

EN

EN

EN



EUROPEAN COMMISSION

Brussels,
COM(2010) 801/3

**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)**

{SEC(2010) 1610}

**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)**

1. INTRODUCTION

The European Union has common standards governing working time since 1993: and these standards have been applied to all sectors of the economy since 2000. The Working Time Directive forms a cornerstone of Social Europe by ensuring minimum protection for all workers against excessive working hours and disregard of minimum rest periods. It also provides for several flexibility mechanisms designed to cope with the particular circumstances of countries, sectors or workers. Over the last few years, however, the effectiveness of EU working time legislation has been questioned on several grounds. Some of its provisions have lagged behind rapid changes in working patterns, making the Directive less helpful for responding to workers' and business needs. Moreover, difficulties in implementing some of its provisions or Court of Justice rulings have led to legal uncertainty or even slippage in compliance as regards some important aspects. Hence the urgent need for a review of the Directive, which the Commission is determined to conduct in accordance with the principles of Smarter Regulation.

The aim of this Communication is to seek the views of the social partners at EU level, in accordance with Article 154(3) of the Treaty on the Functioning of the European Union (TFEU), on the content of envisaged action at EU level to amend the Working Time Directive¹, and to ask whether they wish to enter into negotiation as provided by Article 155.

On 24 March 2010 the Commission adopted a Communication launching the first phase of this consultation². That Communication recalled the difficult situation created by the co-legislators' failure to agree on a previous revision of the Directive³ and invited the EU social partners to indicate their experience with the present Directive, and to outline the type of working time rules that would be needed at EU level to cope with the economic, social, technological and demographic realities of the 21st century.

This Communication brings together the main results of the first-stage consultation of the EU social partners and the main evidence gathered from recent studies about working time trends and patterns and the Directive's economic and social impact. It goes on to set out the key options for an amending legislative proposal. It should be considered jointly with the Commission's Report on implementation of the Directive (adopted simultaneously), which

¹ 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).

² COM(2010) 106, 24.3.2010.

³ Original proposal COM(2004) 607; amended proposal COM(2005) 246.

assesses Member States' compliance with working time rules and identifies the main areas of non-compliance or of legal uncertainty. In order to facilitate the social partners in preparing their replies to this consultation, the Commission will publish the results of all the studies and surveys⁴ that it has used to prepare this Communication.

2. THE FIRST-STAGE CONSULTATION OF THE SOCIAL PARTNERS⁵

There is broad consensus among social partners that the last 20 years have seen major changes in the world of work, which significantly affect the organisation of working time. Nevertheless, there is strong disagreement on the implications of these changes for the organisation of working time. Employers tend to see them as requiring legal changes aimed at greater working time flexibility, while unions consider that they necessitate changes to strengthen legal protection for workers.

Private sector employers emphasise factors such as increased competition, globalisation, the shift from manufacturing to services, market volatility, and technological change, particularly the accelerated use of information and communication technologies.

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 the intensification of work, the development of precarious work, and the negative effects of excessive working hours on health and safety, and on the quality and productivity of work. They emphasise the problems posed by long working hours for combining work and family life and boosting workforce participation. As regards the health sector, unions argue that resorting to long hours can only aggravate the problems of recruiting and retaining staff.

A number of sectoral social partners emphasised distinctive features of their sectors which needed to be taken into account by working time rules. However, opinions differed on the type of changes that were required to the current Directive. The main features were: seasonality, the particular work patterns in the performing arts sector, the provision of residential accommodation at the workplace, autonomy and knowledge working, working in remote areas, the provision of 24-hour services, safety-critical functions, rapidly-fluctuating demand, growth of part-time employment, costs and global competitiveness pressures and skills shortages.

Employers were broadly in agreement with the analysis presented in the Commission's consultation paper. Business Europe, UEAPME and CEEP welcomed the broader perspective

⁴ See the 2010 study by Deloitte for the Commission: 'Study to support an impact assessment on further action at European level regarding Directive 2003/88/EC and the evolution of working time organization'. See also: 'Comparative analysis of working time in the European Union', Eurofound, 2010; 'Fifth Working Conditions Survey', Eurofound, 2010; 'In-depth study on health and safety aspects of working time – effects of working hours on safety, health and work-life balance', 'Flexible working time arrangements and gender equality – A comparative review of thirty European countries', J. Plantenga and Ch. Remery, 2010. The Commission's website provides links to the full text of all the studies mentioned, in order to facilitate this consultation.

⁵ SEC(2010)1610 provides a more detailed overview of the replies.

proposed for the current review. Business Europe and UEAPME argued, however, that the issue of on-call time should be recognised as important for the private as well as for the public sector. Several employer organisations also emphasised that flexibility could benefit both workers and employers and that it should not have a negative connotation.

Conversely, ETUC and other trade unions were critical of the Commission's overall analysis. They considered that the Commission did not take adequately into account the legal importance of the working time rules, nor the Treaty objective of maintaining and improving protection of workers' health and safety; and that the Directive is not functioning effectively within Member States because the Commission has failed in its obligations to uphold and enforce EU law. ETUC and EPSU (EU trade union for services including the public sector) do not accept that employers or public services would face any insuperable obstacles to implementing the *SIMAP-Jaeger* judgments.

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

While Business Europe is opposed in principle to regulating working time at EU level, UEAPME considers that EU regulation is important for providing a level playing field for small and medium enterprises. All cross-industry employer organisations agree that the current rules are too rigid and complex, and stress the need to amend the *SIMAP-Jaeger* case law in particular, as well as the recent rulings on paid annual leave⁶.

For Business Europe it would be useful to extend the reference period to 12 months, but no other issues should be covered by the review, and keeping the opt-out is underlined as crucial. CEEP and UEAPME would consider broadening the review to other matters, and think that extending the reference period to 12 months and changing the *SIMAP-Jaeger* case law would substantially reduce demand for the opt-out.

Public service employers generally stress the need for a 'comprehensive' review of the working time rules as a matter of priority, in view of their huge implications for the functioning of public services. The *SIMAP-Jaeger* case law should be the main focus, but they are also open to improving worker protection against long or onerous hours and enhancing reconciliation of work and family life. They are all reserved regarding any changes to the opt-out, though CEEP regrets its rapid spread in public services and considers that its use is not in the interests of employers, workers or service users.

Unions, on the other hand, point out that the working time rules are based on fundamental social rights protected by the Treaty and by the EU Charter. Therefore, any review must, in overall terms, respect and build on them, in order to improve the protection currently available to workers. It must also give due weight to the positions taken by the Parliament and trade unions during the inter-institutional discussions on the previous amending proposal.

Both ETUC and EPSU are open to a comprehensive review, but consider that changes would only be desirable if they were to genuinely address the need to put an end to the opt-out. The review should seek to enforce per-worker application, and tighten up the derogation for 'autonomous workers'. It should find balanced and sustainable solutions for on-call time, but

⁶ Joined Cases *Schultz-Hoff & Stringer*, C-350/06 & C-520/06.

these must respect and build on the SIMAP-Jaeger case law, with no change to the definition of on-call time or working time. Most health professionals' bodies agree, referring to the health and safety research underlying the Directive, although a minority of doctors' organisations have argued that doctors should be able to work up to 65 hours per week by individual consent. ETUC is also interested in addressing reconciliation of work and family life, and allowing workers more influence over working time patterns.

Replies from sectoral social partners tended to reflect the positions expressed by cross-industry employers and unions respectively. However, a few sectoral replies considered that the Directive did not need to be amended (employer organisations from the hospitality, sea fishing, banking, offshore oil and gas drilling, and private security sectors).

Organisations of public service firefighters also support the SIMAP-Jaeger case law. However, they want to relax the rules on rest periods with a view to keeping the traditional work pattern of 24-hour shifts, which is 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 accept continuing the opt-out temporarily. Some have advocated amending the Directive to exclude volunteer firefighters from its scope.

EUROMIL, an organisation of workers in defence forces, argued that they should be effectively covered by the Directive and the SIMAP-Jaeger case law should be enforced.

As regards the need for other forms of action at EU level, ETUC and EPSU want the Commission to take all possible measures against nonconformity by Member States, including launching infringement procedures. They also support measures to encourage better staffing and resources for labour inspectorates in Member States. Conversely, nine European doctors' organisations argued in a joint reply against launching infringement proceedings. Several replies called for Commission support to comparative research and/or exchange of good practices.

The EU cross-industry social partners have expressed varying degrees of readiness to envisage negotiations under Article 155 TFEU, before or during the second-stage consultation. Business Europe and UEAPME indicated a clear preference for cross-industry solutions, given the broad nature of the issues at stake. However, ETUC would require employer positions to move significantly closer to its own (particularly on the critical issue of the opt-out) before it would consider negotiations.

In the public sector, CEEP strongly advocates finding solutions for public services through negotiation at the cross-sectoral level. CEEP's affiliates CEMR and HOSPEEM take compatible positions. However, EPSU would insist on Member States or public sector employers discontinuing all existing opt-outs before it would decide on entering negotiations.

Social partners in other sectors, with few exceptions, either did not express an interest in negotiation at sectoral level or considered that it would be premature.

3. THE KEY WORKING TIME PATTERNS AND TRENDS⁷

Working time patterns have evolved during the last twenty years as a result of the combined influence of technological changes, globalisation, business restructuring and work organisation, increased importance of services, increased diversity of the workforce and more individualised lifestyles and attitudes towards careers. Although the minimum standards contained in the Directive encourage greater consistency across the EU, and have played an important role in bringing down average work duration, diversity in working time patterns persists and will remain the rule between Member States, between different activities, and between groups of workers.

Overall, the trend has been for gradual reduction in average working time in the EU: from 40.5 hours in 1991 for the EC-12 to 37.5 hours in 2010 in the EU-27⁸. However, this is largely due to a steady increase in the number of people who work part-time, from 15.9 % of the workforce in 1998 to 18.2 % in 2008⁹. Average hours of EU full-time workers have remained virtually unchanged since 2000.

Across Europe, there is still wide variation in average annual hours worked. There is no sign of a convergent trend and it is very unlikely that this picture will change in the near future. The average number of hours worked varies from under 1 400 (Netherlands) to over 2 100 (Greece)¹⁰. Interestingly, the length of working time appears highly inversely correlated with levels of hourly productivity across Member States. While the norm of the 40-hour week is still prevalent in the majority of Member States, a few seem to be developing specific profiles with greater dispersion of hours worked per week (especially the UK, but also Ireland, Netherlands, Germany, and the Nordic countries)¹¹. 9 % of employees (especially males) still work more than 48 hours per week on average, but this share has been declining¹².

The major changes currently taking place relate to flexible arrangement of working time rather than its duration. The last two decades have witnessed the expansion of flexible forms of organisation of working time, such as staggered working hours, flexitime arrangements and working time banking, teleworking, in addition to part-time work. In order to accommodate these developments, there is more focus on allowing tailor-made solutions, often negotiated at company level, within the boundaries of a commonly agreed regulatory framework. However, this shift towards more flexible work patterns and individualised working hours is clearly more marked in northern and western EU Member States than elsewhere.

To a large extent, greater working time flexibility has been promoted by business needs, owing to more volatile markets, growing global competition and closer relationships with consumer/client demand. Value chain restructuring by companies will tend to shift demands for flexibility to subcontractors or units further down the value chain and their workers, hence creating a dual process where new forms of flexible and autonomous ‘knowledge work’ and repetitive and intensive production techniques co-exist¹³.

⁷ See footnote 4.

⁸ 36.4 hours in the EC-12 in 2010.

⁹ Eurostat Labour Force Survey.

¹⁰ See Deloitte study.

¹¹ See Eurofound 5th Survey and Plantenga and Remery (2010).

¹² Ibidem.

¹³ Results of the WORKS project as mentioned in Deloitte study.

However, increased working time flexibility is seen as desirable also by many employees, especially those with family responsibilities seeking to better reconcile their work obligations and personal life¹⁴. The increasing diversity of the labour force (with more older, but especially more female, employees) is a major driver of more individualised time patterns. It can therefore exert a positive influence on female and older workers' participation rates¹⁵. However, the extent to which employees can control or influence the organisation of their work varies a great deal, not only within Member States but also between them. In particular, highly-skilled and professional workers as well as those in knowledge and communication-intensive jobs seem to be able to take greater advantage of flexible hours than manual workers, as they can exert greater control over their working time.

Part-time work and flexible forms of work organisation are just two examples of the increasing diversity of working time arrangements. The significant numbers of people teleworking¹⁶, working in shifts (17%), evenings/nights (10% at least three times a month) or Saturdays/Sundays (53% at least once a month)¹⁷, as well as the non-quantified but increasing phenomenon of 'taking work home' compound a general picture of increasingly diversified work patterns across Europe. The number of workers with multiple jobs (3.8% of the labour force¹⁸) provides another illustration of this flexibility.

This trend is expected to be reinforced in the future, as both partners in the employment relationship will be seeking more tailor-made and individualised working time arrangements; changes in the organisation of work facilitated by the widespread use of digital technologies make it possible. While potentially increasing the scope for win-win solutions, this trend may however entail new risks for the workers of the 21st century, as some will be more vulnerable to the negative consequences of work intensification and of the blurring of the boundary between home and work¹⁹.

4. THE MAIN SOCIAL AND ECONOMIC EFFECTS OF THE DIRECTIVE²⁰

The main objective of the Directive is to protect workers against excessive working hours and neglect of rest periods. There is ample and robust evidence showing that long working hours, missed minimum rests and atypical working hours have a detrimental effect on health and safety, both for the workers concerned and for the general public. Work-life balance can also be negatively affected in particular by working irregular hours, or at unusual times. In particular, the interaction of additive factors such as long hours and shift work may have serious effects on health and safety.

¹⁴ Reconciling work and family life is still seen as a major problem by 18% of workers, especially those doing shift work, on-call work or more than 48 hours a week. Among workers undertaking weekend or night work about two-thirds find it convenient for personal life, but a significant minority do not (EUROSTAT, 2004).

¹⁵ It can also be argued that the concentration of part-time work in low-paid sectors with low career and training opportunities may adversely affect gender equality. See J. Plantenga et al (2010) in fn 4.

¹⁶ Some 4.5 million workers in the EU in 2002 (Implementation Report, EU Framework Agreement on teleworking)

¹⁷ See Eurofound 5th Survey.

¹⁸ Labour Force Survey, 2009.

¹⁹ See Deloitte study.

²⁰ See Deloitte study in fn 4.

This is of particular relevance for the health sector. On the one hand, patient safety needs to be ensured by making sure health and emergency services are not delivered by workers whose skills and judgement are undermined by exhaustion and stress resulting from long working hours. On the other hand, the sector is already facing a gap in supply of skilled professionals that will widen in the future unless appropriate measures are taken to address it. In order to recruit and retain health workers, it is important to make the working conditions more attractive. Reasonable working hours and work-life balance are crucial in that respect.

There is comparatively less robust evidence on the economic and business impact of the Directive, an issue which should not be neglected in the present situation of labour markets. This is probably because economic agents factored working time rules into their behaviour a long time ago.

Surveys show that business is concerned about the effect working time regulation can have on competitiveness and the ability to deal with seasonal and other fluctuations in activity, given in particular the difficulty of recruiting staff in peak periods. Hence the need to resort to flexibility schemes, such as averaging of working time (more often for periods up to 4 months, but also for longer than 12 months), which most replies feel should be extended. Only a minority of companies uses on-call time at the workplace, but for those which do so, the full counting of on-call time as working time would create substantial problems.

Companies in countries where the opt-out is in use in some form want it continued. A sizeable proportion of companies have workers working more than 48 hours, especially to respond to seasonal fluctuations and provide continuous service outside normal working hours. Surprisingly few companies actually ask their employees to give them written consent for that purpose, which suggests gaps in knowledge and compliance.

In public services (health, residential care, fire services and the police), public spending constraints, increased demand for services and world-wide shortages of skilled workers have led to employers seeking ways around the Directive's rules regarding on-call time and compensatory rest.

The current legal framework is seen as generally beneficial for employees since it provides leverage for them to negotiate or receive better working conditions and overall pay in markets where supply is unable to meet added demand for skilled staff. However, in some cases there can also be a loss of income in the absence of an opt-out. It can also act as a catalyst for efficiency gains and measures to improve work-life balance for employees and the quality of service for citizens.

The opt-out is used in both the private and public sectors, mainly where continuity of care or service is needed or demanded by competitive conditions. The opt-out is not seen as an 'easy option' for obviating the requirements of the Directive, but has been used as a tool for flexibility especially in the public sector to accommodate particular activities, resource shortages and specific forms of atypical work. There is also evidence of it being used in some cases to guard against the risk of staff shortages during critical periods.

5. OPTIONS FOR REVIEW

The core rules of the Working Time Directive are also contained in the EU Charter of Fundamental Rights, which provides at Article 31(2) that:

‘Every worker has a right to limitation of maximum working hours, to daily and weekly rest periods and to an annual period of paid leave.’

The Court of Justice, moreover, has repeatedly held that the Directive’s requirements on maximum working time, paid annual leave and minimum rest periods *‘constitute rules of Community social law of particular importance, from which every worker must benefit’*²¹.

The Commission gives due weight to these considerations²². Also, the large majority of EU social partners wishes to retain minimum rules at EU level and recognises that they play a socially and economically useful role. Indeed, no replies called for radical changes to the current framework, although many proposed greater flexibility regarding its application.

Therefore, the Commission will not pursue the option of ending common minimum requirements at EU level, in favour of regulating working time at local and/or national level.

A wide consensus emerged from the replies of the EU social partners that changes to the current working time rules are urgently needed. This is also the Commission’s own view, as expressed in the first-stage consultation paper and in the implementation Report.

Therefore, the Commission will not pursue the option of maintaining the status quo.

There is also a high degree of consensus that EU working time rules should allow greater flexibility for the social partners concerned to negotiate on the details of implementation at the appropriate level. Some replies also consider that regulation at EU level should be clearer, simpler, and enforced in a way which protects key health and safety concerns more effectively, while reducing any unnecessary administrative burdens (especially for SMEs)²³ and reinforcing competitiveness.

However, the opinions of EU social partners still diverge on the main factors that should decide what changes are made to working time rules. Therefore, it was not possible to find consensus on what should be the priorities for the revision, or on the content of any future amended Directive.

The Commission must proceed by considering two main options: a focused review (5.1), or a more comprehensive set of changes (5.2), on the matters highlighted by the social partners in their replies.

²¹ *Dellas*, Case C-14/04; *FNV*, Case C-124/05; *Isère*, C-428/09.

²² See COM(2010) 573 on the Charter.

²³ See also COM(2010) 543 on Smart Regulation in the EU.

5.1. Focused review

The first option consists in proposing new solutions, focused on the questions of on-call time and compensatory rest, and addressing the difficulties of implementing the *SIMAP-Jaeger*²⁴ case law, which were identified by many stakeholders. It is clear from the replies that these two issues are regarded as particularly important within public services which need to provide continuity of service around the clock (for example, in public healthcare, residential care, and in firefighting and emergency services). It is also clear that they are at the root of a considerable number of cases of non-compliance or legal uncertainty²⁵.

The preferred solutions vary to some extent between the social partners, different public services and different Member States. The aim would be to find an appropriate EU common framework that would allow for negotiated solutions at local or sectoral level, supporting both protection of workers' and users' health and safety and the provision of high-quality services. Given the high concentration of the use of on-call time (as defined by the Court rulings) in certain sectors, the Commission could also envisage a solution by means of sectoral negotiations at European level: however, this is a matter for autonomous decision of the social partners.

i) On-call time

A balanced solution to the treatment of on-call time could start with recognition of the principle that all on-call time, where the worker is required to be available to the employer at the workplace in order to provide his or her services in case of need, is working time for the purposes of the Directive, and cannot be considered as rest time²⁶. This would maintain the principles established by the *SIMAP* and *Jaeger* rulings. However, it is proposed to introduce a derogation, limited to sectors where continuity of service is required, which would allow periods of on-call time to be *counted* differently (i.e. not always on a hour-per-hour basis: the 'equivalence' principle) subject to certain maximum weekly limits and provided that the workers concerned are afforded appropriate protection.

Such a solution would respond to the very different activity patterns during on-call time in different sectors and activities, and between different Member States. It would give social partners the flexibility to find solutions at local or sectoral level and identify the most appropriate method for counting on-call time. It would depart from the Court's interpretation in *Dellas*²⁷, but need not require introducing a new distinction between 'active' and 'inactive' periods of on-call time.

For on-call time away from the workplace, the legal position would remain as stated in *SIMAP*:²⁸ only periods spent actually responding to a call would be counted as working time, although waiting time at home could be treated more favourably under national laws or collective agreements.

²⁴ *SIMAP*, Case C-303/98; *Jaeger*, Case C-151/02.

²⁵ COM(2010) 802, Report on Implementation of the Working Time Directive; Deloitte Consulting, (2010), Study to support an impact assessment regarding Directive 2003/88/EC (see footnote 4).

²⁶ As the Court has already held in *Vorel* (Case C-437/05), this has no implications regarding rates of pay, which are outside the scope of the Directive.

²⁷ *Dellas* Case C-14/04.

²⁸ *SIMAP*, Case C-303/98, para 50

Whether the ‘equivalence’ derogation proposed above would apply to the specific situations, where the worker’s residence is provided at the workplace as part of their employment, so that they can be available for occasional calls²⁹. calls for special clarification.

ii) *Compensatory rest*

New provisions would have to be introduced in order to clarify the timing of daily and weekly compensatory rest. The Court held in *Jaeger* that missed minimum daily rest periods should be taken immediately after the extended work shift ends and in any event before the next work period begins (‘immediate compensatory rest’). The legal position is not as clear regarding missed weekly rest.

Many replies called for more flexibility on the timing of compensatory rest: however, recent research confirms severe health and safety effects of delaying minimum daily or weekly rest periods. It is recognised that more flexibility is needed for a range of specific situations. However, this should be carefully limited to situations where it is necessary for objective reasons, and should be subject to overall measures to protect the health and safety of the workers concerned.

The Court of Justice has recently held³⁰ that in very particular situations where the provision of residential care over a limited period necessitates a relationship of trust and confidence with a specific individual, it may be objectively impossible to alternate periods of work and daily rest with the normal regularity. However, it emphasised that such an exception would depend on the worker receiving appropriate alternative protection which ensured sufficient rest and recuperation.

The question of whether weekly rest should normally be taken on a Sunday, rather than on another day of the week, is very complex, raising issues about the effect on health and safety and work-life balance, as well as issues of a social, religious and educational nature. However, it does not necessarily follow that this is an appropriate matter for legislation at EU level: in view of the other issues which arise, the principle of subsidiarity appears applicable.

5.2. Comprehensive review

The second option consists in proposing a more comprehensive set of changes, as well as addressing the questions of on-call time and compensatory rest. This option would allow the review to take more fully into account the changing working patterns and trends described above, and to look at the health and safety issues raised by excessive working hours in a more holistic way. Also, many social partners wanted to address a number of the other issues set out below.

i) *Greater flexibility for new working patterns*

EU rules should respond to the continuing trend towards more flexible forms of work organisation and individualised working hours. The objective is to have well-targeted and sustainable flexibility in working time rules, which will boost productivity and competitiveness while also ensuring more effective protection against health and safety risks.

²⁹ As, for example, with concierges, camping site managers, some residential care wardens, some defence force workers.

³⁰ *Isère*, C-428/09.

The detailed options which follow regarding autonomous workers, work-life balance and multiple employment contracts relate particularly to social partners' comments on these aspects.

The following changes could also be considered, subject to appropriate health and safety protection where applicable:

- Scope for additional flexibility to decide working time arrangements by collective bargaining, provided that specified core requirements are satisfied,
- Derogations to allow reference periods longer than 12 months, in specific cases, by agreement between the social partners,
- Extending the reference period for averaging working time to 12 months by legislation following consultation with the social partners at the appropriate level, in those sectors or Member States where the 'opt-out' derogation is not in use, as part of a balanced package with other options set out below.

ii) Work-life balance for new demographic realities

Major changes are occurring in the world of work, owing to the increasing participation of women and older people, the fact that both partners often now work, sometimes at different hours and on different days, and the challenges posed by care of children and the elderly. The rapid and widespread increase in flexitime working illustrates the strength of demand for more balanced solutions, along with greater individualisation of lifestyles for workers of all ages. Making working time rules more flexible could help Member States achieve the EU 2020 target of increasing workforce participation to 75% (from a current 69%), particularly by further increasing the participation of women and older workers.

The Directive currently makes no provision for workers to be informed by employers about envisaged changes to collective time schedules, or to request changes to individual time schedules. There is evidence that this creates a serious challenge for reconciling work with family life and for general work/life balance.

Consideration should be given to including in the Directive:

- encouragement for social partners to conclude, at the appropriate level and without prejudice to their autonomy, agreements aimed at supporting reconciliation of work and family life,
- a provision whereby Member States, in consultation with social partners, will ensure that employers inform workers well in advance of any substantial change to the pattern of work,
- a provision for employers to examine workers' requests for changes to their working hours and patterns, in the light of each other's needs for flexibility, and to give reasons if refusing such requests.

iii) Autonomous workers

Member States may allow derogations from the 48-hour limit, rest periods and other provisions, under Article 17(1) of the Directive, in the case of certain workers who can

determine their own working time or whose working time is not predetermined. However, there is a need to define this derogation more clearly, both to respond to changing work patterns which allow for relatively autonomous working without clear time boundaries, and also to avoid abuse.

A revised definition should provide that this derogation only applies to senior managers in the public or private sectors, and other workers with genuine and effective autonomy over both the amount and the organisation of their working time.

iv) *Multiple contracts*

A significant minority of workers in the EU work under concurrent employment contracts with different employers or, sometimes, with the same employer. It needs to be made clearer that the working time limit in the Directive applies per worker in such situations. The Commission has previously stated that as far as possible, the Directive must be applied per worker, given its aim of protecting health and safety. However, enforcement can be problematic if the employer is not aware of the worker's other job(s). A first step may be to clarify that if an employee works under more than one contract with the same employer, Member States should put in place effective mechanisms to enforce the Directive's provisions on a per-worker basis. Appropriate mechanisms for monitoring and enforcement are more complex when there are concurrent contracts with different employers. These could be a subject for exchange of good practices under point ix) below.

v) *The scope of the Directive and specific sectoral problems*

One option raised by some replies was to exclude certain groups (for example, defence forces or voluntary firefighters) from the scope of the Directive. However, this appears inconsistent with the Charter, which refers to 'every worker', as well as with the basic principle stated in several rulings of the Court of Justice that the Directive protects fundamental social rights of every 'worker'³¹. The Court recently held³² that the concept of 'worker' in the Directive has an autonomous meaning under EU law, referring to an objectively defined employment relationship, although the application of the concept in particular cases is a matter for national courts.

While all workers satisfying the objective definition of an employment relationship should thus fall within the scope of the Directive, there is a need to consider particular groups such as volunteer firefighters, to whom it is difficult to apply or enforce general rules. They are considered as workers under national law in some Member States, but not in others.

The specific situation of certain road transport mobile workers could also deserve special attention. Some provisions of the Directive regarding rest periods and night work do not apply to these workers³³, and they are not covered by the sectoral Directive 2002/15/EC. Thought could be given to greater harmonisation of working time rules for all road transport mobile workers regardless the type of vehicle they drive, taking into account the existence of specific requirements on driving time, breaks, daily and weekly rest periods laid down in Regulation (EC) No 561/2006.

³¹ See footnote 21.

³² *Isère*, C-428/09.

³³ See SEC(2010) 1611 - Staff Working Paper: report on implementation of the Working Time Directive, section 2.6.1.

vi) Opt-out

The issue of whether to maintain the opt-out is very divisive. It was the main cause of the failure of conciliation between the co-legislators in 2009. Unions and employers have different views on this issue. It is appropriate, therefore, for the Commission to give special attention to this matter, in the light of fresh evidence on its use in practice which shows a wide and rapid proliferation of the opt-out, particularly connected with use of on-call time, but with very variable standards of protection and monitoring³⁴.

It is relevant to note here that out of the 27 Member States, 16 currently allow use of the opt-out, but 11 of them only permit it in sectors or activities which make heavy use of on-call time³⁵. It does not seem realistic to ask all these Member States to refrain from using this derogation, without ensuring feasible alternative solutions. It is clear that the future use of the opt-out in on-call services will depend on how public services absorb the changes introduced by this review regarding on-call time and compensatory rest. Other opportunities for flexibility introduced by the revision of the Directive may discourage wider use of the opt-out, such as an extension of the reference period for averaging weekly working time.

It therefore makes more sense to reduce the need for using the opt-out in the long term, by providing more targeted forms of flexibility, than to re-open a debate on its abolition in which no consensus appears possible between the social partners or between the co-legislators. It is worth recalling that the number of EU workers working more than 48 hours, now representing 9% of the workforce, continues to decline, although there are still large differences between Member States, and arises from other factors (particularly multiple contracts) as well as from use of the opt-out.

In addition, one could reinforce the protection afforded to those workers who accept the opt-out, by ensuring effective monitoring of excess hours³⁶, reducing the risk of pressure from the employer and ensuring that the necessary consent by the individual worker is given freely on an informed basis. The Directive should also provide a mechanism for effective periodic evaluation of the opt-out.

vii) Paid annual leave

Replies highlighted difficulties with one aspect of the law relating to paid annual leave – the rulings in *Schultz-Hoff* and *Stringer*³⁷, which held that a worker who is absent from work for reasons (such as illness) outside his control is still entitled to paid annual leave in respect of that period. It should be borne in mind that proof of incapacity for work and rates of pay during such absence are matters for national law and are outside the scope of the Directive.

The core problem seems to arise from a lack of clarity on whether a worker on long-term sick leave could accumulate paid annual leave entitlements over successive years. Such a prospect creates an unpredictable and potentially substantial cost for employers, and could have the unintended effect of encouraging them to terminate employment of workers on long-term illness before it is clear whether they can return to work after recuperation. Moreover,

³⁴ COM(2010) 802, Report on Implementation of the Working Time Directive; Deloitte Consulting, (2010), Study to support an impact assessment regarding Directive 2003/88/EC (see footnote 4).

³⁵ COM(2010) 802, Report on Implementation of the Working Time Directive.

³⁶ It has been shown that the current provisions in Article 22(1) have remained largely ineffective.

³⁷ See fn. 6.

unlimited accumulation would seem to go beyond what is required to achieve the Directive's aims.

The best solution seems to be an amendment to make it clear that Member States may set appropriate ceilings to the accumulation of paid annual leave entitlements over successive years, once they exceed the number of weeks required to achieve the Directive's aims of minimum rest and recuperation³⁸.

viii) Better regulation

The above proposals would result in codifying a number of important Court decisions and clarifying several points on which there is uncertainty, resulting in clearer, simpler, more transparent and accessible regulation.

The existing text of the Directive is difficult to read and confusingly structured, with a number of now-obsolete provisions. In particular, it contains a number of overlapping derogations and provisions (for example, on reference periods) with some duplication and repetition. Any revision should, however, be carried out with particular care and restraint to ensure that substantive law is unaffected and to avoid any risk of uncertainty.

ix) Enforcement and cooperation measures

Concerns about effective enforcement of core working time standards have been raised by a number of replies and also figure in the Commission's application Report.

This is an important issue. The Commission is ready to support better cooperation and exchanges of good practices in this respect between national authorities and between social partners³⁹, for example by establishing at EU level a committee of experts regarding Working Time.

6. NEXT STEPS

A revised Working Time Directive will be instrumental for improving working conditions and providing businesses and employees with the necessary flexibility for implementing innovative and balanced solutions at the workplace. Further legislative action is necessary in order to shape the EU rules to changing working time patterns while respecting their objective of protecting workers' health and safety, and to clarify critical issues of interpretation.

The Commission will take into account the results of this consultation for its further work on reviewing the Directive. In particular, it may suspend such work if the social partners decide to negotiate between themselves on matters with a sufficiently wide scope. Otherwise, it will proceed to adopt an amending legislative proposal, supported by a detailed impact assessment considering economic and social aspects, which will be published simultaneously.

At the same time, the Commission will continue to use the legal instruments at its disposal in order to correct several situations where Member States do not comply with the present EU

³⁸ Pending case *KHS*, C-214/10 and the Commission's observations in that case.

³⁹ Possible examples could include exchanges on the use of telework (which has already led to a framework agreement of social partners at EU level) or framework agreements on innovative ways of working to provide continuity of care in public services while ensuring quality working conditions.

law, particularly in cases of excessive working hours with manifest negative effects on workers' health and safety.

7. QUESTIONS TO THE SOCIAL PARTNERS

The Commission therefore seeks the views of the social partners on the following questions:

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?

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?

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?