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CEMR Response
to the European Commission's 2nd Phase
Consultation on the review of the
Working Time Directive

Brussels, February 2011

CEMR Response to the European Commission's 2nd Phase Consultation on the reviewing of the Working Time Directive (COM (2010) 801 final)

CEMR Key Messages

1. Services provided by local and regional authorities are very much affected by the Working Time Directive: in particular social, health care and fire services which require 24 hour services;
2. We welcome the European Commission's increased readiness to address, in this second consultation paper, the special requirements of continuous care in the public services, as well as recent changes in work and society requiring a high level of flexibility and adaptability of the work force and work places;
3. In general, flexible working arrangements, work-life-balance, health and safety issues go hand in hand and are beneficial for employees and employers, as well as all European citizens as service users;
4. CEMR supports minimum legislation at EU-level composed of clear definitions, which provides a framework of general qualitative conditions and clearly defined minimum requirements;
5. CEMR strongly believes that in order for a breakthrough in this discussion to be achieved the key will be negotiated solutions with the social partners;
6. We advocate for a comprehensive review that would solve all outstanding issues that are continuously emerging via CJEU case law; and need to be addressed in a consistent way in order to avoid the EU working time regime to be amended or legally questioned further in the medium term;
7. We strongly support that issues such as sector specific derogations for on-call arrangements, compensatory rest, multi-contract arrangements, autonomous workers, flexible working hours, paid leave and, particularly, the continuation of the opt-out from the 48 hour week are tackled specifically in the comprehensive review;
8. A new legal framework should be precise and clear about the relation between the EU framework and national arrangements leaving room for the social partners at the appropriate level (national, regional or local) to find the right solutions for their area or sector;
9. The new proposal needs to ensure that both the continuity of public services to vulnerable sectors of society and the rapid reaction to unforeseeable surges of demand are not jeopardised, particularly at a time of unprecedented financial pressures for local services;
10. According to the principle of subsidiarity, definitions should be subject to national law and/or social partner negotiations to ensure that implementation is fit for purpose;
11. A further impact assessment at the local level should be carried out following the social partners' consultation, and taking into account their responses;

Introduction and General Remarks

1. The Council of European Municipalities and Regions is the European umbrella organisation of national associations of municipalities, towns and regions and currently counts 53 associations in 39 countries as its members. Together, we represent over 100,000 local and regional authorities. The issue of the Working Time Directive (WTD) is of great concern to CEMR's members especially where services are provided on a 24-hour continuous basis as well as its more generic implications for managing health and safety issues caused by working arrangements.
2. CEMR is a recognised European social partner and the Employers' Platform (CEMR-EP) represents employers in the Sectoral Social Dialogue Committee for Local and Regional Government Administration.
3. **Building on our contribution to the first phase consultation¹** of the social partners by the European Commission on the reviewing of the Working Time Directive in Spring 2010, we are providing here the shared view of local authorities across the EU to this more detailed set of proposals advanced by the Commission's new consultation paper.
4. CEMR welcomes the Commission's realistic assessment on the limits of pursuing a repeat of the same legislative path as in the two previous rounds. We particularly welcome the recognition of the many different views that exist and the diverging employment trends across the EU as well as within sectors.
5. While we recognize the need to address the issues raised by the European Court of Justice (CJEU) in SIMAP/Jaeger and subsequent cases² we feel that a recognition of changing work patterns and the need to ensure continuity of service together with work-life balance issues that go beyond working time require a comprehensive review.
6. We strongly support the Commission's increased readiness to put forward balanced proposals where the EU-legislation can provide a general basic framework that is as precise and detailed as possible in its concepts, definitions and scope in order to avoid potential unhelpful interpretations from the CJEU; which can then be supplemented by negotiated solutions, particularly by leaving the details within the framework for social partners at the appropriate level to fill by negotiation and collective agreements.
7. Before moving to propose legislation, we advocate in the first instance for a social partner negotiated solution of the stumbling blocks, scope and detailed legal provisions that a new Directive should contain. This will not only ensure better compliance once legislation is passed but would avoid a prolonged, unnecessary discussion in Parliament and the Council.

¹ CEMR Response to first phase consultation: http://www.ccre.org/docs/cemr_response_working_time_en.pdf

² Pereda Sch Pereda, Shultz-Hof & Stringer in managing the carrying over of annual leave, Marshall-Clay on limits on use of rolled up holiday pay for seasonal workers, term-time only staff and agency workers: KSH, Isere and Fuss, etc.

8. Future legislation should remove legal uncertainty and provide a stable legal framework for the foreseeable future, hence the need to address the issues of compensatory rest, on-call, multiple contracts, opt-outs, and autonomous workers. We particularly welcome that the Commission recognised the needs of specific sectors such as **volunteer fire fighters**³ in ensuring continuity of services.
9. We welcome the Commission's recognition that **opt-outs** used in 16 Member States are not an 'easy option' for obviating the requirements of the Directive, but have been used as a tool for flexibility especially in the public sector to accommodate for particular activities, resource shortages, specific forms of atypical work or to guard against the risk of staff shortages during critical periods. Therefore any hypothetical abolition of such derogations could only come when alternative and more targeted forms of flexibility have been agreed, preferably between the social partners, and proved to be effective. So far we do not see phasing out the opt-outs feasible in the medium term.
10. With specific reference to **local public services**, we welcome the Commission's increased awareness that, in order to ensure high quality and continuity of service, EU legislation needs to take fully into account the nature of each specific community and civil protection services, primarily regarding the quality and range of services that can be delivered in relation to the care and safety of vulnerable citizens. Particularly in smaller and remote communities, this cannot be put into jeopardy at a time of unprecedented financial constraints.
11. We stress the Commission finding that the major change currently taking place is not an increase of working hours (which remain stable) but the increase of flexible forms of organisation of working time, such as staggered working hours, flexitime arrangements and working time banking, tele-working, in addition to part-time work. This requires individualised working hours arrangements within the boundaries of an overarching regulatory framework.
12. Demographic change, an increase in the use of smart technology, and the drive towards 24 hour services means that traditional working patterns no longer fit the needs of a modern, progressive society. In that regard we welcome that the Commission specifically recognises and emphasises the special challenges facing the public sector in terms of delivering high quality services at all times and the consequent need for flexibility in working time arrangements.
13. We would seek to emphasise that the over-riding objective for any future directive must be to protect the health and safety of the workforce in a way that maintains and enhances the quality of public services.
14. CEMR is providing below a set of detailed reactions to the items raised in the Commission consultation paper. They also respond to the four

³ We understand that this also comprises fire-fighters retained to work on an on-call duty. CEMR supports the demands of some of our members that are specifically affected by this problem for the Commission to clarify that this kind of fire-fighters will be subject to specific treatment in the new Commission proposal.

specific questions devised by the Commission, provided at the end of the consultation paper.

Comprehensive Review

(answering to Question 1)

15. We welcome the Commission's proposal for a comprehensive review as a good starting point. Indeed it will allow for a review of all issues affecting the EU working time arrangements rather than just attempting a focused review to solve only specific issues e.g. the on-call and compensatory rest issues being raised by SIMAP/Jaeger.
16. While a focused review would provide a short term solution to these specific problems, it would not sufficiently address other emerging case-law or tackle the changing nature of working time arrangements and work patterns. This would result in a legislative patchwork that would be ripe for further questioning by the CJEU. Moreover there is little guarantee that a focused review alone would be successful as it effectively would be a repeat of the two previous rounds that started in 2003.
17. A comprehensive review should tackle the changing demands for high quality and continuous local public services, varied national and/or sector needs, seasonal changes, demographics, technological developments, etc., while at the same time ensuring the health and safety and work-life balance of the employees.
18. In addition to on-call and compensatory rest issues, specific legal issues to be looked at in detail are opt-outs and sector-specific workers, autonomous workers, multiple contracts, paid annual leave and flexible working conditions.
19. CEMR and its member organisations agree that EU-level legislation setting the framework of working time is useful to ensure minimum compliance of health and safety issues across the Internal Market. This framework should be limited to general qualitative conditions for working time arrangements at national and sectoral levels and should not try to regulate these arrangements with 'one-size-fits-all' quantitative limits. The framework should be precise enough to clearly state the minimum requirements while at the same time specifying the intentions of the legislation to avoid unintended interpretations from the ECJ.
20. The EU legal framework should leave room for national agreements and collective bargaining where the social partners play the leading role and have a shared obligation in setting the terms and conditions of the labour market adapted to the various situations and needs within the EU countries. At the same time the EU legal framework should of course establish a foundation for securing basic rights for all workers, particularly in Member States which are continuing to develop social dialogue mechanisms.
21. In this regard, we express our preference for the European legislation to provide for the recognition of the agreements made by the social partners at EU and/or national, regional and local level, and the building

in of safeguards which prevent these agreements from being misinterpreted by the CJEU.

22. CEMR would prefer a cross-sectoral approach to the issues at play. Indeed, the changing working patterns and organisation of service delivery tend to increasingly blur the precise boundaries between sectors. A sector specific approach at EU level could result in a number of sectoral Directives resulting in sectoral legislation at member state level. This could present our members with significant problems as a single local authority's operations which could cover social care, fire fighting, education, hospitals; etc could then be subject to two or three different sets of working time legislation.
23. In terms of preparing legislation, CEMR supports the option of an agreement being attempted first via the Social Partner route of the detailed provisions that could then be tabled as draft EU legislation. This would ensure more robust definitions being put forward and better implementation at local and regional level.
24. CEMR is aware that, while seeking a comprehensive review that would provide a solution for the outstanding working time issues for the foreseeable future – ideally for two decades – its challenges are no less daunting than those posed by a focused review. However given the stalemate of the previous focused reviews, it remains the best option. Therefore, in the interim, we are keen to seek reassurances that the European Commission will follow through with the completion of the Review, before further CJEU litigation could take place.

(Question 2 is addressed in the five sections below)

On-call time

25. CEMR welcomes that the Commission, while respecting the principle set out in SIMAP/Jaeger that all time spent at the workplace is working time irrespective of it being active or inactive, is proposing a derogation of such principle by allowing on-call time to be counted differently in a number of sectors where continuity of service is required and where on call time is spent resting.
26. We want to underline that such derogation would be negotiated by social partners at the appropriate national, sectoral or local level. The reviewed Directive should enshrine the recognition of the social partner agreements, thus avoiding them being called into question by subsequent CJEU rulings.
27. CEMR emphasizes that the local and regional government sector in general would need to use the derogation especially in (but not limited to) the field of hospitals, residential care homes and fire and rescue services. It remains to be seen how this can be made workable.

28. In respect of the specific methodology for the derogation CEMR wishes to recall its proposal⁴ to allow for the calculation of so-called “inactive time” with a lower factor than “hour by hour” when counting the 48-hours.
29. Finally, we are keen to ensure that the definition of “workplace” is unambiguous in terms of the calculation of Working Time for a specific employment, as this is crucial for the calculation of working time. This is especially important given the Commission’s view that the line between home and workplace is becoming ever more blurred in certain cases.

Compensatory rest

30. CEMR understands the difficulties that have prevented the EC to come forward with an adequate solution with regards to whether compensatory rest shall be taken immediately after or within reasonable time of the work shift, as this is one of the crucial elements still unresolved.
31. CEMR wishes to recall its preference for rests to be taken within a reasonable time rather than requiring them to be immediate, in order to ensure consistency and continuity in service provision. This is particularly the case in hospitals or social institutions, among others.
32. It is crucial to underline that the definition of ‘reasonable time’ should be subject to national law and/or social partner negotiation. We also highlight that it is crucial the EU underlines that the definition of reasonable time can differ from sector to sector within one country, as defined after social partner negotiations. We believe this is the essential element in addressing the basic demands on compensatory rest by all actors involved in this review.

Greater flexibility for new working patterns

33. CEMR supports the Commission proposal which would guarantee such flexible arrangements while ensuring adequate protection against health and safety risks. We believe that the proposed changes to the reference period can be brought forward effectively by increasing the scope and autonomy of collective bargaining and social partner negotiations.
34. We welcome the Commission’s increased recognition that more flexible working patterns are not only due to changing demands in the economy as a whole, but are also desirable by many employees particularly those with family responsibilities or to meet the demands of a diversified and older workforce.

Work-life balance for new demographic realities

35. Mirroring our above line on flexible arrangements, CEMR agrees with the Commission consultation paper that while such arrangements are needed to avoid the negative consequences in terms of health and safety issues, they also have the potential of a win-win solution both for employers and employees.

⁴ CEMR Response to first phase consultation: http://www.ccre.org/docs/cemr_response_working_time_en.pdf

36. In relation to the Commission's proposals to introduce new provisions concerning the information of workers on envisaged changes to collective time schedules, or to request changes to individual time schedules, CEMR wishes to highlight that provisions need to be broad in order to allow social partners and local employers and employee's room to adapt to their specific circumstances.

Autonomous workers

37. CEMR notes that the Commission is seeking to clarify that the existing derogation applies to senior managers in the public and private sectors. Nevertheless, we believe that the Commission's proposed clarification should not go as far as preventing arrangements being made between other employers and employees, for example in knowledge intensive jobs, in order to find individual solutions which would benefit the needs of the employers and work-life-balance of the employees. Otherwise, if the definitions become too narrowed down there will be an increase in opt outs.

38. Often work performance in such jobs is measured in terms of outcomes achieved rather than on time effectively spent at the workplace. These kinds of jobs often have variable work intensity therefore using only the working time criteria as a measure of health and safety standards might be of limited use. Work with social partners would be therefore welcome in order to jointly look at health and safety issues specifically affecting these new types of working patterns.

Multiple contracts

39. CEMR recognises the challenges in terms of enforcing EU rules in respect of workers with multiple-contracts, which are increasingly common as a result of changing work patterns mentioned elsewhere. Municipalities and regions are aware that many of their employees will hold more than one job within the authority, and many more will also engage in part time work outside of the authority. It is also often the case that the same worker has two different sets of contractual arrangements with the same employer.

40. If the Working Time proposals are to include multiple employments, then further technical consideration would be required. This can present difficulties in ensuring adequate rest breaks are given and 48 hours are not exceeded especially if other employment is not declared.

41. We call on the Commission to clarify in its proposals that employers and employees need to be mutually aware of their responsibilities and to ensure this is taken into account. This is especially necessary in determining how multiple employers take responsibility for monitoring and recording. However, even if these obstacles were to be overcome, we are concerned about how individual employers might act on this information and the potential for enforcement, including disciplinary procedures. A crucial element here is the definition (employment, employer) in each contract that the given worker has.

42. While there are no easy answers given the very different situation not only between Member States but also between sectors and even individuals, we advocate a cautious approach that would ensure appropriate subsidiarity arrangements are in place. Multiple contracts with a single employer are totally different to multiple contracts with multiple employers.

The scope of the directive and specific sector problems

43. CEMR welcomes the fact that the Commission, in spite of following up the recent case-law concerning the autonomous and uniform definition of “worker”, recognises the concerns of the social partners that specific sectors have, such as volunteer fire fighters. We would want this recognition to be explicit for a number of key local services such as residential care and fire and rescue services, particularly in small and remote municipalities.

Opt-out

44. As outlined above we welcome that the Commission recognises that the only realistic way of phasing out the many opt-outs that exist at the moment is by addressing the root causes that bring them forward in the first place via more targeted forms of flexibility. In addition to welcoming this approach we are anxious to seek reassurances that the Commission will use its competence to prevent the opt-outs being put into question while such targeted forms of flexibility are identified. We wish to recall that an immediate change of the current provisions would significantly affect municipalities, particularly as regards to emergency services.

Paid annual leave

45. CEMR observes with concern the recent CJEU rulings on paid annual leave⁵. The potential accumulation of paid annual leave entitlements over successive years has generated a great deal of legal uncertainty and unforecasted substantial costs for local employers. Employers which fully abide by the rules, by keeping the workers in employment that are recovering from long term sickness (sometimes also in connection with maternity and parental leave) should not be penalised by the CJEU jurisprudence and EU rules, as it is the case at the moment. CEMR would support the idea of a ceiling to prevent accumulation of paid annual leave to prevent this from happening. We would be equally concerned about the EU attempting to use EU paid annual leave legislation as a way of also tackling wage issues, as those are clearly outside the competence of the EU.

⁵ Schutz, Hoff and Stringer. Gomed and Land Tyrol.

Next steps – Cross sectoral dialogue

(answering to Question 3)

46. CEMR welcomes the careful and realistic approach with which the Commission is approaching the reform of the Working Time Directive. We believe that a two round consultation process prior to making a formal proposal is an appropriate one. However, we would have wished that more transparency and traceability of the Commission preparations were provided. In particular we believe that a more structured involvement of CEMR and our national associations in the impact assessment that took place between the first and the second round of consultation would have improved the local angle of this assessment. Therefore we believe that specific impact assessments at local level, such as those that have been undertaken by CEMR members, are still necessary. We call on the Commission to undertake those before a formal proposal is made. CEMR is keen to cooperate with the Commission.
47. Finally, CEMR believes that due to the difficult process the only realistic way to avoid another legislative stalemate is the negotiation of the revision between the Social Partners at cross-sectoral level. We would like to point out the already existing initiative ‘Smart Regulation’, launched by the European Commission on pre-legislative consultations⁶. Should a negotiation solution not be possible, CEMR is available to the Commission for discussions and exchange of view on a possible legislative draft.

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Council of European Municipalities and Regions

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⁶ http://ec.europa.eu/governance/better_regulation/index_en.htm