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

Executive summary

- CEEP welcomes the scope of the newly-launched consultation. We regard it as a positive step towards making progress in modernising the European legislation on working time.
- CEEP is pleased that the European Commission's consultation document recognises the challenges and needs faced by public employers with regard to delivering high quality continuous services around the clock.
- CEEP agrees with the Commission that the existing Directive needs to be more responsive to the needs of public employers and that ECJ rulings have interpreted the Directive in ways which have created legal uncertainties in its implementation.
- Bearing in mind the failed results of the conciliation process between European Parliament and the Council of spring 2009, a social partner negotiated solution seems to be the appropriate way of dealing with the Working Time Directive to improve compliance with the Directive and to deal with the existing legal uncertainties.
- CEEP is ready to act as a responsible cross-sectoral Social Partner and try, together with the other cross-sectoral Social Partners, to come up with a balanced negotiated solution under article 155 TFEU. CEEP notice that the Directive has a cross-sectoral application and therefore a solution should be cross-sectoral.

Introduction

On 21 December 2010, the European Commission issued a Communication and a second stage consultation to the European Social Partners concerning a review of the Working Time Directive (2003/88/EC).

In connection with this the Commission also launched a comprehensive review of the operation of the Working Time Directive through a Report on implementation by Member States of Directive 2003/88 and a detailed report named "accompanying document" to the first mentioned report.

CEEP welcomes the scope of the newly-launched consultation and regards it as a positive step towards making progress in modernising the European legislation on working time. CEEP would like to thank the European Commission for the detailed review of the Directive. CEEP recognises the huge amount of work undertaken to gain a detailed overview of the many aspects of working time that have to be addressed, given the complex nature of the issues involved. This is reflected in the accompanying document from the Commission. This is especially pertinent in the context of the new needs of the labour market and given the nature of the services provided by the public sector.

Furthermore, the clear focus put on public services by the European Commission is welcomed from a CEEP perspective. The Communication recognises that public services employers need special flexibility in order to make services delivered around the clock function effectively. It is especially positive to note that the Commission is seeking to suggest balanced proposals where the EU-legislation provides a framework that can be supplemented by negotiated solutions. In several cases the Commission specifically suggests leaving the details within the frame for the social partners at appropriate level to fill by negotiation and collective agreements. That has to be done in accordance with national practice.

1. Previous CEEP positions

Since 2003 CEEP has consistently identified the problems that are now evidenced in the Commissions detailed report SEC(2010)1611/2. In particular CEEP would also like to refer to its response to the first stage consultation on the review of the Working Time Directive in May 2010. In the response CEEP focused on the concepts of: working hours, on-call time, reference periods for calculation and compensatory rest periods as critical issues where a pan-European solution is required.

2. Social Partners' responsibilities

CEEP would like to state that this answer takes as its starting point the rights and obligations given to the Social Partners in Article 154 of the Lisbon Treaty. The European Treaty gives the Social Partners certain prerogatives - but it also at the same time puts obligations on the same Partners. CEEP will continue to do everything in its power to live up to these obligations.

3. ETUC and BUSINESSEUROPE answers to the first stage consultation

CEEP takes note of the answers given by ETUC and BUSINESSEUROPE in the first stage consultation on working time. Although the answers given are very different, reflecting the very different interests involved, CEEP notices that both of them left open the possibility of a negotiated solution. CEEP finds this a very positive sign that in spite of the expected differences of opinion there is sufficient common ground to form the basis of a negotiated solution.

CEEP will ensure that its response to this consultation will be shared with the two other recognised cross sectoral Social Partners in order to work for a joint solution.

4. Focus on public employers and services

The consultation and the accompanying documents focus on public services and public employers. The Member States are responsible for the implementation of Directive 2003/88 and all the Member States have made an effort to implement it effectively. But the documents also recognised that public services that have to be delivered 24 hours a day and 7 days a week have special needs that have not properly been addressed in the past. Public employers are in a very difficult situation because of their public obligation to deliver high quality continuous services. This is why it is so important to take note of the views expressed by public employers. This has not been so clearly acknowledged in the past, but CEEP can see a growing understanding of this in the consultation paper and welcomes this.

Response to the consultation

1. A need for adjustments and amendments

CEEP agrees with the Commission that the existing Directive needs to be more responsive to the needs of public employers and that ECJ rulings have interpreted the Directive in ways which have created legal uncertainties in its implementation. CEEP is sure this was not the original intention behind the Directive. CEEP also agrees with the Commission that diversity in working time patterns between Member States persists and will remain the case. A new Working Time Directive has to take these facts into consideration.

CEEP fully supports the health and safety aims of the Working Time Directive. What has always concerned CEEP is that the judgements go well beyond protecting the individuals health and safety (see for instance *Isère* C-428/09 and joined cases *Schultz-Hoff & Stringer*, C-350/06 & C-520/06). In CEEP's view these court cases are not helpful to the public services. In addition it would appear that not a single Member State is now fully in compliance with the Directive.

2. The developments in the use of opt-out

CEEP notes the fact mentioned by the Commission that at the moment 16 Member States are using the opt-out and endorses the Commission's view that "it does not seem realistic to ask all these Member States to refrain from using this derogation, without ensuring feasible alternative solutions." This is in accordance with CEEP observations in the course of several meetings of the Social Dialogue Committee. It appears the Commission confirms that the use of the individual opt-out has spread in the Member States because of the lack of solutions to the problems created by the ECJ judgements. The use of the opt-out is likely to spread even more, possibly to all the Member States, if the Social Partners do not take responsibility for securing alternative solutions.

3. The lack of solutions developed by EU Parliament and Council

Bearing in mind the failed results of the conciliation process of spring 2009 and despite the Commission's willingness to legislate in the field of working time it seems difficult if not

unlikely that the European Parliament and the Council will be able to reach an agreement on a revision of the Working Time Directive. Therefore a social partner negotiated solution seems to be the appropriate way of dealing with the Working Time Directive to improve compliance with the Directive and to deal with the existing legal uncertainties. Without this course of action all 27 Member States are likely to continue to experience problems in complying with the Directive.

The special tasks and obligations of the public employers in Europe

➤ ***Public services 24 hours 7 days a week***

Public services have to be planned around the needs of the users (the public) who has to have access to essential services such as firefighting, health and social care, education, transport, broadcasting and utilities (gas, electricity, water) at all times. Working patterns in the relevant sectors are planned on this basis, and have to balance the requirements of users with the requirement to safeguard the health and safety of the workers providing them. The Commission has also noted that some organisations for fire-fighters wish to keep their 24 hours work-plan. The Isère Case 428/09 clearly shows the need for a more flexible approach than the existing legal interpretation by the Commission and the ECJ.

This can best be done at an appropriate level by the Social Partners in order to meet the desire both of public employers for more efficient public services, of trade unions for safe and decent working conditions, and of both parties for legal certainty. Social Partners are close to the issues and understand the practical impact on frontline services.

➤ ***Different working intensities***

In a practical sense services of general interest in many cases operate with very variable work intensity in accordance with national law. We therefore welcome the Commission's proposal to introduce a derogation in relation to on-call time. A solution to different working intensities needs to be found which strikes a balance and is proportionate to the degree of risk involved.

➤ ***Court cases at EU level should take intentions of Social Partners into consideration***

The Commission also seems to recognise that many of the problems Member States have experienced in implementing the Directive stem from the unhelpful European Court of Justice judgments interpreting the Directive's provisions in ways which undermine the original intention of the legislation, i.e. to protect the health and safety of workers.

If Social Partners had a closer involvement with the court these kinds of problems could more easily be avoided. A formal recognition of the Social Partners in the court system should be established.

- ***Regulation that covers public services in 27 member states has to have a framework character***

Labour law and industrial relation systems in the 27 Member States have a very different character. Attempts to apply common rules across Europe in this area must have a more general and framework nature. This applies particularly in the area of working time, and this understanding must underpin both the way a revised Directive is worded and the Courts' interpretation of such a Directive.

Conclusion:

CEEP answer to the three questions from the Commission

Commission question:

1. Should changes to EU working time rules be limited to the issues of on-call time and compensatory rest, or should they address a wider range of issues, such as some or all of those listed in section 5.2?

CEEP answer:

A new Working Time Directive has to solve the questions of on-call and compensatory rest. But there are also other problems that should be solved. The scope of negotiations is for the Social Partners to decide.

Commission question:

2. Bearing in mind the requirements of Article 153 TFEU do you consider that:

- a) the options set out in section 5.1 regarding on-call time and compensatory rest,
 - b) some or all of the options set out in section 5.2 regarding other issues raised by social partners and the current review,
- could provide an acceptable overall framework for addressing the concerns set out in your replies to the first phase consultation?

CEEP answer:

The suggestions in sections 5.1 and 5.2 of the paper are helpful and may provide the basis for an agreement which would address the concerns raised by CEEP in our response to the 1st phase consultation of the Social Partners. However the Social Partners are through a negotiating process best placed to agree on an acceptable overall framework. There is a very delicate balance of interests involved in order to reach a lasting, practical and workable

solution which balances the issues, commands the confidence of both employers' and workers' representatives and is broadly acceptable to the Member States.

Commission question:

3. Are the EU social partners, at cross-industry or sectoral level, willing to enter into negotiations on all or part of the issues raised in this communication with a view to concluding an agreement that would make it possible to amend the Directive by using the possibilities provided under Article 155 TFEU?

CEEP answer:

Yes. CEEP is ready to act as a responsible cross-sectoral Social Partner and try, together with the other cross-sectoral Social Partners, to come up with a balanced solution. CEEP notices that the Directive has a cross-sectoral application and therefore a solution should be cross-sectoral. In this connection, CEEP is prepared to wait until ETUC has finished its decision procedure later this year.

A revised Directive containing new text on pivotal issues will represent for the European regulation a new and fresh start in the area of working time.
