



Position paper on the organisation of working time

CEMR EMPLOYER'S PLATFORM RESPONSE TO SECOND PHASE CONSULTATION CONCERNING REVISION OF DIRECTIVE 93/104/EC ON CERTAIN ASPECTS OF THE ORGANISATION OF WORKING TIME

Executive summary

48 hour opt-out (article 18.1 (b)(i))

CEMR-EP supports the first option presented by the Commission regarding the individual opt-out provisions, i.e. the tightening up of conditions applying to the individual opt out and the strengthening of measures to ensure its voluntary nature. The other options proposed by the Commission are considered unworkable or undesirable in a pan-European context.

Definition of working time

CEMR-EP seeks urgent clarification on the definition of working time. Simply introducing the concept of inactive time is not a solution in itself. The Commission suggestion gives no indication of how this 'inactive time' will be considered in respect of the necessary calculations required in relation to working time and eligibility for the various rest periods. This option requires very careful consideration as it must be more fully defined and able to take into account national practices and traditions.

CEMR-EP also seeks urgent clarification on the issue of compensatory rest. The judgement of the ECJ goes beyond what was envisaged by the Directive and has a dramatic effect on the ability to deliver many important services. The solution must make it clear that there is not an absolute requirement on employers to provide compensatory rest immediately in legitimate situations subject to derogations when in-work, daily or weekly rest is not afforded, but that it should be provided within a reasonable timescale. This timescale could be set through national legislation or collective bargaining or by other appropriate national practices and traditions.

Derogations from the reference periods (Article 17.4)

CEMR-EP supports the extension of the reference period to calculate maximum weekly working time to 12 months, with a further derogation allowing the extension of this by collective agreement.

Compatibility between work and family life

CEMR-EP agrees that the Working Time Directive is a health and safety measure and not the appropriate instrument to improve compatibility between work and family life. Work life balance issues are best dealt with at the local level taking into account domestic legal frameworks.

Urgency and appropriateness of solution

In light of the continuing problems that the SIMAP and Jaeger judgements are causing public authorities we urge the Commission to seek a speedy resolution, particularly to the issues of the definition of working time and granting of compensatory rest. We would also wish to see continued recognition of the view taken by the Parliament that along with the health and safety of workers, the solutions should take into account considerations of an economic nature.

This is particularly important to public service delivery in the social care and emergency service field.

Introduction

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.

On 19 May 2004, the European Commission issued the second stage consultation of the social partners at community level concerning the revision of Directive 93/104 concerning certain aspects of the organisation of working time.

The following constitutes CEMR-EP's opinion on the objectives and content of the proposals envisaged by the Commission. We request that the Commission come forward with legislative proposals to revise the working time Directive as a matter of urgency.

Opt-out under Article 18.1 (b) (i)

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, given 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.

We restate the point we made in our response to the first consultation that conclusions on the future of the opt-out should not be based on research conducted in a single member state, i.e. 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, which must balance demanding service needs against sometimes reduced employee resources, and employees, who have flexibility to work additional hours if they wish. 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.

Our views on each of the options put forward by the Commission are therefore as follows:

(a) Tighten the conditions of application of the individual opt-out in order to strengthen its voluntary nature and prevent abuse in practice.

CEMR-EP would support this option as the most practical and realistic. CEMR-EP, 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 as a pre-condition for employment or at any point during the employment relationship.

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. Some conclusions drawn from the UK experience may not be correct and it is possible that any observed failing is perhaps more an issue of employer and employee awareness than blatant abuse.

In our response to the first Communication we articulated the simple view which is that the commencement of the employment contract is an appropriate time to convene agreements and related administration, e.g. 48-hour opt-out although it is clearly a possibility that such an agreement and associated written documentation could be discussed after the formation of the employment contract had concluded. This could be a feature of the tightened conditions. We would be happy to consider and discuss other measures aimed at preventing abuse of the opt-out provisions.

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.

(b) Permit exemptions from the maximum weekly working time only through collective agreements or agreements between the social partners

The question of working time is about individual freedom as well as health and safety. There must be a solution achievable that allows workers to work beyond 48 hours if they wish to or indeed need to in order to maintain their lifestyle and take care of their family. This option would deny many workers this possibility because many workplaces or national industrial relations systems in member states do not provide the necessary structures for this type of agreement. This will be particularly the case in the new member states which will face increasing competitive pressures during integration and in some cases have only fledgling social dialogue processes. The flexibilities provided by the opt-out may be particularly of benefit to both employers and employees in these states. This option would deny them the possibility.

(c) Permit derogations from Article 6(2) if authorised by means of collective agreements or agreements between the social partners (in undertakings with no employee representation the individual opt-out with tighter conditions would remain applicable).

In order for this option to be pursued the Commission would need to retain the individual opt-out presumably with tighter conditions as envisaged in option (a). The arguments in relation to option (b) are as relevant to this option and it would seem likely that many workplaces would remain in the situation where the individual opt-out is the available and appropriate way to validate a worker's willingness to work beyond the 48 hour average weekly maximum. Because of the disadvantages associated with this option it must be excluded in favour of the alternative of simply retaining the individual opt-out.

(d) Phasing out the opt-out and identifying practical ways of tackling abuses in the meantime

CEMR-EP does not support any suggestion that the individual opt-out should be phased out. At this stage of development of the EU there is even greater need for flexibility in the labour market in order to meet the expectations of the European Employment Strategy.

Definition of working time

CEMR-EP seeks urgent clarification on the definition of working time and welcomes appropriate changes to the Directive to clarify the intended definition. It seems that the original intention, being a health and safety measure, was to limit the amount of time actually spent physically working.

In our view, 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/her activities or duties in accordance with national laws and/or practice. There remains the possibility that the wording in Article 2 (1) could be enhanced to ensure that this is the case.

CEMR-EP welcomes any solution which remedies the problems created for the provision of public services by the SIMAP and Jaeger judgements. It is willing to consider other possible solutions providing they do not inhibit the ability of local municipal and regional authorities to deliver critical services. However, we are cautious about seeing the concept of 'inactive time' as a panacea for this particular problem.

It could be that a satisfactory interrelated solution may be provided which has as a component the concept of inactive time. However, simply introducing calling on-call time 'inactive time' is not a solution in itself. What is critical is how this period of time is to be measured against the necessary components of 'working time' and 'rest'. The Commission suggestion gives no indication of how this 'inactive time' will be considered in respect of the necessary calculations required in relation to working time and eligibility for the various rest periods. Such an option requires very careful consideration. In order to do so it must be more fully defined so that employers and employees can evaluate how it will work in practice. Also if this is an option which is going to be pursued then ultimately it must provide a formulation which is able to take into account national practices and traditions.

The solution to this particular issue must be very carefully considered and very clearly explained in the Directive otherwise legal challenges of a similar type to SIMAP and Jaeger will simply continue. A critical component of the solution is the interrelated and extremely important issue of the timing of compensatory rest.

Granting compensatory rest

The Jaeger judgement has 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 single period of 11 hours 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 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 our view, the Directive must be modified in such a way as to remedy the ECJ's interpretation that compensatory rest must be taken immediately. The amendment must make it clear that in legitimate situations subject to derogations when in-work, daily or weekly rest is not afforded, there is not an absolute requirement on employers to provide compensatory rest immediately, but that it should be provided within a reasonable timescale. This timescale could be set through national legislation or collective bargaining or by other appropriate national practices and traditions.

This is a really important issue and will still be so regardless of whether we have two definitions of time (working and rest) or three definitions of time (working, inactive and rest).

Derogations from the reference periods (Article 17.4)

CEMR-EP welcomes the proposal to extend reference periods for the purposes of calculating the maximum weekly working hours by regulation. As indicated in our response to the first stage consultation, we feel that legislation should allow for a reference period of 12 months for the calculation of maximum working hours with a possibility to extend this further by collective agreement to allow for additional labour market flexibility required in certain sectors.

Compatibility between work and family life

CEMR-EP agrees that the Working Time Directive is a health and safety measure and not the appropriate instrument to improve compatibility between work and family life. Work life balance issues are best dealt with at the local level taking into account domestic legal frameworks.

Urgency of reaching a resolution

CEMR-EP cannot emphasise enough the urgency of reaching a quick and sustainable resolution, particularly regarding the issues of on-call "inactive" time and compensatory rest. We look forward to appropriate detailed legislative proposals to amend the Working Time Directive 93/104.