Position on the Commission's communication on working time

CEMR EMPLOYERS' PLATFORM RESPONSE TO COMMISSION COMMUNICATION ON WORKING TIME

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This Communication was also targeted at the social partners at Community level, constituting the first phase of the consultation process envisaged in Article 138 (2) of the Treaty establishing the European Community.

The Council of Municipalities and Regions Employers' Platform (CEMR-EP) is a recognised social partner and represents employers in the Sectoral Social Dialogue Committee for Local and Regional Government. The CEMR-EP response to the five issues presented in the consultation document follows the structure of this document.

This response is preceded with a summary of the main points in the CEMR-EP position which are set out below in order of priority:

Summary

- CEMR would welcome appropriate changes to the Directive to clarify the intended definition of working time as set out in the formulation of the Working Time Directive, where room was left for national and sectoral solutions 'in accordance with national laws and/or practice".

- For the application of the opt-out regulation, further research into the operation and administration of the process based on the experience in different member states is needed. In the current situation, CEMR-EP opposes the abolition of the 48 hour opt-out and supports the principle that the opt-out should be a voluntary action by an individual employee and that the employee's agreement should be free and informed.

- The application of compensatory rest must take account of national systems and legal arrangements and make possible the continuation of current national practices, so that levels of public health and safety and care services can be maintained. In particular, it must be clear that compensatory rest must be granted within a reasonable period and not necessarily immediately.

- The EU has already legislated in a number of areas, which improve the reconciliation between work and family life. CEMR-EP considers the Working Time Directive not to be the right tool to achieve this target. An interrelated approach may well provide for a solution capable of striking an acceptable balance. A truly interrelated solution is only capable of being constructed at a national and local level where employers and employees can reach the solutions necessary for their needs.

· As far as reference periods are concerned, CEMR-EP would support the extension of the basic reference period to a timeframe of 12 months with a further derogation allowing the extension of this period by collective agreement.

· CEMR-EP considers additional separate records for the calculation of working time to be bureaucratic and unnecessary as, for many employees, the detail required is accessible from pay records.

Reference Periods

The Directive provides that with regard to calculating the maximum weekly working time of 48 hours, the hours worked by employees may be averaged over a period not exceeding 4 months. Furthermore, this may be extended to 6 months in a number of special cases set out in Article 17 (2) or extended up to 12 months by collective agreement.

The application of reference periods is particularly important in the organisation of flexible working time. The shorter the reference period the less opportunity there is to organise working time in a flexible way to the benefit of employers and employees. Reference periods of less than a year for example can place considerable restriction on the ability to organise working time in areas subject to particular seasonal variations.

The Commission Communication states that there is a tendency in member states to calculate average working time over a period of a year. Where this is achieved it is by collective bargaining at a local, regional or national level.

Those member states (existing and new member states) which do not have a tradition of national collective bargaining or high density of local collective bargaining are denied this flexibility. Therefore an extension of the basic reference period to 12 months would provide greater flexibility for these countries and enable then more easily to meet the targets set out in the European Employment Strategy.

CEMR-EP would support the extension of the basic reference period to 12 months with a further derogation allowing the extension of this period by collective agreement.

The Court of Justice's interpretation of the concept of working time in the SIMAP and Jaeger cases

CEMR-EP has already expressed its concern at the impact of the ECJ rulings in the SIMAP (C-303/98) and Jaeger (C-151/02) cases in a letter to Commissioner Diamantopoulou dated 4 December 2003. The question of the definition of working time is a particularly serious matter because it will have a significant impact on local and regional authorities, in particular, for their management of public safety and health and their ability to continue to deliver high quality health, social care and other services.

A significant problem has been created by the interpretation of the definition of working time (Article 2 (1)) but our concerns about the effect of the Jaeger judgement, in particular, go further and concern the ECJ's position taken with regard to the granting of compensatory rest, this being a derogation allowable under Article 17. This is specifically in relation to activities involving the need for continuity of service.

The definition of working time

Council Directive 93/104/EC limits the working time to 48 hours a week. In the aforementioned Jaeger-ruling, the Court has interpreted the Directive as meaning that working time includes time spent resting or sleeping while in the workplace. The ruling concerned on-call doctors, but if the same principle were applied to other professions (such as fire fighters, ambulance personnel, staff engaged in residential care activities, security staff etc) this could dramatically alter the flexibility afforded to municipalities managing such

services. It would thus increase the required size of the workforce and the associated costs for local authorities charged with managing these services or alternatively result in a reduction in the levels of protection and care provided.

CEMR-EP believes that both the SIMAP and Jaeger judgements have changed the definition of working time from what was originally intended in the Working Time Directive, where room was left for national and sectoral solutions, as set out in the formulation 'in accordance with national laws and/or practice". CEMR-EP would therefore welcome appropriate changes to the Directive to clarify the intended definition of working time. It seems that the original intention, being a health and safety measure, was to limit the amount of time actually spent working.

This is because in several member states of the European Union, having personnel resting and/or sleeping at the workplace is essential for providing the required levels of service while at the same time guaranteeing the health and safety of the workforce. Systems for scheduling and remuneration, in which time spent resting and/or sleeping at the workplace only partially constitutes working time, make this possible. This means that in agencies providing public health and safety, the total number of hours that personnel spend at the workplace often exceeds the limit of 48 hours per week as set by the Directive. However, after the subtracting or weighing of hours spent resting or sleeping, employees stay well within that limit and often within the narrower limits set by national or local collective labour agreements.

In summary we take the view that the ECJ ruling on the definition of working time must be remedied quickly as it contradicts the definition of working time set out in the Directive which states that an employee must be working, at his/her employer's disposal and carrying out his activities or duties in accordance with national laws and/or practice.

Granting compensatory rest

This Jaeger judgement has also placed considerable restriction on the ability to allow essential derogations, specifically the application of compensatory rest. The judgement has effectively removed part of the derogation, specifically the arrangements by which compensatory rest may be taken, for example where the normal period of daily rest is delayed. The judgement provides that the rest must be taken immediately but this may be impossible if there are staff shortages or unexpected sickness or other absence. Given that the rest of the derogation remains, this could have the effect that those responsible for providing essential services will need to make workers work even longer single shifts before they are in a position to provide a singular period of 11 hours compensatory daily rest. This would produce an effect contrary to the intention of the Directive.

National systems designed especially for certain groups of personnel are the result of long historical processes, in which developments in the required levels of public health and safety are fine-tuned with legal developments in employee health and safety. Most member states of the EU have embedded their individual systems in particular arrangements for certain groups of employees in their respective national laws on working time. The recent ruling in the Jaeger-case rules out these particular legal arrangements, and thereby significantly upsets the achieved balances within the member states between public and employee health and safety. In terms of organisation and staff management, it will be very difficult to follow the Directive as interpreted by the ECJ in the Jaeger-case while at the same time guaranteeing the required levels of public health and safety.

While CEMR-EP fully support the health and safety aims of the Working Time Directive, CEMR-EP is concerned that these judgements go beyond the protection of an individual's health and safety. We believe that the impact of these judgements could lead to a reduction in the effectiveness of services in sectors such as fire and rescue services, health services, care of the elderly, care of the disabled and care of vulnerable children. The consequences of the judgements could be shortages of key personnel and increases in costs in many

services of provided by local authorities, leading to the quality of service provision being undermined.

Given the importance of the Jaeger ruling by the ECJ and the problems it causes for services in public health and safety, CEMR-EP would request an appropriate amendment to the Directive to reflect its original intention. The organisation of working time must take account of national systems and legal arrangements and make possible the continuation of current national practices, so that levels of public health and safety and care services can be maintained.

In particular, it must be clear that compensatory rest must be granted within a reasonable period and not immediately.

The impact on local authorities

The full impact on local authorities of the SIMAP and Jaeger decisions is difficult to assess with precision because of additional factors such as the availability of the opt-out and the procurement of certain services from the private sector. However, national employers' organisations provided the following observations at this stage:

In Finland the active working time of physicians on-call on site varies from 10 to almost 100 percent. The Commission for Local Authority Employers estimates that if the above on-call work was to be handled by organising work in 24-hour shifts, an additional 500 physicians, at a minimum, would be needed. Even without a need for more physicians, there is already a shortage of about 9 percent. In other words, local and joint authorities together have almost 1,000 posts for physicians not filled permanently (the total number of posts for physicians is about 11,000). Even the provision of more medical education would not make the additional resources available until more than six years from now.

In the Netherlands the ruling has a major impact on firefighters and ambulance services which utilise time on-call as a means of responding to the demands placed on them. More personnel will need to be hired in order to provide the same level of preparedness. This would require an additional 650 firefighters with associated additional cost at a time when fire departments already face difficulties in hiring adequate staff. The ambulance service would require an additional 150 workers.

In the UK the social care sector will be heavily affected as sleep-in duties are a reasonably common feature in the working patterns established for the provision of residential care for vulnerable children and adults. In an area where many local authorities already face difficulties in recruiting staff this would require the additional recruitment of over 6,000 workers. This estimate only relates to the direct provision of such services. The majority of residential care is now provided by the private sector where the impact may be even greater. Where care is procured by local authorities for their citizens these cost will simply be passed on to the local authority. There could also be additional impact on other 24 hour services such as environmental health, and there could yet be further impact on the ability of fire services to implement staffing structures necessary to meet the requirements of their Integrated Risk Management Plans.

In Denmark the impact is not so intense although there will be a requirement to recruit around 100 additional doctors. There will also be an impact in the social sector and the fire and rescue services.

There will also be significant effects in the health sector in other countries such as Sweden, Norway and Germany which it is not yet possible to quantify.

Given the importance of such services it may even be time to consider additional exemptions and derogations from aspects of the Directive for key public service personnel.

The conditions of application of article 18.1 (b) (i) - **48 hour opt-out**

The 48 hour opt-out has not been widely used in the EU. The main user has been the UK although other member states are showing increasing interest in the use of the opt-out in particular sectors. This interest is driven by the need to be able to respond flexibly to the challenges faced by employers in production environments but also particularly in the local and regional government sector, and the demands of citizens for responsive local public services. This is particularly acute in the health, social care and civil protection services. The importance of the potential use of the opt-out has grown significantly since the rulings of the ECJ in the SIMAP and Jaeger cases. CEMR-EP would support the retention of the capacity to opt-out of the 48 hour maximum working week. The opt-out allows individual freedom in respect of how citizens live and work in the EU.

The Commission Communication states that it has conducted understandably most of its research on this area in the UK. CEMR-EP would wish to point out that in the local and regional government sector in the UK the opt-out is rarely used in practice, although where it is it provides valuable flexibility for both local authorities who must balance demanding service needs against sometimes reduced employee resources and employees who have flexibility to work additional hours if they wish. We also think it insufficient for action at EU level to be based on research in a single member state. More information on experiences in other member states utilising the opt-out is needed in order to carry out detailed research into the operation and administration of the process while also considering its impact on the overall length of working hours and effectiveness in creating additional labour market flexibility.

The voluntary nature of the opt-out

However, CEMR-EP does, of course, support the principle that the opt-out should be a voluntary action by an individual employee and that the employee's agreement should be free and informed. Employees should not be forced to sign opt-outs. It goes on to say that a practice whereby the opt-out agreement is presented at the time the employment contract is signed may undermine the intention that the agreement is a free decision. We take a simple view which is that the commencement of the employment contract is an appropriate time to convene agreements and related administration. Therefore no such conclusion could be drawn from such a practice. Under the UK legislation (The Working Time Regulations 1998) it is clear that the ability to opt-out is voluntary and that employees may terminate any such agreement by giving notice. The Working Time Regulations also provide various penalties for employers if they fail to comply, including orders by inspectors, prosecution of the employer and financial compensation for employees. Financial compensation would be particularly appropriate in the event that an employee suffered a detriment as a result of refusing to agree opt-out of the 48 hour maximum working week.

CEMR-EP would oppose the abolition of the 48 hour opt-out. At this stage there is even greater need for flexibility in the labour market in order to meet the expectations of the European Employment Strategy.

In the UK, the Commission rightly points out that of those that have signed an opt-out and work in excess of 48 hours, many do not actually need to do so because their work is covered by the unmeasured working time exemption. Employers should not be criticised for asking employees to sign opt-outs in such circumstances as where the working time legislation is perhaps not best understood they are merely attempting to ensure, for the avoidance of doubt and potential litigation, that their operations comply with the law. Equally, where employees sign opt-outs but then do not work more than 48 hours employers should not be criticised either. In this situation the employee has merely signed an opt-out to confirm his/her willingness to work in excess of 48 hours which might give access to additional overtime work if available. It is an expression of individual freedom. As phrased currently the Directive requires employers not to require employees to work in excess of 48 hours unless they first have the worker's agreement to perform such work. To imply that an

employer could only ask an employee to sign an opt-out at the stage when they are about to work over the 48 hours average would lead to additional administrative burden and potentially lead to a situations whereby employees would then feel pressured to sign the opt-out rather than exercising their free decision earlier in the employment relationship.

The maintenance of records

Additional separate records for the calculation of working time are often not necessary as for many employees the detail required is accessible from pay records. This is as much the case for those that work below 48 hours as those that work beyond. As already observed by the Commission many of those that have signed opt-outs in the UK are actually covered by the unmeasured working time exemption in any event and so records are not required. Many others will have accurate records of hours worked for the purposes of calculating additional payment. CEMR-EP would oppose additional bureaucratic requirements for record keeping.
CEMR-EP do accept that the employer retains responsibilities for the health and safety of employees. However, these responsibilities may be fulfilled via good management practices including regular risk assessments and the provision of appropriate occupational health services.

Measures aiming at improving the reconciliation between work and family life

Directive 93/104/EC (Working Time Directive) is a health and safety measure designed to place appropriate limitations on working hours, rights to in-work, daily, and weekly rest breaks, rights to paid annual leave and rights to health assessments for night workers. This Directive is not a tool for reconciling work and family life.

The EU has already legislated in a number of areas which improve the reconciliation between work and family life. Council Directive 92/85 EEC (Pregnant Workers Directive) provided rights for expectant and new mothers. Council Directive 96/34/EC (Parental Leave Directive) provided rights to additional leave for employees to care for children and other dependents.

These have been implemented in the member states. In many cases additional specific measures appropriate to the industrial requirements and national practices have been implemented to assist further the reconciliation between work and family life.

The Parliament and Council have established a floor of rights and obligations which operate across the EU. However, CEMR-EP believes that any additional measures should be a matter to be decided at national or local level whether by legislation or collective bargaining, consistent with the practices and traditions of individual member states and individual industrial sectors. CEMR-EP could not support further binding measures at European level in this area.

This is not possible within the confines of The Working Time Directive.

Whether an interrelated approach to these issues would allow for a balanced solution capable of meeting the Commission's criteria, i.e. that it should:

- give workers a high level of health and safety protection in respect of working time;
- give firms and Member States more flexibility in the way they manage working time;
- make it easier to reconcile work and family life;
- avoid imposing unreasonable constraints on firms, particularly small and medium-sized businesses.

The Commission's criteria are demanding but to some extent the individual aims are incompatible. Measures designed to achieve an individual criterion may well hinder the achievement of another. There is therefore the need to strike the right balance.

An interrelated approach may well provide for a solution capable of striking an acceptable balance between the Commission's criteria but this is not possible within the confines of the Working Time Directive or indeed at the European level. The interaction of Council Directive 93/104/EC (Working Time Directive), Council Directive 92/85/ EEC (Pregnant Workers Directive) and Council Directive 96/34/EC (Parental Leave Directive) provide the basic floor of an interrelated solution. However, a truly interrelated solution is only capable of construction at a national and local level where employers and employees can reach the solutions necessary for their needs. This enables European and national legislation to be combined with the practical realities of the labour market for the maximum effectiveness in any period in time.

The next steps

CEMR-EP trusts that the Commission finds that this response is constructive in identifying the problems which need to be tackled. We are of course concerned to see what may be the outcome of the consultation on the Communication because of the potential impact on local authorities and their citizens. We would kindly ask the Commission to take CEMR-EP's concerns on board.