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CEMR Response

to the European Commission
Consultation of the Social Partners on the
review of the Working Time Directive

Brussels, May 2010

CEMR Response

to the European Commission's Consultation of the Social Partners
on the reviewing of the Working Time Directive
(COM(2010) 106 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 require 24 hour services;
2. Changes in work and society require a high level of flexibility and adaptability of the work force and the work places;
3. Flexible work arrangements, work-life-balance, health and safety issues in general go hand in hand and are beneficial for employees and employers;
4. The Working Time Directive of 1993 allowed sufficient room of manoeuvre, however, ECJ jurisprudence has altered the intentions of the directive;
5. CEMR supports legislation at EU-level, which provides a framework with general qualitative conditions and clearly defined minimum requirements;
6. It needs to leave room for national agreements and collective bargaining, but also secure the rights of workers in Member States with a low tradition of social dialogue;
7. The role of social partners at EU level needs continuously be strengthened;
8. A new legal framework should be precise and clear about the relation of EU framework and national arrangements;
9. The new proposal needs to ensure both continuity of public services to vulnerable sectors of society and rapid reaction to unforeseeable surges of demand, particularly at a time of unprecedented financial pressures for local services;
10. An impact assessment should be carried out following the social partners' consultation and taking into account their responses;
11. CEMR supports the initiation of a cross-social dialogue under art. 155 TFEU to find a solution to the review of the Working Time Directive.

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. The issue of the Working Time Directive (WTD) is of great concern to CEMR's members; many of them provide to a wide extent 24-hour services and other services affected by the WTD.
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.
3. We welcome the consultation of the social partners by the European Commission on the reviewing of the Working Time Directive published 24 March 2010.
4. CEMR shares the Commission's view that the failure to reach agreement on the WTD in the conciliation process between the European Parliament and the Council in spring 2009 has prolonged a difficult situation which exists in several Member States. These difficulties have been affecting the local and regional governments ever since the European Court of Justice rulings in the SIMAP/Jaeger case and subsequent cases.
5. Further complications to the operation of contracts of employment through subsequent ECJ judgements such as: Pereda, Shultz-Hof & Stringer in managing the carrying over of annual leave (which may have a counter-productive effect on the way long term sickness absence is managed); and Marshall-Clay which limits the use of rolled up holiday pay for sessional workers, term-time only staff and agency workers.
6. CEMR notes and strongly welcomes the fact that the Commission is taking a new and comprehensive approach to the reviewing of the WTD to avoid the re-launched debate to suffer from the same failures as were experienced in the debate of spring 2009.
7. EU legislation needs to take fully into account the nature of specific community and civil protection services, particularly on the quality and range of services that can be delivered in relation to the care and safety of vulnerable citizens.
8. 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.
9. 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.
10. The Commission has asked a series of questions to the social partners in its Communication COM (2010)106 of 24 March 2010. CEMR would like to take the opportunity to express the views of CEMR and its member organisations on this important matter.

Questions and Answers

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?

11. CEMR member organisations represent local and regional governments who are both public employers and providers of high quality public services to their citizens. In some sectors, especially sectors such as the healthcare sector, social care sector and fire service, these services have to be provided 24 hours a day around the year. This stresses the importance of working arrangements which ensures the health and safety of the employees while at the same time making it possible for the employer to organise the working time in accordance with all the challenges that they are facing, such as the demographic change, and which cause an increased demand for some services and a decreased supply of workforce and new forms for working.
12. The labour market of today is characterised by constant change, technological development and demands of high productivity at a low cost – this will be the case for the future labour market as well, and most likely in an even more radical way. Local and regional governments are facing sustained demands on the quality and cost of the products and services they provide. These constant changes are part of a continued process where jobs are changing increasingly and at a faster pace affecting both employers and employees. Consequently, both employers and employees need adaptability and flexibility in order to comply with the conditions of the labour market. The legislative framework covering the labour market needs to support the possibility for a smooth and steady adaptation to the occurring changes.
13. In the opinion of CEMR and its member organisations, one way of ensuring a sustainable labour market and a well functioning public sector providing services of high quality is to have legislation at EU-level setting the framework for working time. 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.
14. 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 basis of rights securing the workers in Member States which are continuing to develop social dialogue mechanisms.

15. CEMR would also like to emphasise that the role of the social partners at EU level should continuously be attempted to be strengthened. In this context it would be preferable that the European legislation provides for the recognition of the agreements made by the social partners at EU and/or national, regional and local level, avoiding that these agreements could be misinterpreted by the ECJ.
16. Today's society is characterised by significant and ongoing developments caused by, for example, the constant technological improvements, new requirements for education and qualification, and the globalisation of the world. This weakens clear boundaries between the different spheres of private and professional life. The labour market therefore has to adapt to these characteristics as well.
17. The conditions under which local and regional authorities as employers and their employees are organising work has been influenced by increased flexibility in the work planning in terms of rostering/self-rostering, influence on own working hours and possibilities to work from home, etc.
18. For a large and increasing number of employees, management directs work not through traditional arrangements on time and place, but through agreements on input and output. For this group of employees, work becomes decreasingly dependent on time and space.
19. CEMR foresees that these tendencies will grow only more marked in the future. It is important, however, to underline that this can have a positive affect on both employers and employees. The dialogue between employer and employees at the local working place assures the benefit of the employee to influence the planning of the working hours in accordance with private and family life while the employer can plan a quality service delivery.

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

20. During the two decades since the introduction of the WTD the EU has gone through the transformation from an industrial market to the primarily knowledge based market with obvious effects for local and regional authorities, the labour market in general, and the employers and employees especially. Since the adoption of the current Working Time Directive the labour market has undergone a severe transformation. The labour market is constantly moving towards more specialised production techniques and innovative service deliveries as mentioned under question a).
21. A sustained period of booming financial markets has been replaced by recession in the last couple of years. This marked change in the economic climate has shown the need for the labour market to be able to react fast and flexibly to best comply with these external changes. This might indicate that the existing Working Time Directive has become more difficult to apply.

22. Article 2 of the Working Time Directive defines that, “*working time shall mean any period during which the worker is working, at the employer’s disposal and carrying out his activity or duties, in accordance with national laws and/or practice*”. The Council added this definition since it wanted to ensure a flexible and more national definition of the term “working time”. At that point it was not the intention to define the term “working time” further at EU-level.

23. When looking at the original intentions of the Working Time Directive when it was adopted in 1993, it seems that the intentions of this legal framework were coherent with the current wishes for EU-legislation in this field. However the ECJ-rulings in the SIMAP/Jaeger case (and others see paragraph 5) have altered these intentions and leave a jurisprudence not complying with the intentions of the directive. If it comes to the point of producing a new legal text, it will be difficult though necessary to take this into consideration and make the new texts as precise and clear as possible without creating barriers for social partner negotiations and national adoption of the legal framework.

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?

24. The SIMAP/Jaeger ruling drastically altered the definition of working time. This has had a large effect on local and regional authorities in their functioning as employers and providers of key public services. For CEMR’s member organisations the most well-known problems occur in the healthcare sector, fire service and other sectors providing 24-hour services.

25. In the Netherlands, for example, the ruling in the Jaeger case and the subsequent adjustment of national legislation have forced social partners to limit the working time of fire-fighters with on-call duty to an average of 48 hours a week. This has forced the concerned municipalities to recruit additional personnel, raising personnel costs as much as 10 percent. In the health and social care sector, it may not always be possible to recruit and / or finance such an increase of personnel.

26. There are, however, also problems in other fields where local and regional authorities provide services such as in the culture and tourism sector in which the WTD plays a great influence. These types of services are often characterised by seasonal changes. Tourism typically has its peaks during summer and/or winter periods while culture often has its peak seasons during spring and autumn. During these peak seasons it can be difficult for employers and employees to comply with the WTD.

27. For CEMR’s member organisations the following issues are of great concern:

- To maintain a steady and qualified functioning of services e.g. the hospitals and social care institutions it is crucial to ensure a flexible organisation of the definition of working time. A new Working Time Directive should therefore provide an opportunity for local

legislators concerning civil servants and for social partners concerning employees to calculate the “inactive time” flexibly.

- It is crucial that provision of services, particularly in smaller and remote communities, is ensured with the new Directive, particularly to ensure that vulnerable members of society and addressing unforeseeable surges of activity are not put in jeopardy at a time of unprecedented financial constraints;
- Furthermore it is of great importance to allow for the calculation of so-called “inactive time” with a lower factor than “hour by hour” when counting the 48-hours. This could mean to count the “inactive time” in relation to the average of expected demand or rather of actual demand and in relation to the required level of attentiveness during “stand-by duties”. This could vary between 0 and 100 %. Therefore a third category of working time, namely the “inactive time with rest periods at work” could be established, which takes into consideration the difference in health risk to the employee for carrying out such duties
- A new Working Time Directive should contain the so called “opt-out” option as well as a simplification of this exemption. Furthermore, there should be exemptions concerning e.g. rescue services, fire services and disaster control. Retention of such provisions ensure a flexibility in the directive for both employees as well as employers to provide affordable and efficient services.
- Keeping bureaucracy to a minimum, especially in relation to the management of employees with multiple contracts of employment. When coupled with the opt-out employees providing emergency fire and rescue services on an on-call basis, as a second job are the only way that affordable/efficient services can be delivered within outlying communities.
- The rules on compensatory rest periods should allow a need for flexibility in the working time organisation which is a necessity to ensure sufficient workforce coverage at hospitals and social institutions – this goes for both day and night time shifts. By allowing rests to be taken within a reasonable time rather than requiring them to be immediate would go a long way to ensuring consistency in service provision.
- The reference period for the calculation of the maximum working time should be extended and determined according to collective agreements.

28. For a large number of CEMR member organisations collective agreements or other types of agreements setting the terms and conditions for the work of the employee are characterised by a “package” of conditions, rights and demands. The package consists of several measures balanced to create a win-win situation for employer and employee. The maximum working hour is only one parameter in this package. If one parameter is blocked it can create great difficulties for the possibility of reaching agreement on this type of balanced agreement – to the

disadvantage of both employer and employee. The health and safety of the employees should obviously be of great concern to the employers. EU legislation therefore should provide the framework to ensure this while at the same time leaving room for manoeuvre in which the social partners and the employer and employees can conclude their own balanced agreements.

29. However, where sectoral agreements are missing, the general quantitative conditions for working time arrangements with minimum requirements of the future Working Time Directive should secure the rights of the workers (as explained in points 13 & 14).

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 issues which you consider should be added?

30. CEMR can in general terms agree to the content of the Commission's analysis regarding organisation and regulation of working time. The analysis carried out indicates an open-minded approach to the subject in review and a willingness to listen to the opinions of the social partners. However, when the Commission for example on page 5, second point concludes that there is "*substantial scope for flexible working arrangements through collective bargaining (for instance, the annualisation of working time)*", CEMR finds that although it is one of the provisions of the Working Time Directive to enable these flexible working arrangements, the jurisprudence from the ECJ has shown that to a wide extent the flexibility provided by the directive is not applicable.

31. Furthermore CEMR would like to draw attention to the convergence between flexible working arrangements, work-life-balance and health and safety issues. The wording of the analysis indicates that flexibility in working time is inconvenient and harmful to the employees. CEMR however find that flexibility must be seen as a benefit for the employee as well, since this flexibility and influence on own working hours in general go hand in hand with a fruitful work-life-balance.

32. Health and safety of the employee is a crucial matter that needs to be dealt with thoroughly and local and regional authority employers show great commitment to providing such protection. This can be seen at EU-level in, for example, the various ongoing work conducted in the Social Dialogue for Local and Regional Governments between CEMR Employers' Platform and EPSU. CEMR Employers' Platform would like to mention a precise example at this junction where they are negotiating with other sectoral dialogues on an initiative regarding prevention, identification and management of third party violence. This is a reference to underline the fact that when local and regional authority employers request flexibility as regards to the organisation of working time it is not out of unwillingness to protect the health and safety of the employees but indeed for the *benefit* of the employees and their working conditions.

e) Do you consider that the Commission should launch an initiative to amend the Directive? If so, do you agree with the objective of a re-

view as set out in this paper? What do you consider should be its scope? Should one reflect on a different approach to the regulation of working time?

33. In the Communication on reviewing the Working Time Directive the Commission describes a process which includes this first hearing of the social partners, a second hearing of the social partners, and during these hearing-phases the Commission will carry out an Impact Assessment, including an examination of the legal application of the Directive in the Member States. CEMR can support these steps but wishes that the Commission awaits the results of the social partner consultations and takes them into account when conducting an Impact Assessment. At the same time, CEMR would like to take the opportunity to underline the importance of national studies to include social partners at local and regional level.
34. That being said, and bearing in mind the failed results of the conciliation process of spring 2009 CEMR believes that negotiated agreements in the labour market is the way forward. CEMR would therefore prefer to see a new Working Time Directive being agreed upon between the social partners at cross-sectoral level and CEMR and its member organisations would like to encourage and offer support to such negotiations. Such an approach would also support the intention to strengthen the social dialogue, as mentioned earlier (paragraph 14).

f) Do you consider 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?

35. The CEMR sees the issue of working time to be closely linked to other challenges facing the labour market today and in the near future. Sufficient supply of workforce and demographic change are related to how employers organise their workforce to deliver the services they are obliged to provide and must be seen jointly with, for example, the Commission's Green Paper on the Healthcare Worker (COM (2008) 725), New Skills for New Jobs and initiatives regarding the EU2020 Strategy. CEMR finds that there is a need to focus on the challenges arising from demographic change and how this will affect the EU in the years to come. The workforce in the health sector, and care for the elderly will especially need to be increased within the next few years. In the education sector on the other hand, there might be a decreased need and schools will be closed. While solving the problems in relation to the current Working Time Directive it must be ensured to avoid creating new problems and obstacles in relation to the above mentioned changes that are predicted to occur.

36. To help ensure a sustainable workforce, CEMR would like to support the Commission's initiatives ensuring concrete and useful data for local and regional authorities. CEMR member organisations are especially interested in information on the combination of the employees' education and the tasks they perform e.g. which tasks are provided by a nurse and at what level? Do the nurses carry out doctors' tasks? At the

same time, CEMR members would be interested in research about the motivation for taking up employment in other countries. In relation to providing data on the above mentioned areas it should be stressed that the data provided should be of a comparable kind. At the same time it is important to underline that the collection of data should not add disproportionate administrative work to the local and regional authority employers.

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

37. As mentioned above CEMR and its member associations would like to express their support to social partner negotiations in relation to initiating a dialogue under Art. 155. CEMR believes that the social partners are the most obvious stakeholders to find a solution to this difficult matter. Nevertheless in response to the general scope of the question of reviewing the WTD, CEMR believes that the substantive and practical discussions of the issues would be better addressed via the cross-sectoral initiative and should be considered as the most fruitful way to proceed.

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Council of European Municipalities and Regions
Director of Policy: Angelika Poth-Mögele
Email : angelika.poth-moegele@ccre-cemr.org
Phone: + 32 2 500 05 40