**

On 24 March 2010, the European Commission issued a Communication and a first stage consultation to the European social partners concerning a review of the Working Time Directive (2003/88/EC). In its Communication, the Commission states that the failure to reach an agreement between the Council and the European Parliament in April 2009 has created a difficult situation for various Member States as well as for social partners at national level. The Commission also underlines that the current situation in many aspects is unsatisfactory and therefore they are preparing for a comprehensive review of the Working Time Directive.

CEEP shares the views of the Commission regarding this issue. Ever since the European Court of Justice in the SIMAP, Jaeger, Dellas and other later judgments drastically changed the definition of working time from what was originally intended in the Directive, CEEP has urged for appropriate changes to be made in the Directive to clarify the intended definition of working time. For our members, particularly in the health care sector but also in other areas reliant on 24 hour operations, these rulings have had a huge impact on their ability to operate in a functional and efficient way. This issue needs to be dealt with and CEEP therefore welcomes the initiative taken by the European Commission within this field.

CEEP also welcomes the scope of the launched consultation. There is a need for a comprehensive review of the Working Time Directive, especially in the context of new needs of the labour market in order to cope with the challenges of the 21<sup>st</sup> century.

Furthermore, the clear focus put on public services from the European Commission is welcomed. The Communication recognises indeed that public services employers need special flexibility in order to make services delivered around the clock function effectively.

However, we would like to express our strong concern on the fact that the European Commission is carrying out an impact assessment at the same time as a two-stage consultation is initiated. The timing of this procedure is not helpful and may very well have a negative impact on the development of this consultation. This is why we ask the European Commission to wait for the answers of the social partners to the first and second stage consultation before launching any kind of impact assessment.

## **Response to the consultation**

The Communication addresses some key issues in the Directive that are of vital importance for CEEP; working hours, on-call time, the reference time period for the calculation of the weekly maximum working time of 48 hours, and the compensatory rest periods. Besides the general questions mentioned in the Communication; whether action is needed at the EU-level on the Working time Directive and if so what scope it should take, the Commission is awaiting reactions on the following essential questions:

(a) How could we develop balanced and innovative proposals regarding the organisation of working time that move beyond the unsuccessful debates of the last conciliation process? What is your long-term vision for the organisation of working time in a modern setting?

CEEP is of the opinion that any future proposal regarding working time needs to have a well-balanced approach between health and safety and flexibility arrangements for both employers and workers, which have a positive impact on the access to and quality of public services. In our view any future European regulation on working time should allow public employers to run public services in an efficient way with legal recognition for flexible working arrangements that have been agreed between social partners. Flexible working arrangements give also the opportunity to face long term challenges such as the ageing of the workforce and new forms of work life balance. In this respect social partners, or other recognised procedures in accordance with national law and practice, are best placed to find solutions on every day labour market issues and EU law should provide scope for this.

(b) What impact do you think that changes in working patterns and practices have had on the application of the Directive? Have any particular provisions become obsolete, or more difficult to apply?

CEEP fully shares the views outlined by the European Commission in the Communication that the labour market has undergone fundamental structural changes over the 20 years since the first Working Time Directive was adopted. However, for public employers who provide services around the clock the same basic requirements to deliver services to the public are still valid today. At the same time citizens' expectations in terms of the quality and flexibility of the services they receive have increased. Public employers largely have to rely on human workforce to deliver such services to the citizens of Europe. This is the case within the healthcare sector, but also for other sectors including for instance social care and emergency services.

The rulings of the European Court of Justice in the SIMAP, Jaeger and Dellas cases, which stated that all on-call time should be regarded as working time even when the employee is not actively performing any work duties, fundamentally changed the definition of working time from its original intention. Therefore, CEEP would like to reiterate a request put forward already in 2003 to the Commissioner for Employment and Social Affairs that we want to amend the Working Time Directive in accordance with its original intentions. To achieve such an amendment, we are in favour of the Finnish Presidency proposal of 2006 and the Council common position text of June 2008 whereby the inactive part of on-call time would not be regarded as working time unless national law and/or practice, a collective agreement or an agreement between the social partners declares otherwise. Such an amendment is essential for public employers who operate around the clock to organise and carry out their duties in the most efficient way.

(c) What is your experience to date on the overall functioning of the Working Time Directive? What has been your experience regarding the key issues identified in section 5 of this paper?

CEEP is of the opinion that the European Commission itself has all the necessary information to answer this question, thanks to the questionnaire on the practical implementation of Directive 2003/88/EC concerning certain aspects of the organisation of working time, sent to Member States and Social Partners in 2007. When it comes to the specific experience of public services providers, the facts and answers provided by CEEP at that time are still valid today. This includes among other things that the requirements of the Directive and subsequently of the interpretation of the Directive through the SIMAP, Jaeger Dellas rulings (and later on the Pereda, Gerhard Schultz-Hoff and Stringer rulings) have posed particular challenges for many public services. These judgments have also imposed disproportionate costs for public employers. We will further elaborate our views on this issue and the other key issues mentioned in section 5 of the Communication under question (e) below.

(d) Do you agree with the analysis contained in this paper as regards the organisation and the regulation of working time in the EU? Are there any further issues which you consider should be added?

In comparison to previous consultations on the Working Time Directive CEEP is very pleased to see a more realistic approach in the new Communication from the European Commission. However, contrary to any assertion which states that flexible working arrangements are dangerous to the health and safety of workers, there is evidence to demonstrate that some flexible working practices have a positive impact on workers' health and safety and well being. These working practices, developed through recognized procedures, are both beneficial to the workforce and provide the basis for delivering the services that Europe's citizens demand.

(e) Do you consider that the Commission should launch an initiative to amend the Directive? If so, do you agree with the objectives of a review as set out in this paper? What do you consider should be its scope?

CEEP believes that the European social partners are best suited to make balanced amendments to the Working Time Directive. However, if this option is not available CEEP will be in favour of an EC initiative to amend the Directive.

Concerning the scope of such an initiative a further elaboration of CEEP's views concerning the key issues mentioned in the Communication can be found below. In general terms we are in favour of the Finnish Presidency compromise on working time that was presented in October 2006 as well as the Council proposal from 2008 as acceptable compromises to the sensitive provisions in the Directive.

### **Definition of working time**

As already stated in our answer to question (b), CEEP is deeply concerned about the re-interpretation of the concept of working time made by the European Court of Justice in the SIMAP, Jaeger and Dellas judgments. Action to amend the Working Time Directive in a way which allows for the inclusion of inactive on-call time rather than the "black and white" view of either working or not working introduced by the court cases is utterly needed. The

suggestions made by the Finnish Presidency in 2006 as well as by the Council in 2008 are well balanced solutions to this matter.

In the Finnish Presidency compromise the definition of working time is extended to also include “on-call time”, “workplace”, and “inactive part of on-call time”. The compromise moreover stipulates that the inactive part of on-call time shall not be regarded as working time unless national law and/or practice, a collective agreement or an agreement between the social partners declares otherwise. In addition to this there is also included some flexibility on how inactive on-call time should be calculated concerning the rest periods laid down in other articles in the Directive.

### **Working hours**

The number of Member States using the opt-out has largely increased over the years. One of the reasons for this development is the current jurisprudence of the European Court of Justice. This increase, as a consequence of the problems concerning on-call time, was foreseen by CEEP and is most unfortunate. For public employers, we are keen to reduce the over-reliance upon opt-out provisions as they are neither in the interest of the employers, employees or the users of public services. In CEEP’s view emphasis should be placed on compliance with existing provisions in the Directive aimed at preventing misuse rather than the wholesale abolition of the opt-out provisions. In our opinion the requirements to use the opt-out provisions will be reduced if a proper definition of “inactive time” is introduced and changes are made regarding the reference time period (see below). Consequently we do not see any added value in a cessation of the current opt-out provisions.

### **Reference time period for the determination of weekly working time**

In the Working Time Directive there are rules for making average computations of weekly working time, weekly rest, and the length of night work for the reference time period. We consider that it should be possible to calculate average daily rest periods for a certain period of time in the same way.

According to the Directive the reference time period for the calculation of the 48 hours amounts in principle to four months. In specific cases it can be set at six months by the Member States. In terms of collective agreements it can be extended up to 12 months.

The reference time period for the calculation of the weekly maximum working time has considerable significance for designing flexible working time, which can adjust the course of work to seasonal or other fluctuations in the demand for work performance. Different conditions over the course of the year have a considerable influence on these fluctuations in demand.

The general limitation of the reference time period in the Directive to four months, with the possibility of an extension to 12 months only by collective agreement, is not in accordance with this need for flexibility. Therefore CEEP advocates an extension of the reference time period. A reference time period of 12 months should be considered to be the rule. In addition, social partners should be enabled to introduce even longer reference periods by

collective agreement, to the extent that this is required by an objectively justified increase in flexibility for employers and employees in specific areas.

### **Compensatory rest periods**

The jurisprudence of the European Court of Justice stipulates that when the normal rest periods are restricted compensatory rest periods should be taken as soon as possible and any missed daily rest should be taken immediately after an extended shift. From a health and safety point of view, it is very important that employees are able to get compensatory rest as soon as possible when the normal rest periods are restricted, but CEEP finds these provisions too rigid to be applied for services operating around the clock and further flexibility needs to be introduced for employers to more effectively plan and organize their operations.

A well balanced proposal to amend the Directive in this context could be to allow for compensatory rest periods to be taken within a “reasonable time”, to be determined by national legislation or a collective agreement or agreement concluded between the social partners.

(f) Do you think that, apart from legislative measures, other actions at European Union level would merit consideration? If so, what form of action should be taken, and on which issues?

CEEP is of the opinion that the various studies undertaken by the European Commission on different aspects of working conditions could be worth enhancing and promoting in this context. These studies are often very informative, especially when they are made together with the national social partners. The participation of national experts for undertaking national studies can be a solution in some cases but CEEP would like to stress the importance of including public employers’ perspectives, together with their counterparts, when undertaking national studies on working time arrangements.

(g) Do you wish to consider initiating a dialogue under Article 155 TFEU on any of the issues identified in this consultation? If so, on which ones?

CEEP’s view on this question is that a negotiated solution would better meet the needs of employers as well as workers. Therefore we will contact the other cross-sectoral social partners and examine whether negotiations according to Article 155 TFEU can take place.

### **Conclusion**

CEEP fully supports the Health and Safety objectives of the Working Time Directive but a balance is needed between this and flexible working arrangements. For public employers who operate around the clock amendments of the Working Time Directive are essential. CEEP is of the opinion that the European social partners are best suited to make these amendments and only if this option is not available we will urge the Commission to launch an initiative to revise the Directive, based on a sound impact assessment.

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