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## **RESPONSE TO FIRST PHASE SOCIAL PARTNER CONSULTATION REVIEWING THE WORKING TIME DIRECTIVE**

### **Introduction**

1. The European Commission on 24 March launched the first phase consultation of European Social Partners on Reviewing the Working Time Directive. This follows unsuccessful attempts to amend the directive between 2004 and 2009 in order to address problems raised by European Court of Justice (ECJ) jurisprudence in the SIMAP and Jaeger cases. Due to a number of unresolved issues, this blockage has resulted in uncertainty and a lack of legal clarity regarding proper implementation of the directive.
2. In addition, as the consultation document points out, fundamental changes have taken place in the world of work since the directive was agreed in 1993.
3. According to the Commission, both aspects point to the need for a more comprehensive review of working time rules in the EU. To this end, the Commission has invited the social partners to reflect broadly on the impact of the changes that have taken place in the world of work and what this means for the regulation of working time.

### **General remarks**

4. From the outset of the debate in the 1990s, BUSINESSSEUROPE stated that working time should not be regulated at EU level. The diversity of companies' and workers' needs, as well as differences in national regulatory approaches could only lead to a very broad framework, with little added value, or a text which is too complex to manage.
5. The directive was, however adopted in 1993. The price to pay was a very complex text with overly prescriptive rules. This is illustrated by the unusual frequency of alleged breaches of the directive throughout the implementation process.
6. Following the ECJ rulings in 2000 (Simap) and 2003 (Jaeger), the jurisprudence on on-call time widened the obligations stemming from the directive far beyond the Council's intentions. To address this, the Commission proposed to revise the directive to clarify the real intentions of the Council concerning the inactive part of on-call time. The fact that the Commission's proposal addressed other issues such as the opt-out complicated the debate.



7. The directive continues to raise serious problems in terms of implementation. This is evidence that the complex and prescriptive rules were not well designed in the first place. The framework that it provides is rigid. Added to this, legal uncertainty has now increased, particularly regarding on-call time as a result of the rulings of the ECJ on SIMAP and Jaeger. These have added new constraints for member states to correctly implement the directive. In addition, the Schultz-Hoff ruling has caused problems to properly apply national labour law and consequently led to constraints and legal uncertainty for businesses.
8. The Commission is therefore right to take a step back and launch a broader discussion on what has changed in the world of work since 1993. We welcome the fact that the Commission recognises the importance of this evolution and wishes to assess what those changes could mean for the regulation of working time at EU level. For BUSINESSEUROPE, such changes further complicate the implementation of rigid EU regulations.
9. In line with the principles of better regulation and taking into account health and safety considerations, rules on working time must allow for effective implementation by companies in member states. It is at this level that workable, tailor-made solutions have been found and that changes in the organisation of working time are best managed.
10. Any changes to the directive must avoid creating further uncertainty in national systems or hamper the flexibility needed to devise workable working time arrangements at national, sectoral and company level.
11. For companies it is crucial that the directive ensures the following core aspects:
  - The possibility to opt-out from the maximum weekly working hours
  - A legal basis of the directive as health and safety at work
  - Respect of all existing agreements between social partners, whatever level
12. The key concern to be dealt with at EU level is on-call time, due to the legal uncertainty and financial pressure on those public and private sector companies affected. In addition, the ruling of the ECJ on Schultz-Hoff regarding the continued accrual of paid leave while on long-term sick leave, needs to be addressed. Moreover, a reference period for calculation of weekly working hours of 12 months would be beneficial. The other issues analysed in the consultation document are best dealt with by giving room for the emergence of solutions at the national level.
13. BUSINESSEUROPE also emphasises that the issue of working time is of a cross-sectoral nature and cannot be solved by a sectoral approach at European level.
14. The organisation of working time is a core competence of social partners at national level in the relevant sectors. BUSINESSEUROPE and its members are committed to contributing to further discussions, in particular regarding how to move forward on this issue towards workable solutions for the organisation of working time and for the problems related to the current directive.



### **Changes in the world of work**

15. The world of work has changed profoundly since the directive was agreed in 1993. During this period there has been an increase in the use of information and communication technologies (ICT), increased competitive pressure resulting from globalization, more jobs in the services sector and in knowledge-intensive sectors, and a growing individualization of working time.
16. Due to globalisation, there have been changes in the way that services are provided. Companies increasingly use teams based across the globe, to execute projects in sequence across time zones. Services are provided in a more flexible manner, serving clients and customers from diverse locations worldwide. Relationships between clients and customers have certainly evolved extensively, but so too has the speed of delivery of goods and services.
17. Companies have responded by innovating and modernising their business models and developing new approaches to workforce management. The main objective is to become more adaptable to changes in the market and to enhance productivity. Working time flexibility is crucial in this respect.
18. It is increasingly difficult to speak about a standard way of working or a standard category of worker. This is due to the fact that in addition to those workers that are employed in traditional activities or working patterns, an increasing number of workers are now performing knowledge-based jobs, where they are not required to be present at set times in a set location.
19. Many workers are becoming more mobile and autonomous, for example through improvements in ICT. Over half of workers in the EU use computers, the majority with email and internet. In addition, the use of mobile phones has risen from one million people in 1990 to 4.6 billion people today and around 20% of all workers in the US, Europe and Japan have a Personal Digital Assistant (PDA), mobile email or similar device.
20. Flexible working practices are a key element of flexicurity. Such practices are designed to support individual workers, in organising their working time. At the same time, they offer companies the flexibility to adapt working patterns.
21. Individualisation of working time is becoming a key feature in the organisation of working time at company level. For example, individualised work schedules are more common, allowing employees to organise their start time and daily work schedules. Telework is also more widespread. In addition, changes in the world of work mean that a larger variety of contractual relationships are available. For example, in two-thirds of establishments in the EU (with 10 or more employees) at least one worker is employed on a part-time basis. The vast majority of part-time workers are satisfied with this form of flexibility, as according to Eurostat, 75% of them across the EU choose to work part-time. This is even higher in some member states, for example in Ireland where 87% of part-time workers have chosen this form of work.



**Answers to specific questions**

*(a) How could we develop balanced and innovative proposals regarding the organisation of working time that move beyond the unsuccessful debates of the last conciliation process? What is your long-term vision for the organisation of working time in a modern setting?*

22. In order to move beyond the unsuccessful debates of the past, it should be acknowledged that there are limitations to what can be achieved at EU level. Changes in the organisation of working time are best managed at national level. Therefore, companies and workers should not be hampered by detailed and over prescriptive EU level rules on working time, in finding appropriate solutions to fit companies' and workers' needs.

23. An EU level framework should allow for working time flexibility, as this is crucial to fit the diverse needs of employers and employees. As highlighted in the consultation document, this is beneficial for both, as rules can be made adaptable to different sectoral, company and individual workers' situations.

24. To fit to a modern setting, companies should be able to organise working time in such a way to adapt to fluctuations in demand. They must be able to modify production cycles to ensure the most efficient use of resources and to retain their competitive edge. This has become even more critical in dealing with the impact of globalisation and more recently the economic crisis. For example, companies have used short-time working practices to retain staff whilst remaining competitive during the crisis. Flexibility is important in times of economic crisis, however it is equally important when the economy recovers and beyond, when companies need to respond to an increase in demand.

25. The Dublin Foundation's Fourth European Working Conditions Survey states that 80% of people in the EU are satisfied with their work-life balance. Working time flexibility can help workers in reconciling work and family life, helping them to adapt their working time to individual needs. This aspect should be recognised. Companies are committed to providing a work environment which helps employees to successfully balance their work and family life and to enhance their productivity.

*(b) What impact do you think that changes in working patterns and practices have had on the application of the Directive? Have any particular provisions become obsolete, or more difficult to apply?*

26. BUSINESSEUROPE shares in general the observations made in the consultation document regarding the fundamental changes which have occurred in the world of work over the last twenty years. These changes have had a profound impact on the organisation of working time, working patterns and practices at national, company and individual workers' level.

27. In addition to those workers that are employed in traditional working patterns or activities, an increasing number of workers now have more autonomy to organise their working time and working location. This may be to balance their work and family life. It is therefore increasingly difficult to speak about a standard way of working or a standard category of worker.



28. For this reason, many of the detailed and prescriptive rules which are part of the working time directive are difficult to apply. This includes standardised working hours, detailed rules on rest periods and work breaks etc.
29. To compete successfully, flexibility has to be found for companies, to adapt working patterns and to efficiently organise working time. Detailed EU level rules can act as a barrier to this, as is currently the case due to the excessively wide ECJ interpretation of the directive.
30. In the spirit of better regulation, any revision of the directive must avoid imposing more rigid EU rules on working time, as these would be contrary to the changes outlined below.
31. Firstly, changes have occurred for companies:
  - The business environment is increasingly competitive, particularly due to globalisation. This has an impact on the way in which services are provided. Customers' preferences and demands have changed, as they are well aware of the possibilities for companies to provide services in a more mobile way and to respond more quickly. For example, customers are increasingly demanding 24 hour services.
  - Companies have developed a wide variety of working time practices, including working time accounts, annualisation of working hours and flexible work schedules, to ensure the necessary level of internal flexibility and optimise production time.
32. Secondly, the situation has changed for individual workers.
  - The need to reconcile work and family life has resulted in a preference for more working time flexibility. This is in particular due to the fact that in 59% of couples in the EU, both people now work. According to Eurostat 2007 'Statistics in Focus' nearly 70% of men and women found weekend work convenient for their personal life. This shows the importance of flexibility in adapting to a wide variety of worker preferences.
  - The Lisbon process has already helped to raise the employment rate of both women and men. The EU2020 strategy aims at an average employment rate of 75%. This can only reinforce the necessity of more flexible time management arrangements in order to better meet the needs of workers and companies. The working time directive should not create obstacles to achieve this.
  - Workers have benefited from companies introducing flexible working arrangements, for example part-time work, career breaks and flexitime. One example, often used at company level, is a compressed/flexible working week. Such schemes allow full-time employees to schedule their working week more autonomously, providing many with a choice on how to divide their hours on a weekly basis. Other examples include time-credit schemes and parental leave.



- Workers have seen a change in the type of jobs and the type of work they do. For an increasing number of jobs it is now possible to work almost anywhere in the world at any time. This is a reflection of the shift to a knowledge-based economy. Teleworking has increased substantially. In the UK, for example, in 2004 just 11% of employers offered this flexibility to staff. By 2009 this had risen to 66%, reflecting technological advances that have made it easier for employers to offer more mobile ways of working to employees. Consequently, many employees now spend a considerable part, if not the majority of their time away from the office. This includes working at different company sites or on short-term assignments with customers.
33. The main objective of working time regulation should remain protection of workers' health and safety. A variety of instruments can be used to influence the evolution of working time management. Legislation is only one of them. When it is being used, it has to find the right balance between the level of flexibility in the organisation of working time and the level of protection against health and safety risks. It must leave the necessary room to allow social partners at the relevant national levels to elaborate and implement innovative solutions for a modern management of working time, and is not the task of a legislator of a market of nearly 500 million citizens.
- (c) What is your experience to date on the overall functioning of the Working Time Directive? What has been your experience regarding the key issues identified in section 5 of this paper?*
34. There are limitations to what can be achieved through regulation of working time at EU level. The overall functioning of the Working Time Directive is proof of this. The fact that at least 23 member states are suspected of incorrect implementation of the directive shows that EU rules are detailed, complicated and difficult to apply. This is not in line with better regulation.
35. As stated in the consultation document, average weekly working hours are falling - there was a drop from 39 hours in 1990 to 37.8 hours in 2006. In some cases, however, it is necessary to work over the 48-hour limit, to deal with seasonal fluctuations or to respond to changes in demand. The opt-out to maximum weekly working hours is essential in this respect. Also, social partners have frequently found solutions to this through collective bargaining, where win-win agreements can be found at different levels in those member states where this is tackled through social dialogue.
36. Individual workers should be given the choice to work longer hours if they so wish. According to the Dublin Foundation, 87% of Europeans state that they are satisfied with the option of working more or less hours if needed. The regulation of working time should not hamper workers' individual choice.
37. On-call time is the key issue which needs to be solved. This is not only an issue for the public sector but also for the private sector, for example IT, security in chemical plants, private security services and private care service providers. There are significant costs in the private sector as a result of the ECJ rulings on on-call time. For IT companies, for example, a new provision which would calculate inactive on-call hours as working time would increase costs substantially. Running on-call operations, for example through global delivery centres from the EU would become much more costly, with the risk of these moving outside the EU and undermining the business case for investment.





38. Although it is important that the health and safety of workers in sectors where there is a prevalence of on-call time is safeguarded, the efficient functioning of companies in such sectors should also be ensured. Otherwise the health and safety of the wider public may be undermined.
39. Due to the increasing individualisation of working time, averaging of weekly working hours over a longer period is essential. There is an existing trend in this direction. This is also essential for companies to deal with fluctuations in demand. Averaging the reference period over 12 months as a general rule would be beneficial, with a possibility to extend it beyond 12 months by collective agreement. With changes in working patterns, a more flexible approach to daily and weekly rests is also required. This is often a key factor regarding health and safety at work. This should take into account the increased level of autonomy of workers in the organisation of their working time.
40. In recent years, it has proved difficult to come to an agreement on such specific issues. At the EU level, it is important to avoid excessively tight rules which hamper companies and individuals in the organisation of working time.

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

41. In general, we agree with the analysis concerning the organisation and regulation of working time in the EU. By and large, it shows the need for increased flexibility in managing working time. EU level rules must be adaptable to the different national situations and allow social partners to adopt collective agreements at the relevant level, in those member states where this is tackled through social dialogue.
42. We further emphasise the cross-sectoral nature of the issue, in particular on-call time. We regret that the consultation document does not properly reflect this. On-call time is an organisational issue which is critical for individual companies and individual workers in both public and private sectors. An approach focusing on one sector would therefore not be a solution.

*(e) Do you consider that the Commission should launch an initiative to amend the Directive? If so, do you agree with the objectives of a review as set out in this paper? What do you consider should be its scope?*

43. The regulation of working time at EU level was not supported by BUSINESSEUROPE from the outset. The constraints we foresaw have increased following the ECJ rulings on on-call time and accrual of paid annual leave while on long term sick leave, as well as the impact of changes in the world of work on the organisation of working time. At the very moment where social protection systems need to become more sustainable and labour markets attract more people, it is crucial that the regulation of working time does not play against job creation in the EU.



44. Any revision of the directive should aim to solve the on-call issue and the issue regarding continued accrual of paid annual leave while on long term sick leave, by addressing the ECJ rulings. For the other broader issues included in the consultation document, the answer does not lie in a revision of the directive adding new constraints which would further reduce the scope of companies to organise working time. BUSINESSEUROPE believes that no further issues or details should be added to a text which now applies to 27 countries, as opposed to 12 countries which was the case when it was adopted. The objective of any revision should be to create more space for implementation and elaboration of concrete arrangements at national and company level.

45. The core principle for BUSINESSEUROPE is that changes in working time are best managed by the most relevant actors at national level. Therefore, any revision of the directive should better support national solutions through social dialogue, collective agreements, sectoral agreements and other tools. In particular, existing arrangements must be safeguarded.

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

46. Firstly action at EU level should aim at improving the overall functioning of Europe's labour markets. In this respect, the EU employment guidelines should enhance flexibility in the labour market.

47. Working time flexibility is one of the elements which are key to enhancing internal flexicurity. Implementation of the common principles of flexicurity should encourage flexible and reliable contractual arrangements, including with respect to working time. These principles should be strongly established and supported in the EU, through a serious peer review mechanism allowing a relevant and full national implementation reflecting national conditions and arrangements.

48. There is a range of tools which can be used to help manage working time in Europe. A number of European social partner agreements exist, for example on telework and part-time work. Specific national social partner agreements and other actions at national level are also better-conceived tools for managing working time, including collective agreements and specific company measures.

49. In addition, the Commission can facilitate collection and exchange of information on best practices, regarding innovative working time arrangements which have helped to reconcile the needs of companies and workers. This process of mutual learning can add value at national level, by assisting member states in improving the effectiveness of their labour markets, as well as at EU level, by providing coordination between member state employment strategies.





*(g) Do you wish to consider initiating a dialogue under Article 155 TFEU on any of the issues identified in this consultation? If so, on which ones?*

50. Working time is a core issue for companies, as it is critical for the organisation of production and provision of goods and services. It increasingly affects the competitiveness of companies and their ability to respond to clients' and consumers' demands. It is also a main feature of collective bargaining in many countries and companies in Europe. For this reason, an EU directive should above all empower local actors even beyond the provisions of the present text.
51. The present situation, including the lack of clarity and problems of implementation of the directive is not satisfactory, in particular the on-call issue. Any revision of the directive should uphold current and support new solutions at national level.
52. BUSINESSEUROPE and its members are committed to contributing to further discussions, in particular regarding how to move forward on this issue towards workable solutions for the organisation of working time and for the problems related to the current directive. BUSINESSEUROPE hopes that it has provided the Commission with an overview of the changes in working patterns and the impact of these on European companies. In addition, we have aimed to identify the main issues of concern regarding the current directive and the regulation of working time at European level. At the first stage consultation social partners are not required to decide on whether to enter into negotiations on the issue or not. We therefore reserve our answer on this question for the second stage consultation.

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