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**COMMISSION STAFF WORKING PAPER**

*Detailed overview of the replies received from the social partners at European level to the first-phase consultation under Article 154 TFEU on Reviewing the Working Time Directive*

*Accompanying document to the*

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

**Reviewing the Working Time Directive**

**(Second-phase consultation of the social partners at European level  
under Article 154 TFEU)**

{COM(2010) 801 final}

## 1. INTRODUCTION

In March 2010, the Commission consulted<sup>1</sup> the social partners at European level, in accordance with Article 154(2) TFEU, on the need for, and possible direction of, action at EU level to review the Working Time Directive<sup>2</sup>.

This Staff Working Paper provides a detailed overview of the replies which the Commission received.

It is attached to a further Communication from the Commission (COM(2010) 801), which launches the second stage of consultation under Article 154(3) TFEU, asking the social partners at European level for their views on the possible content of such action.

## 2. CONTEXT

The first-phase consultation of the social partners on reviewing the Working Time Directive was launched on 24 March (COM(2010) 106).

The questions on which the Commission consulted the social partners are as follows:

- (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?*
- (a) *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?*
- (b) *What is your experience to date of the overall functioning of the Working Time Directive? What has been your experience regarding the key issues identified in section 5 of COM(2010) 106?*
- (c) *Do you agree with the analysis contained in COM(2010) 106 as regards the organisation and the regulation of working time in the EU? Are there any further issues which you consider should be added?*
- (d) *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 COM(2010) 106? What do you consider should be its scope?*
- (e) *Do you think that, apart from legislative measures, other action at European Union level would merit consideration? If so, what form of action should be taken, and on which issues?*
- (f) *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?*

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<sup>1</sup> COM(2010) 106 (first phase consultation paper, in accordance with Article 154(2) TFEU).

<sup>2</sup> Directive 2003/88/EC of the European Parliament and of the Council of 4 November 2003 concerning certain aspects of the organisation of working time (OJ L 299, 18.11.2003, p. 9).

At the request of the social partners (particularly ETUC and Business Europe), the deadline for replies was extended to 12 June 2010.

The Commission received a total of 47 replies to the consultation.

33 replies were received from recognised European cross-sectoral and sectoral social partners. The sectoral social partners represented the following sectors: agriculture, banking, chemicals, education, film and TV production, healthcare, hotel/restaurant/catering, performing arts, metal/engineering/technological, municipal and regional government, rail transport, retail/commerce, sea fishing and private security. In addition, two social partner organisations represent particular groups (workers at managerial and professional level). A full list of all replying social partner organisations is given in Annex I.

In addition, 14 replies were received from organisations<sup>3</sup> which are not recognised European social partners (European federations of doctors, firefighters, defence forces, and some national doctors' and nurses' organisations, as well as employer federations in certain sectors (oil and gas exploration, private medical clinics, camping parks)). These organisations are listed in Annex II.

In accordance with the Commission's normal practice, replies to a consultation under Article 154 TFEU are not published by the Commission (though a replying organisation may publish its own reply if it so wishes). Rather, the Commission makes available its own analysis of the replies received. This Staff Working Paper provides that analysis for the first-phase consultation on reviewing the Working Time Directive.

### **3. REPLIES TO THE FIRST-STAGE CONSULTATION QUESTIONS**

Overall, employers and unions are in broad agreement that the last 20 years have seen major changes to the world of work which significantly affect the organisation of working time.

However, they emphasise different aspects of these changes, and draw quite different conclusions on their implications for the organisation of working time.

Employers tend to see the changes as necessitating far greater flexibility in the organisation of working time; while unions consider that on the contrary, they underline the continued importance of providing effective legal protection for workers against excessive working hours.

A number of replies (from unions or employers or both) wanted to see specific changes for particular sectors or groups of workers.

This section continues by providing detailed summaries regarding each of the seven questions asked.

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<sup>3</sup> Some replies were received from organisations which are not, and are not affiliated to, the federations recognised by the Commission under Article 152 TFEU as representative social partners at the European level. Following the Commission's usual practice, such replies cannot form part of consultation of recognised social partners under Article 154 TFEU. They have been accepted as contributing to the overall information available to the Commission services, and are mentioned here for completeness, but always with a specific reference to their different status.

### 3.1. Innovative proposals

*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?*

There was general support for the role of collective bargaining in providing flexible and innovative working time solutions. Another theme which attracted wide support from both employer and union federations was the growing importance of measures to improve work-life balance, which were identified as increasingly important for recruiting and retaining workers. Both public-sector employer federations and cross-sectoral trade unions underlined the importance of finding a balanced approach, which would allow flexibility for the provision of high-quality public services while avoiding negative health and safety effects for workers and ensuring working conditions which respond to workers' own needs. A key issue is how to ensure that working time flexibility which benefits employers will also benefit workers.

A number of contributions referred to the need for a better fit between working time rules and overall EU policy imperatives: employers tended to refer more to flexicurity requirements, while workers' organisations tended to focus more on increasing workforce participation by means of work-life balance.

#### *The role of collective bargaining*

There was general support for the role of *collective bargaining*. For example, BusinessEurope, CEEP, CEEMET and UEAPME all acknowledged that a wide range of successful mechanisms for more flexible working time, which benefited both employers and workers, had already been established via collective bargaining.

#### *Increased flexibility*

The main emphasis of employers (BusinessEurope, CEEP, UEAPME, Eurocommerce, HOSPEEM) was on the need for increased flexibility in the organisation of working time. Employers emphasised that they saw flexibility as providing benefits both for workers and for employers. CEEMET referred by way of example to short-time working schemes, time banking, working time accounts and flexitime arrangements.

Unions took a more nuanced view, arguing that while flexibility could provide win-win solutions, some forms of flexibility risked having severe negative effects on workers. ETUC proposed to use the term 'adaptability' instead, arguing that the term 'flexibility' risked having negative connotations for workers.

#### *Excessive working hours*

ETUC advocates 'better working time', avoiding excessive working hours, as a factor to improve productivity and reduce absenteeism. Limiting long-hours working will improve protection of workers' health and safety, while also supporting gender equality and family wellbeing. Moreover, if workers now need to work more years for demographic reasons, long working hours are increasingly unsustainable.

For ETUC, it is particularly necessary to provide better minimum protection to workers with stressful and/or unhealthy working patterns (intensification, broken day shifts ...).

### A balanced approach

CEEP suggested that modern work organisation should be based on striking the right balance between protecting workers' health and safety, and allowing flexibility to provide quality goods or services. This approach would allow public services to cope effectively with the ageing of the EU workforce and provide innovative forms of work-life balance. The social partners were best placed to find such solutions, and EU law should provide scope for this to be done.

HOSPEEM similarly emphasised that in its view real flexibility of working time organisation was needed in order to provide effective and well-targeted 24-hour public health services, but that the measures needed to ensure patient safety had much in common with those required to protect workers' health and safety. Health workers must enjoy fair working conditions, and patients should not be treated by overtired staff.

CEMR also underlined its deep commitment to protecting employees' health and safety and emphasised that its demand for flexibility was intended to benefit employees and to improve working conditions.

Unions generally conclude that sustainable working time arrangements must be based on strong, clear, legally binding minimum rules at European as well as national and global level, so that workers are not unduly pressurised by market forces to abandon health and safety standards.

They consider that such a framework also incentivises balanced negotiations between the social partners to adapt general working time rules to the specific needs of organisations and workers. Such an approach must take account of the fact that, increasingly, modern workers are men and women who also need to reserve time for care obligations, for continuing education, and for active participation in society. It should also take account of differing needs throughout the life course.

### Adapting work organisation to workers' needs

ETUC called for general reflection on how to integrate the diverse needs of workers into sustainable long-term organisation of working time in the EU. For example, work organisation needs to take better account of the fact that, increasingly, workers are not operating in the traditional model of a male household breadwinner. Rather, both men and women are now more likely to work while also having household, care and family obligations.

Given shrinking birthrates, demographic ageing, and the need for later pensionable ages, thought should also be given to a 'life-course' approach (where workers work differently at different stages of their lives but may remain in work longer), including income security aspects.

This concept of 'adaptability' would also respond to greater participation of older workers, the need for a 'life-course' approach, shrinking birthrates, later pensionable ages, and greater diversity and individualisation of workers' needs and lifestyles. *'Limitation [of excessive hours] and adaptability in smart working time arrangements'* form the key to a modern vision of working time organisation.

### More input for workers into the design of working time

ETUC considers that workers need to have a stronger bargaining position for influencing working time patterns to better reflect their needs. Lack of control and influence over working time is a major source of stress for workers. Workers should have a right to request changes in their working hours, and employers should be obliged to notify workers in time about changes to working time schedules.

### Work-life balance

Many replies also emphasised the growing importance of measures to improve **work-life balance** (BusinessEurope, Eurocommerce, EPSU, ETUC, UEAPME), although many employer federations expressed a strong preference for relying on collective bargaining rather than legislative initiatives in this area.

For example, Eurocommerce's experience was that developing and extending reconciliation measures was essential to recruiting and retaining staff. It referred to existing sectoral agreements and guidelines on telework, part-time work and age diversity. It noted that high-performance businesses tend to provide flexible working arrangements, and underlined the importance of reconciliation for increasing women's workforce participation.

Similarly, EPSU described work-life balance as 'key' to any long-term vision of working time organisation, since it was '*clear that workers do want to achieve a better work-life balance.*' Its affiliates had already negotiated at various levels a range of positive working time policies (annual leave, sabbaticals, working time accounts, part-time work options for older workers, longer rest breaks in difficult or stressful occupations). Another examples is DBB/CNV, which underlined the importance for its members of improving work-life reconciliation.

### **3.2. Impact of changes and trends at work**

*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?*

There is broad agreement among employers and unions that the last 20 years have seen major changes in the world of work which significantly affect the organisation of working time. Trade unions hold this view less strongly than employers, for whom it is considered paramount. Employers and unions both emphasise the individualisation of lifestyles, and strong demand from workers for a wider range of options to help in balancing work and private life.

Replies to the above question regarding specific provisions of the Directive are considered in the section 3.3.

Private sector employers emphasise factors such as increased competition, globalisation, the shift from manufacturing to services, technological change and particularly the accelerated use of information and communication technologies, rapid changes in the products demanded by consumers, and sharp fluctuations in demand. CEEMET, for example, saw the de-standardisation of individual working time as a key trend and considered that EU rules should adapt to this.

Public sector employers highlight particularly their obligations to provide high-quality 24-hour services to vulnerable citizens, the escalating demand for health and care services due to demographic factors, the difficulty of containing rising costs in the face of budget constraints exacerbated by the current crisis, and the chronic shortages of qualified healthcare workers.

Trade unions underline in particular the intensification of work, the development of precarious work, the negative effects of excessive working hours on health and safety of workers, as well as on the quality and productivity of their work, and the accompanying risks for third parties (especially in safety-critical activities). They emphasise the problems posed by long working hours for combining work and family life. In ETUC's view, long working hours have a serious negative impact on already-falling birth rates and on the Lisbon objectives of increasing workforce participation by women and by older workers, and pose problems for the new demographic imperative of longer working lives and later pensionable ages.

Unions agree on the factors affecting public services, but argue that resorting to long hours working can only aggravate the problems of recruiting and retaining staff, especially given the feminisation of medical and health workforces and the challenges already posed by work-life reconciliation. Moreover, health and emergency services should not be delivered by overtired staff whose skills or judgment may be impaired by fatigue. Instead, public services should focus on better work organisation models which make the sector a more attractive place to work.

### Globalisation and costs pressures

Manufacturing employer federations (CEEMET) referred to the demands of global competitiveness, cyclical changes and just-in-time production methods, which they saw as making it essential for employers to have more flexibility over the organisation and quantity of working hours. They argued that this also contributed to satisfying individual worker preferences. Employers in the banking sector, and in film and TV production, underlined concerns that their work could easily be moved to cheaper locations outside the EU if costs were seen as uncompetitive. Public services employers referred to the pressures on public budgets and the overall increase in health budgets due to demographic and other factors.

### Autonomy and knowledge working

This issue was important for social partners representing manufacturing employers, managers and professional employees, banking employers, and employers and workers in the performing arts. They generally agreed on the increasing number of knowledge workers whose skills could be of pivotal importance to employers, and also on work organisation which measured performance by achievement of targets rather than by presence at a particular place or for a particular length of time. Both advantages and risks of this development were highlighted.

### Rapidly fluctuating demand

Eurocommerce (retail employers) felt that rapidly fluctuating demand was an important factor for the sector.

### Employment patterns

Sectoral social partners for the performing arts sector emphasised the prevalence of short temporary employment contracts, multiple simultaneous contracts and self-employment in this sector. Employers considered that this aspect required more flexibility, while unions saw it as requiring greater legal protection. Public service education employers also raised concerns about requirements regarding employees who work under more than one employment contract.

### Growth of part-time employment

This was mentioned as an important related feature by social partners for the commerce, performing arts and healthcare sectors.

### Provision of 24-hour services

A number of replies from employers' federations invoked the importance of providing 24-hour services: public services employers generally, health services in the public sector (emphasising responsibility for the care of vulnerable citizens) and the private sector, (information technology, private security, car rental and taxi services, and cargo management). Private security employers, for example, called for more flexibility on the timing of daily and weekly rest.

A number of replies highlighted specific problems regarding workers who are provided with residential accommodation at the workplace (residential care wardens, camping and holiday park staff, offshore oil and gas workers...) or who are available on-call on a 24-hour basis for a very limited period of time in particular circumstances (teachers accompanying children on school trips, assistants to persons with disabilities...).

The question of Sunday rest was raised by DBB/CNV, who considered that working time rules should in general define Sunday as a collective day of rest, but with exceptions for certain necessary sectors (transport, tourism...).

### Workers' demands for adaptable working time

Social partners (mainly employers) for commerce, banking, rail, security, and health, all identified demands by workers for more individual working patterns, or for better reconciliation of work and family life, as an important factor in the organisation of work for their sector.

### Skills shortages

Long-term shortages of certain skilled workers were seen as a problem by social partners for public firefighting services and for public health services. The problem for health services was exacerbated by the relatively long time needed to acquire specialist healthcare qualifications .

## **3.3. Experience of the current rules**

*What is your experience to date of the overall functioning of the Working Time Directive? What has been your experience regarding the key issues identified in section 5 of COM (2010) 106?*

Employers express rather varied perceptions of the Directive itself. Business Europe is opposed in principle to regulating working time at EU level. UEAPME, on the other hand, considers that regulating working time at EU level is important in order to provide a level playing field for small and medium enterprises in particular.

Business Europe, CEEP, CEEMET and UEAPME all agree in finding the current EU rules unacceptably rigid and in insisting on the need to amend the SIMAP-Jaeger case law in particular, as well as the recent judgments on paid annual leave. They argue that EU and national law already provides a high level of protection for workers' health and safety.

Unions, on the other hand, generally stress that EU working time rules are based on fundamental social rights protected by the Treaty and by the EU Charter of Fundamental Rights. They are generally critical of the state of enforcement and application of certain aspects, particularly of the SIMAP-Jaeger judgments. In addition, unions highlighted concerns about derogations which they considered were too broad (particularly the ‘opt-out’ under Article 22 and the ‘autonomous workers’ derogation under Article 17(1), which they considered should be tightened up to avoid potential for abuse. For EPSU and ETUC, the need to protect workers against excessive working hours must be the paramount objective.

Employers and unions both agree that the social partners have already jointly developed a range of good models for working time organisation, which can meet the needs of both employers and workers. Unions argue, however, that the existence of the opt-out and the possibility of different treatment for inactive on-call time often prevent employers from negotiating seriously on such solutions.

A number of sectoral social partners sought to emphasise distinctive features of their sector which needed to be taken into account by working time rules: opinions were varied on whether these distinctive features required any changes to the current Directive, and if so, whether the need was for greater flexibility or greater protection.

A number of employer federations wanted reference periods for average working time to be extended, allowing up to 12 months without needing collective bargaining and longer under collective agreements.

Other factors which were emphasised in the replies<sup>4</sup> were as follows:

#### Seasonality

A number of sectoral social partners emphasised the importance of seasonality in the following sectors: agriculture (including sugar processing), retail sales, performing arts, and tourism.

Similarly, sectoral social partners in film and television production underlined the importance of short, intense working periods within the industry. Here and in agriculture, employers referred to the high cost of using specialised technical equipment for relatively short periods and the shortage of workers with the necessary skills to use it. CEFS, representing sugar producers, argued for a minimum 12-month reference period for average weekly working time.

The same point was made by employers’ organisations from the camping sector and from the offshore work (oil and gas) sectors.

#### Provision of residential accommodation

A number of respondents wanted account to be taken of the fact that workers are commonly provided with residential accommodation at the workplace in certain sectors (private security (concierges), sea fishing, offshore work and camping: although emphasising that workers are only contacted out of hours in rare emergency cases, they were concerned that such a situation

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<sup>4</sup> References to offshore work and camping: the organisations concerned are not recognised European social partners.

could lead to workers' private time being regarded as working time, and asked for clarification.

A separate point was made by public education employers, who expressed concern about the sustainability of educational trips and residential schools, if teachers who were on duty overnight or at weekends in case of emergencies involving students, were considered as on-call at the workplace for the purposes of SIMAP-Jaeger.

#### Working in remote areas

This was an important consideration for public service employers, for agriculture and sea fishing, as well as for employers in camping and in offshore work.

#### Safety-critical functions

Employers in the rail sector, unions for public health and emergency services, and organisations of defence forces employees<sup>5</sup>, referred to the importance of avoiding fatigue-related errors, and of ensuring well-rested workers, in the interests of health and safety both of the workers concerned and of passengers or patients.

#### High prevalence of SMEs

Employers in the hotel, restaurant and catering sector underlined the high prevalence of SMEs in the industry.

#### Health services

The social partners' replies regarding public health services are already summarised in earlier sections of this paper.

In addition, there were a number of replies from national and European associations of doctors and doctors in training (not recognised EU social partners), and one reply from a national body of nurses. Most of these replies argued strongly for maintaining and enforcing the SIMAP-Jaeger case law, with no change to the definition of on-call time or working time. They referred to the research on negative health and safety implications of long working hours and irregular hours both for medical workers and for patients. They also considered that such practices could only exacerbate the difficulties of recruiting and retaining qualified staff.

On the opt-out, most replies from medical workers favoured its abolition. A joint reply of nine European doctors' organisations wanted to end the opt-out, but acknowledged the political obstacles to doing so in practice. They concluded that there should be no change to the existing Directive. An Austrian doctors' federation advocated removing the opt-out, but allowing doctors to work up to 60 hours per week (including on-call time) by collective agreement. The nurses' body felt that compliance with the 48-hour limit is feasible with some reorganisation of working practices, and called for the opt-out to be phased out. Conversely, a UK organisation representing surgeons argued that all surgeons should be allowed to work up to 65 hours per week under individual opt-outs, contending that application of the 48-hour limit in the UK led to more tiring shift patterns and a high level of false compliance.

#### Fire services

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<sup>5</sup> Not a recognised social partner.

Trade unions representing public service firefighters in Germany and in the Netherlands sent a joint reply on the specific needs of the sector. They concluded that all on-call time at the workplace should be considered as working time and not as rest time, following SIMAP-Jaeger. However, the rules on rest periods should be relaxed to allow for maintaining the former working pattern of 24-hour shifts, which was considered to suit the particular needs of the fire services, subject to further exploration of the health and safety effects. In view of the need to recruit and train a sufficient number of additional firefighters, the opt-out should also be extended temporarily, subject to protective conditions: in the long term, it should be abolished.

A number of replies were also received from organisations of firefighters at European or at national level, who are not recognised social partners. Some advocated maintaining the opt-out for fire services which wished to use it, changing the rules on rest periods to allow 24-hour shifts to continue, or amending the Directive to clarify that volunteer firefighters<sup>6</sup> were not included within the scope of the Directive.

#### Defence forces

EUROMIL, an organisation of workers in defence forces in different Member States which has applied for affiliation to ETUC but is not presently a recognised social partner, deplored any proposal to change the SIMAP-Jaeger case law, and stressed the importance of ensuring that workers in defence forces were effectively covered by the Directive. It considered that effective transposition was lacking in many Member States regarding working time of the defence forces.

Flexibility was possible for the specific needs of the armed forces; however, any such derogations should be based on comprehensive and legally binding working time rules treating all on-call time and emergency preparedness as working time, should be negotiated through social dialogue, and should provide proper protection against excessive and irregular hours.

### **3.4. Reaction to the Commission's analysis**

*Do you agree with the analysis contained in COM (2010) 106 as regards the organisation and the regulation of working time in the EU? Are there any further issues which you consider should be added?*

Employers were broadly in agreement with the analysis presented in the Commission's consultation paper. Business Europe, UEAPME and CEEP welcomed the broader perspective proposed for the current review. In particular, CEEP welcomed a more 'realistic' approach in the consultation paper and was pleased with the recognition of the importance of better regulation in this area for the provision of effective public services, while CEMR liked its willingness to listen to the social partners with an open mind.

Business Europe and UEAPME considered, however, that the issue of on-call time should be recognised as important for the private as well as for the public sectors and should, in their view, be seen as essentially cross-sectoral.

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<sup>6</sup> In some Member States, fire services include a core of professional full-time firefighters, together with reserves of volunteer firefighters who have other full-time employment but can be called for occasional firefighting training or duties as required. According to the replies received, their employment status and the conditions under which they participate differ between Member States.

Business Europe argues that treating inactive on-call time at the workplace as working time would seriously affect the activities of private health and residential care providers, security and firefighters at chemical plants, IT service providers (particularly call centres), and private security services. UEAPME mentions private care activities, security services, and private transport (taxis, rented cars).<sup>7</sup>

Several employer organisations also emphasised that flexibility could benefit both workers and employers and that it should not have a negative connotation. CEMR and HOSPEEM both thought that the consultation paper portrayed flexibility as negative for employees<sup>8</sup>, and were anxious to emphasise that flexibility could benefit both workers and employers.

Conversely, the ETUC and EPSU replies were critical of the Commission's overall analysis. They considered that the consultation paper did not reflect adequately the legal importance of the working time rules (Art. 151 TFEU, Art 31 Charter of Fundamental Rights), nor the Treaty objective of maintaining and improving protection of workers' health and safety. In particular, they contend that the Directive is not functioning effectively within Member States because the Commission has failed in its obligations to uphold and enforce the legislation.

### **3.5. Possible legislative action**

*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 COM(2010) 106? What do you consider should be its scope?*

The main cross-sectoral social partners agree on the need to review the Working Time Directive. However, there are important differences between employers and unions regarding its context, scope and objectives.

All cross-sectoral employer organisations agree in finding the current rules too rigid and complex, and stress the need to amend the SIMAP-Jaeger case law in particular, as well as the *Schultz-Hoff* and *Stringer* rulings on paid annual leave. For Business Europe, it would also be useful to extend the reference period, but no other issues should be covered by the review, and it insists on keeping the opt-out. Conversely, CEEP and UEAPME would consider broadening the scope for revision to other matters, and take the view that extending the reference period to 12 months and changing the SIMAP-Jaeger case law would substantially reduce demand for the opt-out.

Unions, on the other hand, emphasise that the working time rules are based on fundamental social rights protected by the Treaty and by the EU Charter of Fundamental Rights. Therefore, they consider that any review must, in overall terms, respect and build on the existing law, in order to improve protection currently available to workers (both legally and in practice.) Protecting workers against excessive working hours must be the paramount objective. Derogations should be tightened. They also consider that a new review must give due weight

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<sup>7</sup> On-call time in residential care, fire services and 24-hour health services falls within the scope of the SIMAP-Jaeger judgments, whether it takes place in the public or the private sector. It is not clear to what extent the IT, transport and security activities mentioned actually use on-call time at the workplace, as defined by the SIMAP and Jaeger judgments.

<sup>8</sup> COM(2010) 106 refers frequently to the positive potential of flexibility for both employers and workers. In one instance, on page 4, it states that some forms of flexibility can lead to intensification of work, which can affect health and safety, training opportunities and productivity.

to the positions taken by the Parliament and trade unions during the inter-institutional discussions on the previous amending proposal.

The replies of other social partners generally follow the positions expressed by cross-sectoral employers and trade unions respectively, with a small number of exceptions.

Business Europe is opposed in principle to regulating working time at European level, and considers the Directive is too complex and prescriptive. The new review should recognise the limits for effective EU action, and should decentralise decisions on working time as much as possible to national or company level. Business Europe wants to restrict EU action to the Directive's core objective of protecting workers' health and safety. Other objectives of working time organisation are, in its view, best decided at national level or by collective bargaining.

UEAPME, on the other hand, underlines the importance for SMEs of having a common framework of working time rules which can ensure a fair level playing field across Member States. It still considers the existing rules as somewhat detailed and prescriptive, and would like to see simpler and more flexible rules. UEAPME supports a review, noting that *'the most difficult part of the exercise is to define the scope'* but favours including SIMAP-Jaeger, the annual leave judgments, and the option of a 12-month reference period by legislation. UEAPME seems to put much less emphasis on the opt-out, suggesting that a 12-month reference period would avoid any 'systematic' need for its use. UEAPME felt that protection of health and safety must remain the primary objective, but that account should also be taken of important new aims, such as the need for more flexibility for businesses and workers in the organisation of working time.

CEEP, CEMR and HOSPEEM emphasise that they still consider a 'comprehensive' review of the working time rules as an urgent priority, in view of its huge implications for the functioning of public services. Inactive on-call time at the workplace must be counted as working time. They emphasise the SIMAP-Jaeger case law as the main focus of such a review, but also express some openness regarding protection of employees from long hours or onerous shift patterns and improving reconciliation of work and family life. They are all reserved regarding any changes to the opt-out, though to different degrees. CEEP regrets the rapid spread of the opt-out in public services and considers that its use is not in the interests of employers, workers or service users; it suggests that changes to SIMAP-Jaeger would substantially reduce demand for the opt-out among public services. HOSPEEM however asserts that its members would still insist on keeping the opt-out even if changes were made to SIMAP-Jaeger. Generally, public service employers felt that the overriding objective of the review should be to ensure protection of workers' health and safety in a way which maintains and enhances the continuity and quality of public services, including implications for patients.

Trade unions consider that the health and safety objective should remain paramount, but could encourage action to improve reconciliation of work and family life, provided that this was not at the expense of health and safety protection. Otherwise, they argue that there is no basis for taking account in a health and safety directive of goals such as productivity, competitiveness, or better regulation.

Both ETUC and EPSU are open to a comprehensive review, but they consider that changes to the Directive would only be desirable if they were to genuinely address the need to put an end to the opt-out, and improve protection currently available to workers against working excessive hours. The review should find balanced and sustainable solutions for on-call time, but these should respect and build on the SIMAP-Jaeger case law, with no change to the

definition of on-call time or working time. As well, the review should ensure that the 48-hour limit to working time applies per worker, not per-contract, in the case of a worker who is employed simultaneously under more than one contract. Another priority is to tighten up the derogation for 'autonomous workers'. ETUC is also interested in looking at reconciliation of work and family life, and allowing workers more influence over working time patterns.

ETUC and EPSU do not accept that employers or public services would face any insuperable obstacles to implementing the *SIMAP-Jaeger* judgments, and refer to some successful experiences in changing the organisation of working time in public health services to comply with the 48-hour week. The unions consider that because the Commission has not issued infringement proceedings to enforce *SIMAP-Jaeger*, many Member States have had no real incentive to explore different forms of work organisation which would have provided a sustainable alternative to using the opt-out.

EPSU disputes the consultation paper's references to a lack of legal clarity regarding on-call time, reference periods or the opt-out. For EPSU, the *SIMAP-Jaeger* judgments provide perfect clarity on the requirements of Community law; the problem is rather a lack of political will to implement them on the part of Member States and the Commission.

In ETUC and EPSU's view, the proper course for the Commission in the period 2004-2009 was a legislative proposal to end the opt-out, to clarify that the Directive should apply per-worker and not per-contract, to codify the *SIMAP-Jaeger* case law, and to leave the rules on reference periods unchanged. Instead, the Commission is seen as having sought compromises with Member States who were unwilling to accept such an approach. The unions state that they would find it unacceptable should the Commission decide not to take due account in any new legislative proposal of the Parliament's and the unions' views, as expressed by the failure of the 2004-2009 proposal.

The replies of other social partners generally follow the positions expressed by cross-sectoral employers and trade unions respectively.

The majority of health professionals' bodies underlined the negative health and safety implications of long working hours and irregular hours both for medical workers and for patients. However, two national doctors' federations in different Member States (Austria and UK) contended that surgeons or hospital doctors should be able to work up to 60 or 65 hours per week.

Organisations of public service firefighters also supported the *SIMAP-Jaeger* case law. However, they considered that rules on rest periods should be relaxed to allow firefighters to keep their traditional working pattern of 24-hour shifts, which was considered to suit the particular needs of the fire services, subject to further exploration of any health and safety effects. Under certain conditions, some would consider continuing the opt-out temporarily. Some replies advocated amending the Directive to exclude volunteer firefighters from its scope.

For EUROMIL, an organisation of workers in defence forces, the *SIMAP-Jaeger* case law should be enforced and such workers should be effectively covered by the Directive. It considered that effective transposition was lacking in many Member States regarding working time of the defence forces.

Conversely, a few sectoral replies considered that the Directive did not need to be amended. HOTREC, for hotels, catering and restaurant employers, considered that the sector had now

absorbed the impact of the legislation, and did not favour any further changes. Both employers and unions in the sea fishing sector, and employers in the banking and private security sectors, indicated that they did not have any problems with the current rules. The same approach was taken by OGP, an association of oil and gas producers providing offshore work.

A few replies from sectoral social partners pointed out that Member States, in their view, had not made sufficient use of flexibility already provided by the Working Time Directive (mainly regarding the length of reference periods in the security, industrial and agricultural sectors).

### **3.6. Other forms of action**

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

ETUC and EPSU called for legal action by the Commission to enforce the rules, though some other replies opposed this. Several proposed EU support for exchanging good practices regarding the organisation of working time. As regards the health sector, there was also interest in research and other measures to improve the supply of qualified medical and nursing staff across all Member States.

ETUC and EPSU want the Commission to take all possible measures against nonconformity by Member States, including by launching infringement procedures. They also support measures to encourage better staffing and resources for labour inspectorates in Member States. COESS, representing private security employers, also called for stronger enforcement of the Directive.

Conversely, a joint reply from nine European doctors' organisations (not a recognised European social partner) argued that infringement proceedings were not a good solution, and advocated information, assistance and persuasion for Member States, together with support for sharing good practices.

Several replies indicated that they would welcome Commission support for comparative research and/or exchange of good practices regarding working time generally (Business Europe), to support national studies involving national social partners at local level (CEMR) or on specific themes. Reconciliation of work and family life was a popular theme (Eurocommerce, EPSU). ETUC and EPSU favoured action to publicise innovative work organisation to avoid long working hours, and good practices which allow implementation of *SIMAP-Jaeger*.

Public sector employers in the health sector proposed EU support for comparative research and other measures to ensure a sufficient supply of qualified medical staff in all EU Member States (HOSPEEM)<sup>9</sup> or for exchange of comparative data for local and regional authorities on the match between qualifications and the tasks actually performed by workers, notably for nursing (CEMR).

ETUC also felt that an evaluation of the Part-Time Work Directive would be useful, in order to assess possible action to support higher quality of part-time work.

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<sup>9</sup> REF DG SANCO's recent Green Paper on this issue.

### 3.7. Interest in negotiation

*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?*

The main cross-sectoral social partners (ETUC and Business Europe) emphasise that working time issues are considered as cross-sectoral, and that any negotiations should take place at cross-sectoral level. Business Europe's reply suggests openness to negotiate, while reserving its decision to the second phase. UEAPME's reply similarly states that it is open to discussions and willing to contribute to finding workable solutions. However, ETUC is more reserved, and would require employer positions to move significantly closer to its own before it would consider negotiations.

As regards cross-sectoral social partners for the public sector, the situation is somewhat different. The employer federations express a firm interest in negotiating an overall solution. CEEP strongly advocates finding solutions for public services through cross-sectoral social dialogue at European level. CEEP's affiliate CEMR (representing municipal and regional public services employers) expresses a preference for cross-sectoral social dialogue. Meanwhile, HOSPEEM (CEEP's affiliate representing public health services employers) states its willingness to consider sectoral negotiations as an alternative, should cross-sectoral negotiations be ruled out.<sup>10</sup>

However, EPSU is the main trade union partner for any negotiations regarding the public sector with CEEP, CEMR or HOSPEEM. EPSU's position is that negotiations at the moment would distract from working towards a Directive which offered improved protection for workers' health and safety. Furthermore, EPSU insists that Member States would have to discontinue all existing opt-outs before EPSU decided whether to enter negotiations.

European Medical Organisations (a group of nine European doctors' associations), which is not a recognised social partner, underlined its wish to participate in any negotiations regarding the health sector.

Sectoral social partners generally did not express an interest in negotiation at this stage, other than at cross-sectoral level.

No joint replies were received from the various European social dialogue committees, other than one from the sea fishing sector. The sectoral social partners for sea fishing sent a joint reply indicating that they are already negotiating an agreement regarding the content of a relevant ILO Convention, and that otherwise they want the existing special provisions for the sea fishing sector (under Article 21 of the Directive) to continue unchanged.

EUROCOMMERCE noted that the sectoral social dialogue committee for the retail sector had already agreed to work together on identifying and clarifying any issues of common concern on working time, if possible linked to the reconciliation of work and family life. Therefore, it would be premature to decide on the possibility of negotiation at this stage.

Most sectoral social partners did not comment regarding the possibility of dialogue. A couple considered that sectoral dialogue would be inappropriate, since the issues had cross-sectoral

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<sup>10</sup> Conversely, the EFEE, representing public sector employers in education, considered that only a cross-sectoral dialogue would be workable.

relevance (CEEMET for metal, engineering and technology employers; PEARLE, representing performing arts employers.)

CER for the rail sector indicated that it would be prepared to consider a constructive dialogue if cross-sectoral dialogue should prove unrealistic. Eurocadres was prepared to contribute along with ETUC in any negotiations regarding the working time of ‘autonomous’ or knowledge workers.

EBF-BCESA, representing employers in the banking sector, considered that only certain sectors were really affected by the EU rules, so that sectoral solutions were preferable: however, it was too early to assess whether a sectoral dialogue was feasible.

#### **4. VIEWS ON THE WAY FORWARD**

Several social partners asked the Commission to defer the second-stage consultation until they had received more information. They referred in particular to the Commission’s ongoing work to assess the impact of the Directive, and to the Commission’s pending report on implementation of the Directive by Member States.

UEAPME and ETUC both argue that the second-stage consultation should take place only after the social partners have been informed of the outcome of the Commission’s impact assessment study, so that they can respond on a fully informed basis. ETUC also considers that the social partners should be provided with the Commission’s pending report on implementation of the Directive to inform replies to this consultation.

Eurocommerce states that it will await the Commission’s impact assessment study before deciding whether social dialogue in the retail sector is appropriate.

CEEP meanwhile expresses strong concern that the Commission is carrying out its impact assessment at the same time as the consultation. It fears that such timing would be unhelpful and could have a negative effect on the development of the consultation.

CEEP and CEMR both ask the Commission to await the social partners’ replies to the second-stage consultation, before launching any impact assessment, which should then take account of the replies received.

A distinction should be drawn between studies by external experts on the social and economic effects of the Directive, which are being prepared for the Commission during the consultation of the social partners, and the prospective impact assessment which the Commission must prepare in relation to any legislative changes it proposes. The latter could draw on previous studies, but would await the outcome of the first and second consultations of the social partners.

In order to facilitate the social partners’ preparation of their replies, the Commission proposes to publish the results of all the studies and reports that it has used to prepare the second-stage consultation.

## ANNEX I

### List of recognised European social partners' organisations which replied to the first phase consultation on 'Reviewing the Working Time Directive'

#### **1. Cross-sectoral organisations of employers or workers**

- BusinessEurope
- European Centre of Enterprises with Public Participation and of Enterprises of General Economic Interest (CEEP)
- European Trade Union Confederation (ETUC)

#### **2. Cross-sectoral organisations representing certain categories of workers or undertakings**

- Eurocadres
- European Association of Craft and Small and Medium-Sized Enterprises (UEAPME)
- European Confederation of Executives and Managerial Staff (CEC)

#### **3. Sectoral organisations representing employers**

- Association of National Organisations of Fishing Enterprises in the EU (EUROPECHE) (*joint reply with COGECA and ETF*)
- Banking Committee for European Social Affairs (EBF-BCESA)
- Committee of Agricultural Organisations in the European Union (COPA) & Employers' Group of the Committee of Agricultural Organisations in the European Union (GEOPA) (*no overall position: forwarded replies of AT and UK national affiliates*)
- Community of European Railway and Infrastructure Companies (CER)
- Council of European Employers of the Metal, Engineering and Technology-Based Industries (CEEMET)
- Council of European Municipalities and Regions (CEMR) (*also separate replies of its DE affiliates, the TdL (employers' association representing German Länder) and DStGB (employers' association representing German cities and municipalities)*)
- European Chemical Employers Group (CEEG) (*also separate reply of its DE affiliate, BAVC*)
- European Committee of Sugar Manufacturers (CEFS)
- European Coordination of Independent Producers (CEPI) (*joint reply with FIAPF*)
- European Federation of Education Employers (EFEE)
- European Federation of Security Services (CoESS)
- European Hospital and Healthcare Employers' Association (HOSPEEM) (*also separate reply of its UK affiliate, NHS*)
- European Rail Infrastructure Managers (EIM)
- General Committee for Agricultural Cooperation in the European Union (COGECA) (*re sea fishing only: joint reply with Europeche and ETF*)
- Hotels, Restaurants and Cafés in Europe (HOTREC)
- International Federation of Film Producers' Associations (FIAPF) (*joint reply with CEPI*)
- Performing Arts Employers' Associations League Europe (PEARLE)
- Retail, Wholesale and International Trade Representation to the EU (EuroCommerce)

#### **4. Sectoral organisations representing workers**

- European Federation of Public Service Unions (EPSU)
- International Federation of Actors (FIA) & International Federation of Musicians (IFM) (*joint reply with UNI-MEI as EAEA, Alliance Européenne des Arts et du Spectacle*)
- European Transport Workers' Federation (ETF) (*regarding sea fishing only: joint reply with Europeche & COGECA*)

## ANNEX II

### **Organisations which replied to the consultation but which are not (and are not affiliated to) recognised European social partners**

- FNSEA (Fédération Nationale des Syndicats d’Exploitants Agricoles [France, farmers])
- Federation of European Fire Officer Associations
- International Association of Oil and Gas Producers (OGP)
- EFCO and HPA (European Federation of Camping Site Organisations and Holiday Park Associations)
- BDPK Bundesverband Deutscher Privatkliniken e.V. [organisation of German private medical clinics]
- EUROMIL (European federation of associations representing workers in national defence forces: seeking affiliation to, and forwarded by, ETUC)
- International Association of Fire & Rescue Services
- Fédération française des Sapeurs-Pompiers [France, firefighters’ association]
- Royal College of Surgeons [UK, medical training body]
- European Medical Organisations [joint reply of nine European associations of doctors or doctors in training: AEMH, CEOM, CPME, EANA, EMSA, FEMS, PWG-EJD, UEMO, UEMS] and additional reply of FEMS/Fédération Européenne des Médecins Salariés
- ANAAO-ASSOMED [Italian association of salaried doctors]
- Österreichische Ärztekammer (Austrian Federal Chamber of Employed Doctors)
- Royal College of Nursing (UK)