BUSINESSEUROPE

POSITION PAPER

31 October 2014

Consultation on the practical implementation of Directive 2003/88/EC concerning certain aspects of the organisation of working time

BUSINESSEUROPE RESPONSE[1]

1. TRANSPOSITION

Do you consider that the Working Time Directive has been transposed in a satisfactory way in the EU Member States?

BUSINESSEUROPE member federations generally consider that from a legal point of view the Working Time Directive has been transposed in a satisfactory way in their respective countries. However, some point out that the transposition from a practical point of view is not consistent with the needs of employers and workers and the changing working environment. In many cases, national transposing legislation is even stricter than the directive requires, thereby constraining working time flexibility and hampering the competitiveness of companies. Some cite the directive's non-regression clause as a factor in this, which has meant that national legislation on working time predating the EU directive could not be amended to the level of the EU directive.

Some member federations note that the Commission's report in 2010 on implementation of the directive showed that many member states had not properly transposed the directive.

If you consider that there is room for concern about transposition in specific sectors or concerning specific provisions, please give details.

Member federations point to problems of non-compliance with the Directive regarding on-call time and provisions on compensatory rest in certain public and private sectors.

The importance of giving room for more specific community provisions on working time for certain sectors is highlighted, for example for mobile road transport.

If you consider that transposition of the Directive has been particularly satisfactory in any respect, please give details.

Satisfactory transposition regarding the use of the derogation for autonomous workers is highlighted.

[1] This response provides a general summary of the replies received from BUSINESSEUROPE member federations. More detailed information can be found in the attached compilation of replies.

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2. SOCIAL PARTNERSHIP

Do you consider that the social partners have been sufficiently consulted and involved by the national authorities before the adoption of national measures transposing the Directive, as well as concerning the practical implementation of these measures?

BUSINESSEUROPE member federations in general consider that they have been sufficiently consulted and involved by national authorities regarding transposition of the directive. However, some of them have highlighted that more attention could be paid to legal imperfections in the directive.

The Directive provides at Articles 17 and 18 for derogations by means of collective agreements or agreements concluded between the two sides of industry. Please indicate how you evaluate the experience in this regard. Are there any examples which you consider as providing possible models of good practice?

For most member federations the possibilities to derogate by means of collective agreements or agreements concluded between the two sides of industry are seen as positive, as they allow some flexibility and the possibility to find effective solutions for workers and employers. Where these possibilities are used at national level, it is often across a variety of sectors.

The possibility to extend the reference period for calculating weekly working time from four to twelve months by collective agreement is cited as an example of good practice by some member federations. However, others point out that the directive is too restrictive as it makes the use of this possibility subject to collective agreement, making it difficult for some companies to use it. This concerns in particular SMEs where workers are often not unionised, and those companies which have difficulties or no possibility in negotiating collective agreements with trade unions.

Other member federations highlight that due to the complexity and incoherency of their national legislation transposing the working time directive, the possibility of making more use company level agreements would be welcome.

3. MONITORING OF IMPLEMENTATION

Please indicate whether you consider that the enforcement and monitoring of the Directive at national level is satisfactory. If you see any problems, please indicate their overall impact and make recommendations for improvement.

BUSINESSEUROPE member federations are generally satisfied about enforcement and monitoring of the directive in their respective country. One exception cited is court rulings which count all of on-call time at the workplace as working time, whereas two different components of on-call time (active and in-active) need to be recognised.

Member federations highlight that monitoring subjects companies to many administrative requirements, in particular onerous record-keeping. Others point out that fines could be more moderate.

Some member federations highlight that the complexity of the national regulations implementing the directive causes legal uncertainty for companies.

Others point to specific issues at national level such as the need for less administrative burdens for exemptions to the prohibition to employ workers for work on Sundays or public holidays; or the need for more flexibility for categories of employees where there are generally no compliance problems.

Can you identify any examples of good practice as concerns monitoring and enforcement?

Examples of good practice identified are the use of enforcement not as an end in itself, rather as a means to achieving compliance with legislation; and inspection focused on sectors at risk.

Another example of good practice identified regarding implementation in general is applying flexibility in working regimes and working hours accounts.

4. EVALUATION

Please describe any evaluation work carried out under your authority. Please indicate what were the main conclusions as regards the socio-economic impact of the transposing measures, in particular on:

- ***workers' health and safety***
- ***work/life balance***
- ***business flexibility/competitiveness***
- ***consumers/service users***
- ***SMEs***
- ***administrative/regulatory burden.***

BUSINESSEUROPE member federations find that the measures to transpose the directive meet its objectives in terms of protecting workers' health and safety, however that they go beyond what is necessary in this regard. In some countries this is due to stricter provisions than stipulated in the directive. This creates administrative burdens for companies.

Member federations highlight that the rigidity of the legislation also hampers the possibilities for better work-life balance. They also mention the need for national transposing measures to better take account of opportunities that the digitization of the world of work provides for improving work-life balance.

Member federations point out that the transposing measures do not allow for adequate business flexibility, in particular the need for companies to compete globally by adjusting rapidly to demand.

Some member federations highlight that the transposing measures are not in line with the needs of customers and service users. This includes for example, users of public and private care services. A case study is provided which shows that new models have been developed in this field to improve such services. However, such models would be unviable if the directive was fully implemented (in line with ECJ rulings) to count all on-

call time spent at the workplace (active and in-active) as working time. Some member federations highlight that the rigidity of the national transposing measures prevent the development of new business activities in ecommerce, technology and IT maintenance services.

Does the practical application of the Directive in the Member States, in your view, meet the objectives of the Directive (i.e. to protect and improve the health and safety of workers, while providing flexibility in the application of certain provisions and avoiding imposing unnecessary constraints on SMEs)?

There is general and strong agreement among employers' federations that whilst the practical application of the directive meets the objective of protecting the health and safety of workers, it does not meet the objective of providing flexibility in application of the provisions of the directive. This flexibility is important for employers and employees.

Member federations point to inadequate flexibility regarding application of provisions on on-call time and compensatory rest. This is due to ECJ judgements stipulating that all on-call time at the workplace (active and in-active) has to be regarded as working time. This has serious consequences across EU countries not only for the health and care sector, but also in transport and other industrial activities, for example where in-company fire brigades exist or other safety-related services have to be provided continually. Considering inactive periods at the workplace during on-call duty as working time also raises costs for many sectors - for example due to the need for increased manpower.

Member federations point out that unnecessary constraints are imposed on SMEs, making it difficult for them to introduce working time schemes. For example, they are constrained in using the derogation to a 12 month reference period, partly due to lack of collective bargaining possibilities. The flexibility offered by this possible derogation is also constrained in those countries where no possibility exists for derogation by collective agreements or agreements by both sides of industry.

5. OUTLOOK

Please indicate:

- ***any priorities for your organisation in this subject area;***
- ***any proposal for additions or changes to the Directive, stating the reasons;***
- ***any flanking measures at EU level which you consider could be useful.***

The priority for BUSINESSEUROPE is to increase the possibilities for companies to use flexible working time arrangements according to their specific needs. Flexibility is crucial for companies' competitiveness and also benefits workers, particularly in the context of new technological developments and the trend towards individualisation of working time models.

It is also important that the directive gives room for national solutions and allows member states to take account of specific national situations, for example through the use of derogations. It should be possible to agree on flexible working time arrangements at all levels – between the employer and individual employee, between the employer and worker representative and through collective bargaining. The further application of existing collective agreements should not be impeded.

BUSINESSEUROPE member federations point out that certain issues are related to national transposition of the directive and others to the EU directive. In this section, we focus on the EU directive.

The main issues for employers are the following:

1. On-call time – European Court of Justice (ECJ) case law on on-call time has created problems in terms of a lack of practicability and legal uncertainty in application of the directive. The solution would be to define on-call time in the directive as an additional category alongside working time and rest periods. On-call time would have to be divided into active and in-active, whereby in-active on-call time would not be counted as working time. Some approaches have already been developed at national and sectoral level to deal with the problems caused by the ECJ case law – their functioning should not be impeded in the future.

2. Compensatory rest – Rulings of the ECJ on on-call time also established strict conditions for the provision of compensatory rest, i.e. that it should be taken immediately following the corresponding periods worked. This is impractical as it is not always possible to comply with this condition. It would be more practical for compensatory rest to be taken within a reasonable period.

3. Opt-out and autonomous workers derogation – the possibility of an individual opt-out from the 48 hours maximum working week and the derogation for autonomous workers should be retained as a permanent provisions of the directive. The flexibility of the opt-out and the derogation for autonomous workers are essential for companies. It would be beneficial if the opt-out were available by two independent means: either by collective agreement or by individual consent as opposed to a combination of both.

4. Reference period - a twelve-month reference period for calculating weekly working time would better reflect the trend towards annualisation of working time, allow companies to deal with fluctuating demand and better take into account business cycles and customers' needs. It would also give more opportunity to small and medium-sized enterprises to use this possibility. A possibility to further extend the reference period beyond twelve months by collective agreement would be useful.

5. Paid annual leave – Rulings of the ECJ have provided that paid annual leave can be accrued during periods of protracted absence due to illness. This is in contradiction to the objective of paid annual leave, which is to allow workers to rest from work, not from periods of illness. Member states should be allowed to make annual leave dependent on attendance at work and they should have the possibility to strictly link the right to paid annual leave to the year in which it is earned, also in the case of long-term illness. Employers should not be obliged to provide for financial compensation for untaken annual leave in the case of deceased workers.

6. Holiday pay – A recent ECJ ruling on how holiday pay should be calculated goes beyond the intentions of the Directive – which does not say how holiday pay should be calculated, stating only that workers have the right to four weeks' paid annual leave. The ruling also does not respect the EU treaty which reserves matters of pay to the Member States. Member states should be free to define 'normal pay' at a national level.

7. Non-regression clause – the non-regression clause in the working time directive makes it difficult to provide flexibility in national transposing measures after the adoption of the directive.

BUSINESSEUROPE

Social Partners Questionnaire on practical implementation of Directive 2003/88/EC concerning certain aspects of the organisation of working time

October 2014

COMPILATIONS OF REPLIES BY BUSINESSEUROPE

MEMBER FEDERATIONS

Social Partners Questionnaire on practical implementation of Directive 2003/88/EC concerning certain aspects of the organisation of working time

Compilation of replies by BUSINESSEUROPE member federations

October 2014

Introduction

Following the request from the European Commission on 17 July 2014, several BUSINESSEUROPE member federations have provided feedback on the practical implementation of the working time directive in their countries.

BUSINESSEUROPE federations that have replied to the Commission questionnaire are the following:

Austria	Federation of Austrian Industries – IV
Belgium	Federation of Enterprises in Belgium - FEB-VBO
Czech Republic	Confederation of Industry of the Czech Republic – SPCR
Finland	Confederation of Finnish Industries – EK
France	Mouvement des Entreprises de France - MEDEF
Germany	Bundesvereinigung der Deutschen Arbeitgeberverbände – BDA
Ireland	Irish Business and Employers Confederation – IBEC
Italy	Confederation of Italian Industry - Confindustria
Netherlands	Confederation of Netherlands Industry and Employers – VNO-NCW
Portugal	Confederation of Portuguese Industry – CIP
Spain	Confederación Española de Organizaciones Empresariales - CEOE
Sweden	Confederation of Swedish Enterprise - SN
UK	Confederation of British Industry - CBI

Austria

Federation of Austrian Industries – IV

Due to various different national backgrounds we think that the working time directive should limit itself to the key elements of working time at the European level. Therefore we are critical about political tendencies which would like to include other objective than classical occupational safety and health issues.

If there is a revision of the working time directive we think that the following issues should also be addressed:

- Correction of case-law on the definition of on-call duty (Bereitschaftsdienst – EuGH Simap/Jaeger
- Permanent maintenance of the opt out scheme
- Deletion of the non-regression clause which in its present form makes flexibility attempts within the national labour law after the adoption of the Directive rather difficult.

In general we would like to stress that in the future revision of the working time directive problems of lack of practicability and legal uncertainty caused by case law of the ECJ should be solved in a reasonable and forward-looking way for our companies and their employees.

Belgium

Federation of Enterprises in Belgium - FEB-VBO

1. TRANSPOSITION

- ***Do you consider that the Working Time Directive has been transposed in a satisfactory way in the EU Member States?***

The Belgian law on working time dates back to 1971. As such, it predates the Directive. Since Article 23 of the Directive provides that "the directive shall not constitute valid grounds for reducing the general level of protection afforded to workers", the law's provisions could not be relaxed in 1993.

The following legislations have been adopted since the last report, COM (2010) 802 final:

- the Law of 12 December 2010[1] on working time for workers exercising medical professions;
- 'European' holidays[2], providing for a right to paid leave in proportion to the work performed in the current year.

- ***If you consider that there is room for concern about transposition in specific sectors or concerning specific provisions, please give details.***

The Belgian law (1971) is even more prescriptive and rigid than the directive.

Our working time legislation is obsolete. As mentioned above, the Belgian law on working time dates back to 1971. As such, it predates the Directive and, to a certain extent, served as inspiration for it. Since Article 23 of the Directive provides that "the directive shall not constitute valid grounds for reducing the general level of protection afforded to workers", the law's provisions could not be relaxed in 1993.

Yet the economy has undergone a major transformation in the last 40 years. Companies are now working in an ever-changing international market and must constantly adapt their production to remain competitive on all the different markets. They also need to innovate and develop new products and services. Nowadays, however, these very innovations are compromised by the inflexibility of Belgian legislation, especially if they are connected to the creation of new services.

Although many specific amendments have been made to the law, the overall content of the existing rules does not meet companies' current needs in view of international competition and changing consumption habits. In fact, the current rules are even preventing the development of a great many new activities in the field of new technologies (such as e-commerce, helpdesks and technical and IT maintenance services).

E-commerce is a good example here. Nowadays, most people expect next-day delivery for an order placed at 8.00 p.m., at the same price as delivery within 48 hours. If these orders are to be prepared and delivered in time, there must be people working to fulfil them. The Belgian law that defines "night work" as any work performed between 8.00 p.m. and

[1] Loi du 12 décembre 2010 fixant la durée du travail des médecins, dentistes, vétérinaires, des candidats-médecins en formation, des candidats-dentistes en formation et étudiants stagiaires se préparant à ces professions (M.B., 22 décembre 2010, Ed 2).

[2] Arrêté royal du 19 juin 2012 (MB 28.06.2012)

6.00 a.m. is a major obstacle to the development of e-commerce in Belgium. Companies are setting up their headquarters outside the borders so that they can meet their customers' demands.

In the same vein, customers expect to be able to contact helpdesks at any hour of the day or night. At present, helpdesks are having to be set up in other countries, where working time legislation is less restrictive than in Belgium.

2. SOCIAL PARTNERSHIP

- ***Do you consider that the social partners have been sufficiently consulted and involved by the national authorities before the adoption of national measures transposing the Directive, as well as concerning the practical implementation of these measures?***

Few national transposition measures were needed as the law of 1971 already conformed with the principles of the directive.

- ***The Directive provides at Articles 17 and 18 for derogations by means of collective agreements or agreements concluded between the two sides of industry. Please indicate how you evaluate the experience in this regard. Are there any examples which you consider as providing possible models of good practice?***

Belgium has a wide range of flexibility measures (allowing derogations). However, most sectors believe that the legal framework is neither appropriate nor effective when it comes to furthering the development of economic activities and employment.

Our working time legislation has become too complex to implement:

Belgian labour law is more like a complex series of unrelated standards than a coherent body of legislation intended to support companies in the development of their activities.

At present, the law is designed as a group of general rules from which derogation is possible, in theory, providing that all the specific procedures are observed – and each of these procedures comes with its own unique requirements (agreement of the trade union delegation, agreement or notification of the labour inspectorate, collective agreement and/or amendment to the company regulations, involvement of the joint commission and/or the King, and so on). Far from promoting cooperation, these complex negotiation or authorisation procedures often result in deadlocks within companies and/or joint commissions, preventing the proposed measures from going through.

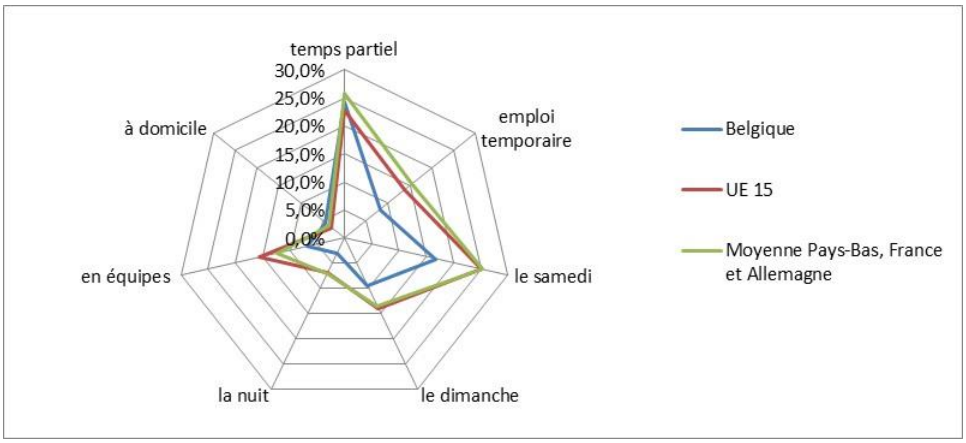
Many employers report that they have experienced such deadlocks within their companies, despite there being an agreement between the employer and the employees on certain flexibility measures. Deadlocks are especially damaging in social and economic terms, particularly since they often recur any time the company wants to make a derogation.

Overtime is a case in point. The procedures that must be completed significantly limit the use of overtime, even when employees themselves express their desire to work extra hours. An employer who wants staff to work overtime to cope with an extraordinary increase in the volume of work must obtain the agreement of the labour inspectorate and the staff representative body, if there is one (Article 26(1) of the Law of 16 March 1971). This requirement and the debates that stem from it – mostly concerning the 'extraordinary' nature of the increase in the volume of work – are bureaucratic obstacles to the use of overtime.

Overtime is not the only issue that is prone to triggering deadlocks. In a number of sectors, companies have been unable to introduce annualised working hours (a system which extends the reference period for calculating weekly working time from three months to one year) because a collective agreement must be drawn up to allow the measure to be implemented (Article 26bis of the Law of 16 March 1971).

Complicated arrangements like this are in place for every aspect of work organisation. So although Belgium has around forty measures that allow a degree of flexibility (i.e. derogations), it is one of the countries that makes least use of such measures.

Types of work organisation in Belgium, neighbouring countries and the EU-15 in 2013



Source: Eurostat, FEB estimates

The situation could be simplified to some extent if the directive and the law's role in work organisation were revised and more use was made of company-level negotiations. The law would, of course, continue to play a part as it would still set down the fundamental rules intended to safeguard employees' health and safety.

However, the law would provide that individual negotiations (if the derogations were strictly individual) or collective negotiations (for collective working time) should be used to determine the applicable working hours and conditions. This new, more balanced approach could prove an effective means of achieving the twin goals of simplification and efficiency.

Flexibility costs dearly

Having to negotiate on derogations makes flexibility very costly indeed – the trade unions are well aware that employers need these derogations, and push up the price as a result. The upshot is that the price for a certain degree of flexibility (+ efficiency) is sometimes so high that industries/companies turn down an agreement or refuse to launch/develop an activity in Belgium.

3. MONITORING OF IMPLEMENTATION

- ***Please indicate whether you consider that the enforcement and monitoring of the Directive at national level is satisfactory.***
- ***If you see any problems, please indicate their overall impact and make recommendations for improvement.***

Monitoring means that companies are subject to a great many administrative requirements (annexes to their company regulations, a requirement to keep attendance lists, clocking in and out, and others).
While some inspection bodies are pragmatic, others are less and attach more importance to the letter of the law (procedures) than to its spirit (employees' health and safety and employees' consent or request).

Besides, the complexity of the legislation (different derogation procedures depending on the type of derogation and the industry) has created considerable legal uncertainty for employers.

- ***Can you identify any examples of good practice as concerns monitoring and enforcement?***

No

4. EVALUATION

- ***Please describe any evaluation work carried out under your authority.***
- ***Please indicate what were the main conclusions as regards the socio-economic impact of the transposing measures, in particular on:***
  - ***workers' health and safety***

Good impact

  - ***work/life balance***

To be seen in connection with 15 existing types of leave schemes in Belgium.

  - ***business flexibility/competitiveness***

Limited business flexibility. The transposing measures (which were not taken as the Law of 1971 was even more stringent than the directive) do not allow sufficient flexibility and do not allow companies to be sufficiently competitive.

Moreover, the cost of negotiating work flexibility is sometimes so high that such flexibility remains very limited in Belgium[3].

  - ***consumers/service users***

See remarks on e-commerce, helpdesks and technical and IT maintenance (page 2).

  - ***SMEs***
  - ***administrative/regulatory burden.***

See above (page 3).

- ***Does the practical application of the Directive in the Member States, in your view, meet the objectives of the Directive (i.e. to protect and improve the health and safety of workers, while providing flexibility in the application of certain provisions and avoiding imposing unnecessary constraints on SMEs)?***

No. As Michel Davagle synthetises[4],

[3] Working time in the European union : Belgium – EWO - Eurofound 2011

The system has become a straitjacket and is engendering 'bureaucratisation' of work, which conflicts with the flexibility that is required of any type of (social) work and is demanded by the employees.

The social partners have worked within the joint commissions to attempt to find solutions to the problems. However, any measures require the trade unions' approval; in exchange, they demanded salary scale increases and financial compensation for these 'uncomfortable' working hours. The system of derogations has inevitably led to increasing rigidity and complexity in the implementation of the law on work. Besides, individual workers are not pleased with the lack of flexibility, as they would rather work in a less restrictive environment.

5. OUTLOOK

- ***Please indicate:***
  - ***any priorities for your organisation in this subject area;***

Less rigid regulation of working time

  - ***any proposal for additions or changes to the Directive, stating the reasons;***

Less precise definition of working time (less prescriptive) to allow more flexible negotiation at company and sectoral level, bearing in mind the specific requirements of each company or sector (e.g. active and inactive on-call time)

- More flexible timing of compensatory rest
- More flexible reference periods

[4] 40 ans d'application de la loi du 16 mars 1971 – AJPDS, p 454 Michel Davagle

Czech Republic

Confederation of Industry of the Czech Republic – SPCR

1. TRANSPOSITION

- The working time directive has been transposed in a satisfactory way into the Czech Labour Code (262/2006) Sections 78-100.
- Section 93a – Additionally agreed overtime work in health care. *Additionally agreed overtime work of employees in health care may not exceed on average eight hours per week, and as regards employees in health care rescue services it may not exceed on average 12 hour per week, over a period that may not be longer than 26 consecutive weeks, only relevant collective agreement may increase this period up to a maximum of 52 consecutive weeks.*

A derogation from the rules concerning on-call duty and compensatory rest in the health care sector terminated on 31 December 2013. Since 1st January 2014 is applied an *Additionally agreed overtime work.* But it is not sufficient for the health care sector and the hospitals are permanently violating these rules.

- Section 86 *Working hours accounts*

2. SOCIAL PARTNERSHIP

- The social partners have been sufficiently involved and consulted by the national authorities before the adoption of national measures transposing as well as practical implementation of this measures (via tripartite concertations and bipartite negotiations).
- Reference period 12 month applied by the collective agreement.

3. MONITORING OF IMPLEMENTATION

- The enforcement and implementation of the Directive at the national level is satisfactory via Labour Inspection.
- There are problems in the health care sector. The management is looking for different solutions (many times at the edge of the rules): work shifts system, combinations of the different contracts and agreements). There are only two ways – more finances and employees or limited access to the health care.
- Applying flexible working regimes and working hours accounts

Finland

Confederation of Finnish Industries – EK

- EK is satisfied the way the current Directive has been implemented in Finland. The Directive has functioned relatively well in practice.

- It is crucial that the Directive now as well as in the future gives room for national solutions and also allows Member States to take into account the specific situations in the forms of derogations, e.g. managing executives or other persons with autonomous decision-taking power.

- It is also important that the current Directive allows certain amount of flexibility in working time to be arranged through collective agreements.

- However, as the company-level flexible working time arrangements are amongst the key factors to the competitiveness of the European companies, in the future the Directive should directly make it possible to agree on flexible working time arrangements more widely in all levels (between employer and individual employee or between employer and worker representative and between collective bargaining parties).

  Currently e.g. in Finland there are still too big differences between sectors and branches in terms of the possibilities given in the collective agreements to the parties at workplace level to agree on flexible working time arrangements. This has an instant influence on the competitiveness of certain sectors. The reason to the differences is to some extent the rigid and old-fashioned culture of trade unions in some sectors towards all sorts of flexible arrangements

- Our organisation's priority is to increase the possibilities for companies in each sector to use flexible working time arrangements according to their needs.

- In the future the unpractical elements of the current Directive, such as the reference period of maximum 12 months, should also be modified. Longer reference periods would benefit both the employees and employers. They would better take into account the business cycles and customers' need. Furthermore, they would make it easier for workers to combine work- and private life in a longer perspective (e.g. saving longer leaves before the retirement).

France

Mouvement des Entreprises de France - MEDEF

1. TRANSPOSITION

- ***Estimez-vous que la directive sur le temps de travail a été transposée de manière satisfaisante dans les États membres de l'UE?***
- ***Si vous pensez que la transposition de la directive dans des secteurs spécifiques ou que certaines dispositions de cette dernière risquent de poser un problème, veuillez en indiquer la ou les raisons.***
- ***Si vous pensez que la transposition a été effectuée de manière particulièrement satisfaisante à tous égards, veuillez préciser.***

En France, la transposition de la directive a été opérée de façon satisfaisante dans les domaines où elle était nécessaire. Et la loi française conserve des dispositions plus favorables que la directive, par exemple la durée maximale du travail qui est fixée à 44 heures en moyenne sur 12 semaines (et non à 48 heures).

Cependant l'interprétation donnée par la CJUE de certaines dispositions de la directive, en particulier sur la définition du temps de travail et sur le droit aux congés payés, s'oppose aux dispositions du droit national et crée une insécurité juridique pour les entreprises. Les dispositions relatives aux heures d'équivalence (temps de garde sur le lieu de travail) ont donc dû être sécurisées pour s'intégrer dans la durée maximale du travail, alors que le droit français ne les intégrait pas pour leur totalité.

Actuellement les multiples décisions de la CJUE sur les congés payés sont en contradiction avec la législation française conçue (depuis 1936) sur le principe selon lequel le droit et la durée des congés sont fonction de la durée du travail effectif (ou assimilé) accompli. Si la loi française a déjà supprimé toute condition d'une durée minimale de service pour se conformer à l'interprétation de la CJUE, la question de l'assimilation de toutes les périodes d'absence à du travail effectif pour le droit au congé annuel de quatre semaines n'est pas réglée et exigerait à notre avis une modification du texte de la directive plutôt que de la loi française.

2. PARTENARIAT SOCIAL

- ***Estimez-vous que les autorités nationales ont suffisamment consulté les partenaires sociaux et qu'elles les ont associés comme il convenait avant l'adoption de mesures visant la transposition de la directive et lors de leur mise en application?***

Oui

- ***La directive prévoit en ses articles 17 et 18 des mesures dérogatoires par voie de conventions collectives ou d'accords conclus entre partenaires sociaux. Veuillez faire part de vos constatations à cet égard. Certains exemples vous semblent-ils susceptibles de servir de modèles de bonnes pratiques?***

Les dérogations prévues par les articles 17 et 18 sont utilisées dans nos accords collectifs (notamment pour les salariés ayant un pouvoir de décision autonome et pour la période de repos quotidien de 11 heures). Nous considérons qu'elles sont indispensables pour permettre la flexibilité nécessaire à l'organisation du travail et prendre en compte les situations dans lesquelles la durée du travail ne peut être prédéterminée.

3. SUIVI DE L'APPLICATION

- ***Veuillez indiquer si vous jugez satisfaisants le contrôle et l'application de la directive au niveau national.***
- ***Si vous avez constaté un quelconque problème, veuillez en indiquer les incidences générales et formuler des recommandations en vue de sa résolution.***
- ***Avez-vous relevé des exemples de bonnes pratiques en ce qui concerne le contrôle et l'application de la directive?***

Le contrôle et l'application des dispositions relatives à l'aménagement du temps de travail sont assurés à la fois par l'inspection du travail et par les juges qui vérifient strictement que les mesures appliquées y sont conformes et assurent la protection de la sécurité et de la santé des salariés.

Mais les entreprises sont victimes de l'insécurité juridique qui résultent des réponses apportées par la CJUE aux questions préjudicielles souvent posées par les juridictions françaises. A cet égard une clarification des textes, basée sur l'objectif de la directive de protection de la santé, permettrait de résoudre ce problème.

4. ÉVALUATION

- ***Veuillez décrire les éventuels travaux d'évaluation menés sous votre autorité.***
- ***Veuillez exposer les principales conclusions sur les incidences socio-économiques des mesures de transposition, notamment en ce qui concerne :***
  - ***o la santé et la sécurité des travailleurs***
  - ***o l'équilibre entre vie professionnelle et vie privée***
  - ***o la souplesse des entreprises et leur compétitivité***
  - ***o les consommateurs et les usagers***
  - ***o les PME***
  - ***o les charges administratives et réglementaires.***

Aucun

Selon vous, l'application de la directive dans les États membres sert-elle les objectifs visés (protéger et améliorer la santé et la sécurité des travailleurs, tout en prévoyant une certaine souplesse dans l'application de diverses dispositions et en veillant à éviter d'imposer des contraintes inutiles aux PME)?

Oui. La souplesse nécessaire provient des possibilités de dérogation, mais la jurisprudence dépasse les objectifs de la directive en contredisant le droit national et en s'opposant, contrairement à la lettre du texte à ce que la définition du temps de travail se fasse conformément à la législation / ou à la pratique nationale et que le congé annuel payé bénéficie aux salariés conformément aux conditions d'obtention et d'octroi prévue par la législation /ou la pratique nationale.

5. PERSPECTIVES

Veuillez préciser:
• les priorités de votre organisation dans ce domaine,
• toute proposition d'ajout ou de modification de la directive, ainsi que le raisons qui la sous-tendent,
• toute mesure d'accompagnement au niveau de l'UE qui, selon vous, pourrait être utile.

La priorité est de clarifier les dispositions sur le congé annuel qui doivent, au niveau de la directive, rester des prescriptions minimales de sécurité et de santé.

Pour le reste il convient de n'apporter aucune rigidité supplémentaire aux possibilités d'aménagement du temps de travail qui sont indispensables à la compétitivité des entreprises. Pour le MEDEF ces questions relèvent du dialogue social dans les entreprises, la réglementation européenne ou nationale ne devant fixer que les dispositions d'ordre public destinées à protéger la santé et la sécurité des salariés.

Germany

Bundesvereinigung der Deutschen Arbeitgeberverbände – BDA

1. TRANSPOSITION

Do you consider that the Working Time Directive has been transposed in a satisfactory way in the EU Member States?

The German Working Hours Act (ArbZG) meets the requirements of the Working Time Directive (WTD). However, in some cases, the Working Hours Act is framed even more strictly than the working time directive. This sometimes leads to negative restrictions on working time flexibility.

Regarding maximum working time, the Working Hours Act goes beyond what is required under the Working Time Directive. According to Article 6 of the Working Time Directive, the average working time for each seven-day period including overtime must not exceed 48 hours. But within this framework, the employer is free to determine working time arrangements. The German Working Hours Act merely allows a maximum daily working time. The restriction on maximum daily working time often impedes companies in periods of peak production which call for longer working hours in the short term and restricts flexibility, above all in international competition. In particular, growing economic cooperation in the framework of international value creation chains calls for operational cooperation across several time zones. This in turn calls for more flexibility in the legislative framework for the organisation of working time. The necessary health protection is also safeguarded when workers switch from daily to weekly working time. First, working time is appropriately limited by a maximum weekly working time. Second, the minimum daily rest period of eleven hours is sufficient to protect against overwork.

Nevertheless, flexibility measures must not lead to more stringent documentation obligations in national laws – in particular, in § 16 paragraph 2 ArbZG.

If you consider that there is room for concern about transposition in specific sectors or concerning specific provisions, please give details.

The precedence given to more specific Community provisions provided for in Article 14 WTD must be maintained. This applies in particular for the more flexible provisions of Directive 2002/15/EC on the organisation of the working time of persons performing mobile road transport activities. Above all, the more favourable (as compared with the Working Time Directive) definition of periods of availability in Article 3 of Directive 2002/15/EC and the extension of the reference period through collective agreements provided for in Article 8 of Directive 2002/15/EC, both of which are taken into account in § 21 a ArbZG, are of essential importance for the haulage sector. Use of the possibility to negotiate the organisation of working time is also made in the corresponding collective agreements.

If you consider that transposition of the Directive has been particularly satisfactory in any respect, please give details.

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2. SOCIAL PARTNERSHIP

Do you consider that the social partners have been sufficiently consulted and involved by the national authorities before the adoption of national measures transposing the Directive, as well as concerning the practical implementation of these measures?

The social partners are consulted when laws are amended. They are informed about the draft legislation and have the possibility to submit written comments. The social partners are regularly invited to take part in a federal-level parliamentary hearing. Members of the relevant parliamentary committee have the possibility to pose questions to the social partners with a view to ascertaining the effects of the new law.

The Directive provides at Articles 17 and 18 for derogations by means of collective agreements or agreements concluded between the two sides of industry. Please indicate how you evaluate the experience in this regard. Are there any examples which you consider as providing possible models of good practice?

There are numerous tried and tested derogations enshrined in collective agreements in various sectors.

3. MONITORING OF IMPLEMENTATION

Please indicate whether you consider that the enforcement and monitoring of the Directive at national level is satisfactory.

As implementation act, the Working Hours Act is monitored and enforced by the responsible regulatory authority. The regulatory authority determines the necessary measures which the employer must take in order to meet its obligations under the Working Hours Act. Furthermore, the regulatory authority can require the employer to provide information needed to implement the Working Hours Act.

If you see any problems, please indicate their overall impact and make recommendations for improvement.

In Germany the employment of workers on Sundays and public holidays is generally prohibited. However, there are exemptions for certain areas. In addition, regulatory authorities can permit further exemptions. This must be possible with less red tape.

Can you identify any examples of good practice as concerns monitoring and enforcement?

-

4. EVALUATION

Please describe any evaluation work carried out under your authority.

-

Please indicate what were the main conclusions as regards the socio-economic impact of the transposing measures, in particular on:

- ***workers' health and safety***
- ***work/life balance***
- ***business flexibility/competitiveness***
- ***consumers/service users***
- ***SMEs***
- ***administrative/regulatory burden.***

The protection of workers` health is safeguarded by the current provisions. Nevertheless, the Working Hours Act goes beyond what is necessary in the interest of health and safety, for instance with regard to maximum working time (see above under point 1.). This is to the

detriment of flexibility allowing a better work-life balance. Thus, a maximum weekly working time would increase flexibility and improve the work-life balance.

Greater flexibility in working time would also enhance the competitiveness of the German economy. Companies could hold their own better in international competition. Increasing competition at global level calls for the ability to adjust rapidly and flexibly to demand.

Digitisation of the world of work offers the technical framework for this also in the interest of a better work-life balance. Working time legislation must also take adequate account of this and must not leave unexploited the advantages and opportunities for a more flexible deployment of employees arising from digitisation.

Does the practical application of the Directive in the Member States, in your view, meet the objectives of the Directive (i.e. to protect and improve the health and safety of workers, while providing flexibility in the application of certain provisions and avoiding imposing unnecessary constraints on SMEs)?

Flexibility in the application of the provisions of the Directive is not satisfactory. The Directive meets its objectives regarding the protection of health and safety of workers.

ECJ jurisprudence on working time in the SIMAP and Jaeger (on-call duty has to be regarded as working time) cases has deeply changed working time legislation in Germany, which has considerable consequences for companies and employees. The implications of the ECJ jurisprudence are not limited to the health sector but also extended to certain industrial sectors, for instance those in which an in-house fire brigade has to be maintained or other safety-related services have to be performed. A revision of the Working Time Directive is therefore urgently needed in order to reach more working time flexibility.

The concrete and balanced proposal for solving practical problems tabled by employers in European social partner negotiations provides that on-call duty should be defined in the Working Time Directive as an additional time category alongside working time and rest periods consisting of active and inactive parts. The inactive part of on-call duty should not be classified as working time insofar as national legislation and/or negotiated provisions so provide. With such a provision, the absurd situation would be remedied whereby a fireman would be obliged to take a long rest period directly after a night of undisturbed sleep during on-call duty – “a rest period to recover from a rest period” as it were – because this form of inactive on-call duty is deemed to be working time under ECJ jurisprudence.

5. OUTLOOK

Please indicate:

- ***any priorities for your organisation in this subject area;***
- ***any proposal for additions or changes to the Directive, stating the reasons;***
- ***any flanking measures at EU level which you consider could be useful.***

a) Priorities at national level

Technological developments and the trend towards individualisation of life models and working time models increasingly offer more opportunities for companies and employees to be flexible. In this connection, individual organisation of working time with autonomous availability in terms of location and duration of working time is increasingly moving centre-stage for employees. Against the background of these developments, a corresponding adjustment to or greater flexibility in statutory national framework conditions is necessary. The other two objectives pursued by the Working Time Directive – safety and health protection in the organisation of working time – are already sufficiently taken into account.

In addition to a shift to a maximum weekly working time, further flexibility measures should be taken. Thus, the possibility for collective agreements to provide for derogations from the minimum rest period of eleven hours should be further extended.

b) Necessary amendments at EU level

aa) On-call duty

Prompted by ECJ jurisprudence in the SIMAP/Jaeger cases, an amendment to the Working Time Directive at EU level concerning on-call duty is necessary. On-call duty must not be deemed to be working time in all circumstances. At least, inactive parts of on-call duty should not be regarded as working time. In this regard, the review of the Working Time Directive must respect existing approaches for evaluating on-call duty that have developed historically in individual countries and sectors, and not impede their functioning. It should also be taken into account here that the nature and intensity of the workloads associated with on-call duties vary considerably depending on where they are used; accordingly, there is no place for a centralising “one size fits all” solution to the issue of on-call duty.

For employers, there is an urgent need for a legislative reaction at European level in order to allow the status quo before the above-mentioned ECJ rulings to be reinstated. The Working Time Directive must enable the continuation of tried and tested forms of on-call duty which meet the wishes of employees and companies and which are in no way incompatible with health protection.

To this end, an instrument must be introduced which makes it possible to differentiate between different forms of on-call duty. This differentiation could be implemented through the introduction of a new time category. The European Commission had also proposed a category covering the “inactive parts” of on-call duty in the initial stages of the revision of the Working Time Directive. The “inactive parts” of on-call duty would not then be regarded as working time.

Against the background of different workloads faced by employees, social partners at sectoral or company level should be able to decide for themselves on a flexible organisation within this new time category. At least, an opening clause should be created so that it can be decided in each collective agreement that inactive parts of on-call duty and/or waiting periods are not credited or are only partially classified as working time.

In this way, sufficient account would be taken in particular of those constellations where on-call duty consists to a very large extent of inactive periods, as is the case with in-house fire brigades for example.

bb) Amendment of the reference period for maximum weekly working time

Also necessary is an amendment of the reference period contained in Article 16 (b) WTD concerning maximum weekly working time within the meaning of Article 6 WTD, taking it from four to twelve months. In the case of collective agreements, a further extension of the reference period beyond twelve months must also be possible. This would mean a genuine added value for working time flexibility to the benefit of companies and employees alike.

cc) Delete non-regression clause

The so-called non-regression clause (Article 23 WTD) which prevents national law being amended to a lower level decreed in the Directive should be deleted in order to enable more flexible provisions at national level.

dd) Maintain the opt-out regulation

Efforts to make the Working Time Directive more flexible must not at the same time bring in new restrictions. Above all, the opt-out possibility in Article 22 WTD enabling a derogation from maximum weekly working time must be maintained.

ee) Amendment of right to leave

There is also a need for an amendment at EU level concerning the provisions in the Working Time Directive on the right to leave. Whereas ECJ clarified in its ruling in the KHS case (dated 22 November 2011, C-214/10) that the right to paid annual leave lapses at the latest 15 months after the end of the year in respect of which the right arises, even in the case of long-term illness, this long entitlement period is not necessary in such cases however. Rather, the right to paid annual leave should continue to be linked strictly to the year in which it is earned in these cases too.

Ireland

Irish Business and Employers Confederation – IBEC

SUMMARY OF THIS SUBMISSION

The Directive is entirely unfit for purpose. It requires radical amendment. Its practical impact has been extremely negative for employers and for the administration of the State. It has created burdens on employers and on the taxpayer which are disproportionate to any benefits it may have created for workers. It is so difficult to operate that many member states have been unable to effectively transpose its provisions. It has produced absurd interpretations by the CJEU including that workers who are asleep can be deemed to be working and that workers who are deceased are entitled to paid annual leave.

The provisions of the Directive are so onerous that a majority of EU member states have opted out of one of the key provisions of the Directive, Article 6, which regulates the maximum average number of working hours per week. This level of opt-out creates a crisis of credibility for the Directive which urgently needs to be addressed. The opt-out needs to be maintained, but the Directive needs to be amended to make it more realistic and thus provide a path for those member states who have opted out to opt back in again. In the interim, Ireland should exercise its right to opt out of Article 6.

While all employers face some challenges arising from the Directive, the health and care sectors face particular challenges. Residential care providers and the home-care sector are in serious danger of having their entire model of service provision made unviable by the Directive. The consequent cost for the State and society in general of that outcome would be unacceptably high.

Ibec submits that the amendments which are required include the following:

1. The creation of a new category of time, namely “on-call time”, which can be treated differently to both working time and rest.
2. The introduction of greater flexibility in the implementation of the provisions of the Directive, including by (a) permitting compensatory rest to be provided within a reasonable period and (b) making available longer averaging periods for the maximum working week.
3. A permission for member states to make annual leave dependent on attendance at work, such that annual leave need not accrue during periods of protracted absence unless member states provide for such accrual.

To permit effect to be given to these amendments, an amending Directive should not contain any non-regression clause.

SECTION 1 – INTRODUCTION

1.1 Expressions used in this submission

In this submission:

- Directive 2003/88/EC concerning certain aspects of the organisation of working time is referred to as “the Directive”, which expression also includes the preceding directives relating to working time, namely Directive 1993/104/EC and Directive 2000/34/EC;

- the primary Irish transposing measure, the *Organisation of Working Time Act 1997* is referred to as "the Act of 1997";
- the Report from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions on implementation by member states of Directive 2003/88/EC ('the Working Time Directive") COM(2010) 802 is referred to as "the Commission's Report of 2010";
- the sectors of the economy which provide health care, care to the elderly in both residential and in-home settings, and care to persons with disabilities are collectively referred to as "health and care sectors", an expression which includes both public and private provision of such services, and the services they provide are referred to as "health and care services";
- the expression "employer's premises" includes all places where the employed worker actually works, including places that are different to the place at which the employer is based.

1.2 Background to this submission

Article 24(2) of the Directive provides that

> *"Member states shall report to the Commission every five years on the practical implementation of the provisions of this directive, indicating the viewpoints of the two sides of industry."*

The social dialogue communication of 26 June 2002 states that in the context of Article 137 directives

> *"the Commission will consult the social partners when preparing reports on the directives concerned."*

The Commission has requested member states to report further to Article 24(2), with a view to the Commission preparing its report. The Commission has also asked the European social partners for their views, further to the social dialogue communication of 2002.

Ibec has been requested to make submissions to both the Irish Government (through the Department of Jobs, Enterprise and Innovation) and *BusinessEurope* so that the views of Irish employers can be represented in their respective inputs to both strands of the Commission's review. This submission has been prepared for submission both to the Irish Government and *BusinessEurope*.

1.3 Previous actions have highlighted the deficiencies in the Directive

The commonly-held understanding that the Directive is not fit for purpose is not new. It is evident from the Commission's attempt to reform the Directive which failed in 2009 and the social partners' attempt to negotiate an amended directive which failed in 2012. Both failures followed lengthy processes in which the deficiencies of the Directive were examined in great detail.

The problems arising from the Directive were assessed in detail in the Commission's Report of 2010 and the accompanying Commission Staff Working Paper SEC(2010) 1611/2.

1.4 Inaccurate statements about Irish law in the Commission's Report of 2010

While the Commission's Report of 2010 is a helpful analysis in many respects, it should not be taken as being accurate in every respect. For example, it fell into serious error in its

assessment of Ireland's transposition of the definition of "working time". The Report asserts the following.

> *"It is also clear that there is a significant number of member states where on-call time at the workplace is still not fully treated as working time in accordance with the Court's decisions:*
>
> - *There is no legal requirement or practice of treating "active" on-call time as working time in Ireland (as a general rule) …*
> - *"Inactive on-call time at the workplace is, as a general rule, not counted as working time by the applicable national law … in … Ireland …"*

These assertions are not correct. The definition of working time in the Act of 1997 closely follows the definition of working time in the Directive. When the CJEU interpreted the Directive's definition of working time broadly in cases such as *SIMAP*, *Jaeger* and *Dellas*, the Irish Labour Court was able to – and repeatedly has – applied that broader interpretation to the definition to the Irish legislation. In light of the Labour Court's interpretation, which includes both active on-call time and inactive on-call time at the workplace, there is no need for the Act of 1997 to expressly include those elements in the definition of "working time" – they are already included in that definition.

The foregoing should not be read as a suggestion that there is universal compliance with rules on on-call time across all sectors of the economy.

SECTION 2 – ON-CALL TIME

2.1 Introduction: the challenge for the health and care sectors

The Directive poses particular challenges for the health and care sectors. Ireland had a hybrid model of provision of health care, care to the elderly and care to persons with disabilities.

- Some services are publically-funded and publically provided.
- Some services are publically-funded and privately provided.
- Some services are privately-funded and privately provided.

Under this model, the State is the primary funder of the great majority of health and care services. The State is also the default provider to people who cannot afford private provision, so measures which render private provision uneconomic have an impact on the finances of the State. The provisions of the Directive which impact adversely on providers of health and care services – whether public or private – are of fundamental concern to the community as a whole; the impacts are not limited to the employers in these sectors.

For reasons described below, full compliance with the CJEU's interpretation of the Directive's provisions in relation to the maximum working week and compensatory rest would have a massively negative impact on the ability of employers in the health and care sectors to provide services. This would have a further knock-on effect on the earnings of workers in these sectors, and in some cases for the survival of those workers' jobs.

As described above, Irish law is compliant with CJEU decisions. In many cases, practice in Ireland is not compliant, in part because workers are not willing to forego overtime earnings.

There are two radically different scenarios which need to be considered in relation to the health and care sectors.

- Where working hours have, historically, been excessive.
- Where real working hours are not excessive but may be artificially depicted as being excessive by virtue of the decisions of the CJEU.

2.2 Where working hours have, historically, been excessive, the Directive should continue to forbid excessive hours.

This first category includes many junior hospital doctors doing on-call work. The Directive was implemented in Ireland in relation to "doctors in training" (herein described as "junior hospital doctors") in progressive stages which were specified in secondary legislation in 2004. However, many issues remain to be resolved in relation to junior hospital doctors. The reasons for the lack of a resolution of this issue are complicated. The reasons include:

- the fact that doctors' representatives have sought increased pay rates to offset losses in overtime earnings which would follow from reductions in hours;
- labour market pressures and the challenges in providing a suitable number of qualified medical personnel in the midst of an unprecedented economic crisis; and
- the fact that the work of junior hospital doctors is inextricably linked to their training and educational needs.

The issue of the working hours of junior hospital doctors are currently being addressed in a collective bargaining process.

Ibec does not suggest any change to the Directive which would avoid the imperative to bring the working hours of junior hospital doctors down to levels which are consistent with the protection of the health and safety of the doctors themselves and of their patients.

2.3 Where working hours are not excessive, Directive should be amended to permit existing work patterns.

The decisions of the CJEU have had perverse consequences in relation to certain categories of workers in the health and care sectors. These are workers whose working hours were never excessive, but which might now be deemed to be excessive because of the artificial interpretation of the definition of "working time" prescribed by the CJEU. This definition includes inactive on-call time at the employer's premises as working time irrespective of the likelihood of the worker being required to work during that time.

The CJEU's interpretation arose from the factual matrix of junior hospital doctors. It is not too much of a simplification to say that, in many cases, such doctors were required to work excessive hours. Some of those hours were asserted by their employers not to be working time because the doctors were said to be "on-call" and could rest at their employers' premises between calls. However, in reality, the amount of rest which the doctors received in any given period of "on-call" work was often so little that the aggregate rest was inadequate. The CJEU found a remedy to this problem by finding that all inactive on-call time at the employer's premises is included in the definition of "working time".

In addressing one problem, the CJEU created another. The Court's definition of "working time" now encompasses other categories of workers whose inactive on-call time at the employer's premises almost always involves genuine rest. For example, in the sectors which provide care to the elderly and to people with disabilities, workers are often required to sleep in the premises, in case the service-users require assistance in the night. These periods are known as "sleepovers". Unlike junior hospital doctors in busy hospitals, workers who do

sleepovers are rarely disturbed during the night. In reality, their sleepovers amount to rest, not work, but the CJEU appears to have deemed such sleepovers to be work.[5]

On the rare occasions when these workers are awoken during the night to attend to service-users, the ensuing time is (properly) regarded as working time for all purposes; nothing in this submission should be read as making any suggestion that this treatment of working time during the night should change.

This extension of the definition of "working time" cases a number of problems, the most obvious of which are as follows.

(a) Shortening the maximum working week, thereby reducing the worker's income

By adding the time spent sleeping to the time spent actually working, there is a danger of the worker's average weekly "working" hours exceeding the 48-hour maximum. To remedy this problem, employers would have to reduce working hours, both during the day and at night. This would place a burden on employers, who would need to find extra staff to fill the lost hours. It would also place a burden on employees, whose take-home pay must inevitably decrease if their real working hours (ie working hours during the day) decrease.

In order to help us better understand the practical impact of full compliance with the Directive in the health and care sectors, Ibec in 2012 examined a case study, using the actual rosters of an actual worker who was a typical full-time worker in a typical care facility. That case study remains relevant; it is attached hereto as Appendix 2 for illustrative purposes. In order to achieve compliance with the Directive during the period examined, the employer in question would have had to reduce her working hours – pre-rating the reductions across day and night – with the effect that she would have lost 17.5% of her earnings.

Enormous labour market challenges would arise if such workers were required to reduce their total working time. Public and private health and care services already face difficulties attracting and retaining suitably qualified employees. The recruitment of an additional cohort of qualified staff to replace a large block of working hours lost because of the CJEU's definition of "working time" would place enormous new strains on an already strained situation.

Even greater practical problems would arise if such a worker's working hours were such as to render him or her a "night worker" for the purposes of the Act of 1997. Even greater restrictions apply to the working time of night workers.

(b) Worker would have to receive an 11-hour break after his or her night's sleep

Issues also arise in respect of Article 3 of the Directive, which requires every worker to receive an 11 hour break from work each day. By counting time spent sleeping as "working time", a worker who works a shift of as short as 5 hours, then completes an 8-hour sleepover, would be obliged to take an 11 hour break before working again.

[5] Please note that this statement is without prejudice to Ibec members' rights to take the view that the decisions of the CJEU in relation to junior hospital doctors cannot be read as being directly relevant to residential care settings. It may well be that the CJEU may, in future, clarify its jurisprudence with the effect of creating a *de minimis* threshold of actual work which must be done before inactive on-call time will be deemed to be "working time". This submission is based on the assumption that the CJEU will not revise it jurisprudence in this way, but Ibec reserves the right, on behalf of its members, to argue that the CJEU should do so.

This creates enormous problems in preparing rosters for workers. There is absolutely no health and safety-based requirement for an employee to take an 11-hour break after a full night's sleep.

Furthermore, the CJEU's restrictive interpretation of the conditions applicable to compensatory rest (described below) would make it very difficult for an employer to find a practical means of addressing the issues arising.

(c) Worker would need to be woken from his or her night's sleep to take a 30 minute break.

The utter absurdity of this situation is demonstrated by the issues arising from Article 4 of the Directive, which obliges employers to give a rest break to a worker whose working day is longer than six hours. The Irish transposing legislation, the Act of 1997, requires an employer to grant a 15-minute break during every 4.5 hours worked and a 30 minute break every 6 hours worked.

This provision is appropriate in its own terms, but becomes absurd when read in light of the inclusion of sleepovers as part of working time. Consider the case of an employee who sleeps for more than six consecutive hours at the employer's premises. Such an employee is (theoretically) liable to be asked to work at any time at which a service user needs assistance. He or she is therefore on inactive on-call time during his of her night's sleep and consequently is at "work" while he or she sleeps.

The only way of achieving compliance with the Act of 1997 is for the worker to wake up during the night and leave the employer's premises to take a "break" of 30 minutes.

Such an arrangement would not only be impractical in the extreme; it could potentially pose a threat to the health and safety of the worker by interrupting his or her night's sleep. In this case, the Directive's consequence is exactly the opposite of its objective.

2.4 Practicable solutions are readily available

The foregoing problems are far from insoluble. There are a number of practical solutions which would achieve a balance between:

- the need to protect the health and safety of those whose on-call time is often (though not invariably) characterised by a large amount of work (such as junior hospital doctors); and
- the reality that workers who typically spend an entire night asleep at their employer's premises and are in no sense working.

The starting point to any solution is to amend the Directive to acknowledge that a third status should exist between work and rest. That status should be "on-call time". Within that status a number of subdivisions need to be introduced which would reflect:

- the different levels of protection required between active and inactive on-call time and
- time spent on or off the employer's premises.

Member states should have discretion to legislate for treatments of on-call time that are appropriate to national conditions, subject to certain minimum safeguards, such as:

- time spent actually working should always be considered “working time”, including time spent working while on-call and
- periods of inactive on-call time which are insufficient to amount to genuine rest should not be considered as “rest” for the purposes of the Directive.

These safeguards would prevent any return to the unsatisfactory manner in which the working time of junior hospital doctors was often managed under working-time rules prior to the *SIMAP* decision, while restoring some logic to the Directive’s treatment of people whose periods of inactive on-call time is usually characterised by genuine rest.

The Directive as it stands results in levels of absurdity and impracticability such that there is no conceivable way it will be complied with in its current form. These issues require urgent attention.

SECTION 3 - COMPENSATORY REST

Workers who cannot, for sound operational reasons, receive the breaks provided for them further to the provisions of the Directive at the required times must receive compensatory rest for those missed breaks further to the provisions of Article 17(2) of the Directive.

This is particularly significant in the context of the requirement to provide an 11-hour rest break in each 24-hour period, as provided for in Article 3 of the Directive. Article 17 of the Directive permits derogations from this provision (as well as other provisions) of the Directive, provided that the workers concerned are afforded equivalent periods of compensatory rest and provided that the workers work in sectors of employment where it is appropriate for derogations to be made.

Irish transposing legislation has made provision for compensatory rest. This legislation is not limited to the Act of 1997. It also includes

- paragraph 4, “compensatory rest periods” of the *Organisation of Working Time (General Exemption) Regulations 1998,* SI 21 of 1998 and
- the *Organisation of Working Time (Code of Practice on Compensatory Rest and Related Matters) (Declaration) Order 1998*, SI 44 of 1998.

The CJEU has established strict conditions for the provision of compensatory rest. In particular is a condition established in the *Jaeger* case in the following terms.

> *“[The derogation] is subject to the condition that equivalent compensating rest periods be accorded to the workers concerned at times immediately following the corresponding periods worked.”*

This condition is impractical and unrealistic. It is not always possible to provide compensatory rest immediately after the period worked. Sometimes it is necessary and reasonable to provide the compensatory rest within a reasonable period afterward, such as by means of allowing the worker a long weekend to rest at the end of the week in which the work occurred.

The decision in *Jaeger* undermines practical arrangements which have been agreed by tripartite bodies in Ireland. The *Code of Practice on Compensatory Rest and Related Matters* in Ireland was agreed within the structures of Ireland’s tripartite Labour Relations Commission after detailed consultation between unions, employers’ representatives and state representatives. This code was given legal effect by Statutory Instrument 44 of 1998. The Code requires compensatory rest to be provided “as soon as possible and, generally, in

an adjacent time frame". This provides appropriate protection to the health and safety of workers without arbitrarily establishing an absolute requirement for immediacy.

An absolute requirement for immediacy would provide particular problems for acute health care provision, where patients simply cannot wait for medical staff to return from breaks. In that sector, the current system under the Code of Practice works well in balancing the needs of the public for acute health care against the needs of medical staff for appropriate rest to protect their health and safety.

Article 17(2) needs to be amended to provide that compensatory rest periods can be provided within a reasonable time after the end of the relevant period of work, so that there can be no question raised about the adequacy of transposition measures which – like Ireland's – achieve an arrangement which is both practical and provides effective protections for the health and safety of workers.

SECTION 4 - ANNUAL LEAVE, SICK LEAVE AND DEATH

Issues have arisen about the manner in which annual leave is to regulated by member states further to Article 7 of the Directive. The CJEU has given a perverse interpretation to Article 7 which far exceeds the scope of the Directive. The issues arising under Article 7 are far less serious than the issues arising in respect of on-call time and compensatory rest, but they are nevertheless significant.

These interpretations place a cost on employers which is disproportionate to the benefits received by workers. Further, these interpretations create an atmosphere which is inimical to the creation of jobs and the fostering of enterprise within the European Union.

The decision of the CJEU in the joined cases of *Schultz Hoff* and *Stringer*, insofar as it has the effect that annual leave must continue to accrue to employees who are out of work on protected periods of sick leave is perverse. The purpose of annual leave is to provide rest from work; its purpose is not to provide rest from recuperation. Member states should only be obliged to provide that annual leave accrues to people who are at work; member states would be free to make greater provision if they so chose.

Similarly, the decision of the CJEU in the recent *Bollacke* case is also perverse. In discovering a right to monetary compensation for the estates of deceased workers who die without having taken all their accrued annual leave, the Court has created a benefit which by definition cannot be related to protecting the health and safety of the workers to whom the annual leave relates. It is difficult to identify circumstances in which a deceased person could benefit from taking a holiday.

Such interpretations of Article 7 render that Article unfit for purpose and creates an impression the Directive as a whole is divorced from the reality of the workplace and the exigencies of the economic crisis from which Europe is only beginning to emerge. Article 7 needs to be revised to provide that:

- member states are not obliged to provide for annual leave otherwise than as a consequence of workers having actually done work, and
- member states are not obliged to provide for financial compensation for untaken annual leave to be made to the estates of deceased workers.

SECTION 5 – NO NEED FOR A SO-CALLED "NON-REGRESSION" CLAUSE

It is common for Directives providing for employment rights to contain Articles whose effect is to prevent member states from using the transposition of the respective Directives as valid grounds for reducing the general level of protection afforded to workers. These are commonly described as "non-regression" clauses, though that expression should be used carefully as the word "regression" has a pejorative connotation which is not always justified.

While such so-called "non-regression" clauses are in most cases appropriate, it would not be appropriate to include one in any amendment to the Directive.

For any amendments to the Directive to provide meaningful respite from the disproportionate burdens which have been placed on employers by the CJEU's various interpretations of the Directive (described above) member states must be free to implement those amendments. A "non-regression" clause would inhibit the proper implementation of those amendments.

It should be noted that the problems identified above were created in the name of protecting workers, but do not always have the effect of benefitting workers. In particular:

- unduly restrictive rules for on-call working have the effect of reducing wage levels for affected workers;
- unduly restrictive rules in relation to compensatory rest restrict job creation; and
- the provision of windfall benefits to certain workers (or their estates, if they are dead) in relation to annual leave means fewer resources are available for the salary rolls of workers who are alive and at work.

All of those provisions result in costs which – having regard to the preponderance of public-sector employers among the employers affected – place a burden on every tax-paying citizen.

The most invidious effect of the faults of the Directive is to inhibit job creation. Europe needs to foster a culture of enterprise rather than stifling enterprise with unjustifiable measures which purport to protect the interests of workers but in reality achieve little but to discourage job creation with the Union. The Directive needs to be amended to reduce the burden on employers and to allow that reduction to be promptly implemented.

APPENDIX 1 – IBEC'S RESPONSES TO THE QUESTIONS POSED IN THE COMMON FORMAT FOR REPORTS BY THE SOCIAL PARTNERS ON THE PRACTICAL IMPLEMENTATION OF THE DIRECTIVE

1. TRANSPOSITION

Do you consider that the Working Time Directive has been transposed in a satisfactory way in the EU member states?

Absolutely not. The Commission's report of 2010 indicates that many member states have either not properly transposed the Directive or have opted out of one of its key provisions. Irish law has adequately transposed the Directive in most respects. By "adequately", we mean "in a manner compliant with EU law", not necessarily "in a manner consistent with the needs of employers or workers". This situation is not satisfactory because the provisions of the Directive are not satisfactory.

In practice in Ireland several important provisions Irish transposing legislation are not universally complied with. This is especially the case in respect of on-call work. Where non-compliance arises, it is because the provisions of the Directive and of the Irish transposing legislation are unjustifiably burdensome and are contrary to the interests of employers and workers.

Some challenges arise in relation to Ireland's transposition of the Directive. The Act of 1997 "gold-plated" the Directive to some extent. For example, the Act requires employers to make additional provision to workers who are required to work on a Sunday, either by paying them a premium for Sunday work or by providing one of a number of similar alternatives. The CJEU, in the case of *UK v Council*, annulled a provision in the original draft working time directive which would have made special provision for Sundays, yet the Irish legislature nevertheless saw fit to impose particular burdens on employers whose business requires work on a Sunday. There is no justification for treating any one day of the week differently from other days of the week.

Another issue arises in respect of Ireland's imposition of record-keeping requirements on employers. The transposing legislation is unduly prescriptive. For example, records are required to be kept in respect of office-workers who work in routine and predictable pattern and who always receive adequate rests and breaks. Such workers often do not accept that their employer needs to record the minute details of their working time and they often resist measures designed to achieve compliance with the Act of 1997. More flexible means of recording compliance need to be established in respect of such workers.

If you consider that there is room for concern about transposition in specific sectors or concerning specific provisions, please give details.

Ibec's concern arises from the fact that adequate transposition (in the legal sense) gives rise to enormous practical difficulties. The sectors which are worst affected are the health and care sectors, including the public and private health sectors; the sector which provides care for people with intellectual disability; the sector which provides care for residential care for the elderly; the sector which provides care for the in-home care of the elderly and the infirm and (in the matter of compensatory rest) the sector which provides acute health care.

If you consider that transposition of the Directive has been particularly satisfactory in any respect please give details.

Ireland has availed of a number of derogations permitted by the Directive, such as a derogation in relation to autonomous workers. In that regard, the Irish transposition is

necessary and appropriate; any reduction in the scope of the derogation would have a massively negative impact on the ability of employers to operate their businesses.

2. SOCIAL PARTNERSHIP

Do you consider that the social partners have been sufficiently consulted and involved by the national authorities before the adoption of national measures transposing the Directive, as well as concerning the practical implementation of these measures?

Yes, although it should be noted that the Irish government no longer uses the expression "social partnership" and many of the structures formerly associated with social partnership in Ireland no longer exist.

The government department with primary responsibility for transposition measures in Ireland is the Department of Jobs, Enterprise and Innovation. That Department carefully and thoroughly consults both representatives of workers and of employers in all relevant measures, both before the adoption of national measures and concerning the practical implementation of those measures. That is not the same as saying that employers representatives are happy with all outcomes, but the great majority of concerns raised by employers in respect of transposition measures are rooted in the substantive provisions of the Directive and not in any deficiency in the transposing legislation.

The Directive provides at Articles 17 and 18 for derogations by means of collective agreements or agreements concluded between the two sides of industry. Please indicate how you evaluate the experience in this regard. Are there any examples which you consider as providing possible models of good practice?

The Irish transposing legislation provides for derogations of the types permitted by Articles 17 and 18, including certain derogations by means of collective agreement.

Insofar as the provisions exist, their operation is satisfactory. For example, a number of collective agreements have been registered which provide for a 12 month averaging period in respect of the Article 6-based provision in relation to the 48-hour maximum working week. These collective agreements facilitate the legitimate interest of employers to maintain production during busy periods and the legitimate interest of workers employed in seasonal industries to maximise their income. Examples of such agreements occur in a wide range of disparate industries; they are certainly not limited to the specific sectors identified in other parts of this submission.

The main concern in respect of these derogations is that the provisions of the Directive are unduly restrictive. The limited nature of the derogations infringe on the right of workers who are not members of trade unions to earn a living and discriminate against SMEs which are less likely to be unionised. Workers and employers in non-union sectors may not avail of the 12-month derogation; in some cases they may not be able to avail even of the 6-month derogation.

In seasonal industries which are predominantly non-union – such as the tourism sector – the traditional model is intensive working during the summer followed by limited hours of work during the winter. The absence of a provision which permits a derogation in respect of workers who are not members of a union means that such workers are forbidden from working available hours in busy months even where they want and need to work those hours. Almost 80% of private-sector workers in Ireland are not members of trade unions. Excluding them from the derogation mechanism is not appropriate.

3. MONITORING OF IMPLEMENTATION

Please indicate whether you consider that the enforcement and monitoring of the Directive as national level is satisfactory.

The Irish monitoring and enforcement body is the called the National Employment Rights Authority ("NERA"). NERA inspectors have broad powers of investigation in respect of the Act of 1997 and other employment legislation. Enforcement is divided between criminal prosecution (taken by NERA) and civil enforcement by aggrieved workers or their trade union, which can result in awards of compensation of up to 2 years' pay in some cases. Enforcement and monitoring is adequate albeit that issues occasionally arise in practice, especially arising from unduly onerous record-keeping obligations which have been imposed on employers by the transposing legislation.

If you see any problems, please indicate their overall impact and make recommendations for improvement.

An issue arises in respect of the monitoring of the Irish transposing legislation as it relates to record-keeping. The Act of 1997 and related secondary legislation impose unduly onerous burdens in respect of record-keeping, as described above. These onerous burdens often become clear to employers in the context of enforcement by the national authority, NERA. The legislation needs to be more flexible in respect of categories of employees for which, in reality, no substantive compliance problems arise.

Can you identify any examples of good practice as concerns monitoring and enforcement?

NERA's approach is focussed on achieving compliance with employment law; enforcement is used as a means to that end rather than an end in itself. This is good practice. Ibec has a concern that new draft legislation (called the *Workplace Relations Commission Bill 2014*) will change the nature of NERA and give enforcement a priority over compliance.

4. EVALUATION

Please describe any evaluation work carried out under your authority.

We attach at Appendix 2 a case study conducted by Ibec in 2012. This case study took as an example an actual (anonymous) employee in an actual undertaking in the care sector. The case study examined the actual hours worked by that employee; the actual hours spent on sleepover; and the actual amount of pay received by the employee for that work and those sleepovers. The employee's average number of "working" hours (including sleepovers) exceeded the 48 hour maximum prescribed by the Directive.

The case study then proceeded to postulate a hypothetical roster for that employee during the same period; a roster which would have been complaint with the Directive. This assumed that actual work and sleepovers would be reduced in a pro-rated manner and that hourly wage rates would remain unchanged.

The net impact on the representative employee used in the case study would have been a 17.5% reduction in wages; see Appendix 2, and the attached spreadsheet containing workings, for more detail.

The same case study demonstrated that the number of nights during which any given employee is called to work is less than 1% of the nights on which residential staff are present at the undertaking. It is not the case that workers on sleepovers are called on to work

excessive hours or that they do not get rest appropriate to their health and safety requirements.

Please indicate what were the main conclusions as regards the socio-economic impact of the transposing measures, in particular on:

- ***Workers health and safety***
- ***Work/life balance***
- ***Business flexibility/competitiveness***
- ***Consumers/service users***
- ***SMEs***
- ***Administrative/regulatory burden.***

See the case study attached at Appendix 2, and the submissions above, which address these points.

As regards consumers and service users, a further point arises in respect of sleepovers. Treating staff who work sleepovers as being at work would have an enormous and negative impact on the service provided to service users who are elderly or who have intellectual disabilities. In recent decades, the model of service provision to such service users has changed radically and for the better. The previous model tended to concentrate service users in congregated settings. The modern model disperses service users to small units modelled on family units. This model provides demonstrably better care for service users than the former model. The new model aspires to make service users feel that they live in a real home, as opposed to living in impersonal institutional care.

Small units are only viable where staff work on a sleepover basis, with no waking staff at night-time. The full implementation of the Directive in its current form would make this model unviable. Services would be required to revert to larger congregated settings with night-time services provided by waking staff. This would be a massively retrograde step from the point of view of the elderly and people with disabilities.

Does the practical application of the Directive in member states, in your view, meet the objectives of the Directive (i.e. to protect and improve the health and safety of workers, while providing flexibility in the application of certain provisions and avoiding imposing unnecessary constraints on SMEs)?

No. Examples of the Directive's failures include the following:

1. The Directive fails to achieve adequate flexibility in certain respects, including in relation to on-call time in the health and care sectors and in relation to compensatory rest.
2. The Directive imposes unnecessary constraints on SMEs, especially insofar as SMEs (being, typically, non-unionised) are excluded from the derogation which would permit a 12-month averaging period in respect of the 48-hour maximum week.
3. Several of the Directive's measures pursue a legitimate objective but are disproportionate and unnecessary for the achievement of those measures. These include measures in relation to on-call work and compensatory rest which have the effect of limiting the amount of remunerated employment which an employee can undertake because unremunerated employment (such as time spent on sleep-over) is counted as "working time".

5. OUTLOOK

Please indicate:

- ***any priorities for your organisation in this subject area;***
- ***any proposal for additions or changes to the Directive, stating the reasons;***

- ***any flanking measures at EU level which you consider could be useful.***

Ibec's priority is to see the Directive reformed to render it fit for purpose. This would entail reducing the rigidity of the Directive and allowing more flexible approaches by member states, to recognise and address atypical workplace situations. Reform of this nature would reduce the incentive of member states to opt-out of the provisions of Article 6 and thereby improve the overall effectiveness of the Directive.

For the reasons specified above, the key reforms would be as follows:

1. The creation of a new category of time which is neither working time nor rest, namely inactive on-call time.
2. The introduction of greater flexibility around the provision of compensatory rest, so that such rest may be provided within a reasonable period rather than immediately following the relevant period of working time.
3. The standardisation of averaging periods for the maximum working week at 12 months (where circumstances exist justifying such a period) without the requirement for collective agreement.

To permit effect to be given to these amendments, an amending Directive should not contain any non-regression clause.

A secondary, but nevertheless important, reform would be to limit the obligation of employers to provide annual leave to situations where the worker is actually working, and not absent due to illness or death.

4. A permission for member states to make the accrual of annual leave dependent on attendance at work, such that annual leave need not accrue during periods of protracted absence.

APPENDIX 2 – CASE STUDY ON IMPACT ON EMPLOYEES IN CARE INSTITUTIONS OF FULL IMPLEMENTATION OF CJEU DECISIONS ON "INACTIVE ON-CALL TIME".

April 2012

Summary

Full implementation of the decisions of the CJEU in relation to what is called "inactive on-call time" would have a significantly negative impact on the earnings of workers in numerous care institutions in Ireland. This is one reason why the Working Time Directive requires urgent amendment. The employee in this case study has been selected for study because she is representative of a significant number of employees in care institutions in Ireland and is employed by an undertaking which is representative of such institutions.

Background to the sector

The expression "care institution" encompasses several types of undertakings in which persons in need of care reside. These undertakings include nursing homes for elderly persons and care homes for persons with intellectual disability.

In Ireland there is a mixed model of provision of such types of care. Some undertakings are State run; some are privately run but publically-funded; a small number may be privately run and privately funded.

"Sleepovers" in the undertaking used in this case study

The undertaking used in this case study is a privately-run but publically-funded care institution. It is typical of residential care institutions in Ireland. The undertaking is home to approximately 150 residents, who live in a number of community settings and who are in need of care and supervision. The undertaking is obliged – both for reasons of proper care of its residents and to ensure regulatory compliance – to make certain that a sufficient number of appropriately qualified employees are present on the premises at all times, including at night, to provide care if needed. Employees in this category are known collectively as "residential staff", a category which includes care assistants, social care workers and nursing staff.

The undertaking currently employs the whole-time equivalent of 305 employees. Of this number, "residential staff" constitute approximately 120 whole-time equivalents.[6]

The vast majority of residents in the undertaking do not require care or attention during night-time hours. Therefore, members of residential staff are only rarely called to work during night-time hours. Most members of residential staff are able to sleep through almost every night without disturbance.[7]

Nights spent in the undertaking by residential staff are called "sleepovers".

The number of nights during which any given employee is called to work is less than 1% of the nights on which residential staff are present at the undertaking.

[6] The numbers are approximate because the undertaking has been engaged in a process of reducing staff numbers in recent months, arising from reductions in public funding caused by Ireland's economic crisis.

[7] This renders such employees radically different from other categories of employees – such as junior doctors "on call" in hospitals – whose cases have come before the CJEU.

Structure of pay for staff eligible for sleepover

Members of residential staff are paid under the following headings.

- An hourly rate for ordinary daytime working hours.
- A premium rate for daytime working hours on Sundays and public holidays.
- A fixed premium amount in respect of any Saturday on which they work. [8]
- A nightly fee for each night of sleepover.
- An additional payment in respect of each night of sleepover during which they are required to work for more than one hour.

Employees are required to work a set number of (daytime) hours per month and to be available for a set number of nights for sleepover.

A full-time employee is required to be available to be at work for an average of 39 hours per week and to be available for sleepover approximately 12 nights per month.

Part-time employees are available for reduced hours and reduced numbers of sleepovers on a pro-rated basis.

Shifts are normally arranged in blocks of 8 or 10 hours. Each shift includes a one-hour break which is paid and during which the employee is not required to be available to work. The one-hour break therefore is not "working time" for the purposes of the Working Time Directive or the Irish transposing legislation, the *Organisation of Working Time Act 1997*.

The average 39 hour working week therefore includes 4 or 5 hours paid break per week, and does not include sleepovers.

The employee used in this case study

For the purposes of this case study, an individual employee has been chosen. This employee is typical of other members of residential staff. She is a full-time care assistant.[9]

- The employee's rate of pay for daytime working hours is €18.09 per hour.
- The employee's premium rate of pay for Sundays and public holidays is €36.18 per hour.
- The employee receives a premium payment of €10.37 in respect of any Saturday on which she works.
- The employee's fee for each night of sleepover is €36.05 per sleepover.
- The employee's additional payment in respect of each night of sleepover time during which she is required to work more than 1 hour is €22.61 per hour worked.

The period studied is the period from November 2011 to February 2012 inclusive.[10]

The employee's actual working hours and actual pay

[8] This is not an hourly premium; it is a fixed sum paid in addition to the normal daytime hourly rate. The amount is the same irrespective of how many hours are worked in any particular Saturday.

[9] Other members of residential staff, such as social care workers and nurses, are paid more than the employee because of their greater qualifications and responsibilities.

[10] A four-month period was studied because four months is the standard averaging period provided in the *Organisation of Working Time Act 1997* for the purposes of the 48-hour working week.

In the period studied the employee was paid for:

- 602.56 hours at the normal daytime rate, yielding €10,900.31;
- 7 Saturday shifts at a premium of €10.37 per shift, yielding €72.59;
- 73.44 hours at the premium daytime rate, yielding €2,657.07;
- 47 sleepovers of 8 hours each (376 hours total) yielding €1,694.35.

She was paid a total of €15.324.31 in respect of a total of 1,052 hours. However, 68 of those hours were paid breaks, so only 984 of the hours would count as "working time" for the purposes of the *Organisation of Working Time Act 1997*.

Note that the employee was never required to work for more than an hour during any of her sleepovers in the period studied. It is unlikely that she was disturbed at all on any such night. This is typical of the employees in the undertaking. Employees in care institutions are only rarely required to work during sleepovers.

The period studied comprised 121 days, or 17.29 weeks. The maximum weekly working time should not have exceeded an average of 48 hours in this period. This means that the employee should, strictly speaking, not have worked more than 830 hours in the period.

In order to render the work compliant, the undertaking would have had to reduce the employee's working time by 154 hours in the period. This would have had a significant effect on her earnings.

Notional working hours which would have been compliant and pay which she would have received for working those hours

If the undertaking had reduced the employee's hours such that her working time (as defined) did not exceed 830 hours,[11] the employee would have been paid for:

- 491.09 hours at the normal daytime rate, yielding €8,883.75;
- 7 Saturday shifts at a premium of €10.37 per shift, yielding €72.59;
- 59.85 hours at the premium daytime rate, yielding €2,165.50;
- 42 sleepovers of 8 hours each (336 hours total) yielding €1,514.10.

She would have been paid a total of €12,635.95 in respect of a total of 886.94 hours. However, 57 of those hours would have been paid breaks, so only 829.94 of the hours would count as "working time" for the purposes of the *Organisation of Working Time Act 1997*. This would have provided an average working week of 48.01 hours during the period, almost exactly the same as the maximum average working week permissible under the *Organisation of Working Time Act 1997*.[12]

This would have resulted in a reduction in earnings of €2,688 for the employee during that four month period. That would represent an annual reduction in earnings of approximately €8,109, or approximately 17.5% of her salary.

[11] The calculation has been done on the nearest pro-rating of hours which is practicable within the three categories of work (normal daytime, premium daytime, sleepover) bearing in mind that all sleepovers are of 8 hours duration.

[12] It should also be noted that the employee is by law forbidden from working additional hours in a second employment which would increase her average working week to more than 48 hours.

Italy

Confederation of Italian Industry – Confindustria

1. TRANSPOSITION

Do you consider that the Working Time Directive has been transposed in a satisfactory way in the EU Member States?

Yes, it is satisfactory considering that legislation leaves ample room for collective bargaining to regulate aspects on which adaptability is necessary to match both companies' and workers' needs.

If you consider that there is room for concern about transposition in specific sectors or concerning specific provisions, please give details.

If you consider that transposition of the Directive has been particularly satisfactory in any respect, please give details.

In particular for the role granted to collective bargaining.

2. SOCIAL PARTNERSHIP

Do you consider that the social partners have been sufficiently consulted and involved by the national authorities before the adoption of national measures transposing the Directive, as well as concerning the practical implementation of these measures?

No new developments since the adoption of the national legislation in 2003, when the social partners had the chance to express their respective views on the implementation of the Directive.

The Directive provides at Articles 17 and 18 for derogations by means of collective agreements or agreements concluded between the two sides of industry. Please indicate how you evaluate the experience in this regard. Are there any examples which you consider as providing possible models of good practice?

Collective bargaining in Italy in this regard has been developing effective solutions that are positive for companies and workers.

In the Italian experience, the model of good practice is represented by the possibility in itself to allow collective bargaining to develop suitable solutions for sectors and companies.

3. MONITORING OF IMPLEMENTATION

Please indicate whether you consider that the enforcement and monitoring of the Directive at national level is satisfactory.

The enforcement of the Directive is not satisfactory when labour courts rule the full counting of on-call time as working time, while the treatment of on-call time requires the recognition of two different components that cannot be treated as the same when considering the purpose of the protection of the safety and health of workers.

4. EVALUATION

Please describe any evaluation work carried out under your authority.

Please indicate what were the main conclusions as regards the socio-economic impact of the transposing measures, in particular on:

- ***workers' health and safety;***
- ***work/life balance;***
- ***business flexibility/competitiveness***
- ***consumers/service users***
- ***SMEs***
- ***Administrative/regulatory burden.***

Does the practical application of the Directive in the Member States, in your view, meet the objectives of the Directive (i.e. to protective and improve the health and safety of workers, while providing flexibility in the application of certain provisions and avoiding imposing unnecessary constraints on SMEs)?

Yes, the practical application of the Directive meets its objectives. Some challenges remain with regard to enforcement in particular on the treatment of on-call time, as said above.

5. OUTLOOK

Please indicate:

- ***any priorities for your organisation in this subject area;***
- ***any proposal for additions or changes to the Directive, stating the reasons;***
- ***any flanking measures at EU level which you consider could be useful.***

For Confindustria the priority is the extension, by means of legislation, of the reference period for averaging working time to 12 months.

As said above, collective bargaining can play an important role when identifying effective solutions at sectoral and company level for the organisation of working time.

However, considering that, with the new competitiveness challenges, all companies in all sectors need to deal with seasonal and other fluctuations in activity, a legislative intervention is the more appropriate and effective instrument to grant that extension.

That intervention would represent the most balanced solution to meet companies' needs, while providing adequate protections for workers.

At the same time, this solution would allow to respect the average weekly working time limits, with reduced need for derogations.

The Netherlands

Confederation of Netherlands Industry and Employers – VNO-NCW

1. TRANSPOSITION

- It is difficult if not impossible to judge about the implementation of the directive within other EU-countries.
- It is clear that the opt out in EU countries is applied very differently, and leads to an unequal playing field. There is also an unequal playing field where countries make further constraints to the EU regulation.
- By the complex design of the Directive an satisfying implementation will never be the case.

2. SOCIAL PARTNERSHIP

- By the Social Economic Council this is a decent process. We regret that the Ministry of Social Affairs doesn't have a feeling for juridical imperfections in the WTD. They don't want discussion about it, so imperfections stay out of focus. In practice it leads to unnecessary frictions into organisations. If the Inspection of the Ministry would like to think/handle in the ghost of the meanings of the WTD, frictions could be overcome. The contrary is often the case.
- Formal this is well arranged, but in practice the influence of the trade unions is a braking factor. The Ministry don't want to pass the trade union, although often on the level of the employee participation there is concensus on the desired deviations. With this attitude the trade unions can block the apply of this aspect of the WTD.

3. MONITORING OF IMPLEMENTATION

- there are no complaints about enforcement and monitoring
- the fine regime could be a little bit more moderate. High fines are not logic in cases of a first check/control (especially when in concerns sme's)
- a good example is that the Inspection in consultation with social partners titles risk sectors, where as a result there is a special focus on control

4. EVALUATION

- there hasn't been an evaluation
- this Directive is beyond shooting. A lot of details and specific conditions makes application not easy, where the main rules hinder and obstruct innovation. The directive is passed slowly by developments in society within an globalising economy. If the Directive doesn't adapt it will be in foreseable time for a growing kind of situations be regard as irrelevant.

5. OUTLOOK

- Labour- and rest period belong to the direct consultation of employer and employee. There are a lot of national and international prescriptions which frustrate that. The WTD can be diminshed to a small kind of coreregulations.
- In the present WTD the presence service leads to an almost unenforceable bureaucratic regulation. Also consignment is a carepoint, because the WTD has only two colours (labourtime or rest time).
- The maximum work week of 40 hours average for night workers is also an care point. In that fulltime workers are not able to make overtime and in the case of an average labour time of 8 hours per shift it hinders innovation of labour sytems with night labour.

Portugal

Confederation of Portuguese Industry – CIP

1. TRANSPOSITION

In Portugal, Council Directive 93/104/EC of 23 November 1993 concerning certain aspects of the organization of working time was transposed by the Decree-Law 73/98, from 10th of November.

The provisions of the Directive 93/104/EC and of the Directive 2000/34/EC of the European Parliament and of the Council of 22 June 2000 (amending Council Directive 93/104/EC concerning certain aspects of the organisation of working time to cover sectors and activities excluded from that Directive), where both passed on to the first Portuguese Labour Code (Law no. 99/2003, of 27th of August, which came into force on the 1st of December of 2003) and its Regulation (Law no. 35/2004, of 29th of July – article 2nd, s)).

So, both directives where transposed to national law.

Nowadays, those same Directives are expressly transposed in the Law that approved the revision of the Portuguese Labour Code (PLC): Law no. 7/2009, of 12th of February – see article 2nd, n).

In CIP perspective, however, the transposition is not totally satisfactory.

In fact, some of the restrictions present in Decree-Law 73/98, from 10th of November, are also present in the PLC.

For example, differently to the Directive, that considers working time as the period during which the worker is working, at the employer's disposal and carrying out his activity or duties, the PLC includes in the concept of working time, between others, the following interruptions to work:

- Interruptions to work that are considered as work by collective agreement, by company's internal regulation or by common practice in the company;
- Occasional interruptions in the daily work period, inherent to the satisfaction of undelayable personal needs;
- Interruptions to work caused by weather conditions that affect the company's activities.

On the other hand, the PLC does not provide a reference period "not exceeding 14 days" for the application of Article 5 (weekly rest period), as allowed in Article 16 (a) of the Directive, neither takes advantages from all possible derogations allowed in article 17 (3) of the Directive.

These examples of restrictions are, of course, holding back the competitiveness of Portuguese companies.

2. SOCIAL PARTNERSHIP

Social partners were first consulted about the transposition of the working time Directive in 1998 and, also in 2003, during the elaboration of the first Labour Code, in 2008, during its revision, and in 2012, when changes where introduced in the PLC.

Regarding collective bargaining, CIP has detected many difficulties on the negotiation of these matters, since some trade unions disagree, as a principle, on the introduction of

adaptability and flexibility of working time (for example, bank of hours and other working time arrangements).

3. MONITORING OF IMPLEMENTATION

There are no relevant problems to report regarding the enforcement and monitoring of the Directive.

However, like we said before, the implementation of the Directive through collective agreements has been facing obstacles by trade unions that are against the introduction of adaptability and flexibility in working time arrangements.

4. EVALUATION

CIP makes a negative evaluation of the Directive.

This is one of those cases were the principle of subsidiarity should have been respected. Working time should have never been regulated at EU level. It is a matter for the EU Member States to define because it interferes with their own social-economical context, their social dialogue practices, their legislation and, indirectly, in wages.

Some of the difficulties and negative aspects have already been mentioned before (see answers to questions 2. and 4. above).

Those difficulties are, however, aggravated in the case of Portuguese micro and SME's, because these companies frequently have no collective bargaining and, therefore, it is almost impossible to introduce working time schemes to match the needs of companies and workers.

5. OUTLOOK

CIP perspective is that the EU Directive on working time should be changed in order to introduce more flexibility in working time arrangements.

This could be achieved through a revision of the Directive assuring that:

- The inactive part of on-call time is not considered as working time;
- The reference period for calculating weekly working time over 12 months should be a general rule, with a possibility to extend it beyond 12 months by collective agreement;
- Opt-outs could be made by two independent means: either by collective agreement or by individual consent.

Spain

Confederación Española de Organizaciones Empresariales - CEOE

CEOE contribution focuses on those aspects of the Directive that have raised more problems when it comes to their practical implementation, because of the vagueness of some legal provisions and the consequences of the European Court of Justice (ECJ) jurisprudence aimed at filling those gaps.

The Directive 2003/88/EC lacks clarity regarding two fundamental aspects: first, the working time definition when the worker is waiting or at the employer's disposal in the company offices. Second, the annual paid leave during the annual accrual period.

Concerning the first issue, in the "SIMAP" and "Jaeger" judgments (Sindicato de Médicos de Asistencia Pública v Conselleria de Sanidad y Consumo de la Generalidad Valenciana, 2000 and Landeshauptstadt Kiel v Jaeger, 2003) the ECJ concluded that the time available, including the inactive part, should be considered as working time. This decision should be interpreted in the context of the sector concerned, the health sector. Applying the criteria established in this ECJ ruling to all sectors could obviate their own specificities and generate additional costs for companies.

Regarding the second issue, the Shultz-Hoff ruling (2009) determined that annual paid leave can be remunerated in another period that the annual accrual period, if the worker has been on sick leave for the whole or part of the period of reference. This situation introduced legal uncertainty from a business point of view, because it has an impact on the implementation of the commitments made between employers and workers in terms of working time and rest periods.

In 2004, the European Commission presented a proposal revision of the Directive 2003/88/EC, aimed at clarifying both issues, as well as reducing the exceptions to the maximum weekly working time. In 2009, negotiations between European Parliament and Council about this revision stopped and the Commission launched a new consultation to the European social partners, including BUSINESSEUROPE. This time the European social partners decided to start negotiations, which ended without an agreement in December 2012.

Considering the above, it is likely that the Commission initiates a new consultation, based on the national implementation reports and the study that is elaborating on the impact of the some possible amendments to the Directive 2003/88/EC.

From a business perspective, besides the definition of on-call time and the annual paid leave, the members of CEOE[13] have identified other provisions of the Directive that could be improved:

a) Revising the definition of "working time" established in Article 2.1, specifying that it is "any period during which the worker is working, at the employer´s disposal and carrying out *effectively* his activity or duties, in accordance with national legislation and/or practices".
b) Introducing the concept "employee´s attendance time": any period during which the worker is at the workplace, but not providing effective work. The employee´s attendance time would become working time when the worker started to do effective

[13] CEOE´s consultation result, through its Committee on Social Dialogue to its associated business organizations, April 2012, held in the framework of negotiations among the European social partners for the revision of Directive 2003/88 / EC and then in September 2014.

work. Each Member State would regulate the concept, taking into account the collective bargaining process.

c) Regarding “shift work” (Article 2.5) the definition determines “any method of organising work in shifts whereby workers succeed each other at the same work stations”. This latest connotation (“at the same work”) does not add anything to “shift work”, being in practice an obstacle to comprehend the real implication, since this is a concrete example only practicable in the manufacturing and industrial sectors. Therefore, such limitation should be removed.
d) The Directive, in Article 3, establishes a minimum daily rest period of 11 consecutive hours per 24-hour period. However there should be a modulation of the minimum rest in cases of exceptional or extraordinary situations, reducing this time to seven or eight hours. This reduction would be compensated by adding the difference to another or others daily rests in a period of seven days or at another moment in time, by mutual agreement between employer and employee.
e) Regarding the “weekly rest”, Article 5 of the Directive should stipulate that the minimum weekly rest is 35 hours every seven days. Additionally, Article 5 should clearly state that there is no daily rest between the work day that immediately precedes the weekly rest and the next first day of work. Moreover, the reference period to calculate it (Article 16) could be extended from 14 days to 21 or 28 days.
f) The maximum length of the weekly working time should be extended from 48 hours to 52 hours to meet the needs of specific productive sectors.
g) As for determining the maximum weekly working time, it should be established in Article 6 of the Directive that the limit of 48 hours in any seven-day period shall be computed as annual total average. If this is not accepted, Article 16 of the Directive could be revised to contemplate that Member States may provide a reference period of twelve months, without a collective agreement (Article 19). Furthermore, Article 19 should allow the extension of the reference period if agreed by the social partners or via collective agreement.
h) As regards derogations established in Article 17, paragraph 3 point c (viii), they should cover the carriage of passengers, whether it is urban or not.

Finally, it is crucial that any legislative reform in this field avoids the inclusion of concepts that impede flexible working time arrangements. At the same time, legislation in this field should guarantee the correct balance between flexibility in working time management and protection against risks to health and safety. Companies need to be able to adapt to demand fluctuations, in order to ensure the most efficient use of their resources and preserve or even increase their competitive advantage.

Sweden

Confederation of Swedish Enterprise

1. TRANSPOSITION

Do you consider that the Working Time Directive has been transposed in a satisfactory way in the EU Member States?

The transposition might be legally satisfactory but is not consistent with the needs of employers and workers and the changing working environment. The non step back clause in the directive makes national legislation unnecessary complicated and to some extent even stricter than the directive requires, thereby constraining working time flexibility and hampering the competitiveness of companies.

If you consider that there is room for concern about transposition in specific sectors or concerning specific provisions, please give details.

We see problems with the Directive regarding on-call time and provisions on compensatory rest in certain public and private sectors. In the Swedish transposition derogations from the directive are in principle only allowed due to collective agreements. The option provided for derogations in Article 17.3 by law, regulations, or administrative provisions has not been used causing problems for employers in general and especially for employers without a collective agreement.

It is important to give room for more specific community provisions on working time for certain sectors, for example for mobile road transport.

The non-step back clause is also a problem.

If you consider that transposition of the Directive has been particularly satisfactory in any respect, please give details.

-

2. SOCIAL PARTNERSHIP

Do you consider that the social partners have been sufficiently consulted and involved by the national authorities before the adoption of national measures transposing the Directive, as well as concerning the practical implementation of these measures?

There have been sufficiently consultation and involvement by national authorities regarding transposition of the directive. However, more attention could have been paid to legal imperfections in the directive as well as employers views. For instance differences in definition of what constitutes time worked in the Swedish Working Hours Act and the Working Hours Directive led to over implementation. The definition of work hours is considerably wider in Swedish working hours legislation than it is in the EC Working Time Directive. The EC's working hours definition includes only absence due to holiday and illness with time worked while Swedish Working Hours law includes in principle all absences except leave without permission. Since Sweden has a very generous leave legislation, statutory and other leave except holiday and sickness summarize to about 7 percent of agreed working hours. Differences in definition of working hours therefore leads to more limited opportunities for Swedish business than for competitors in other countries.

None of the possible derogations in article 17.3 have been included in Swedish legislation, which leads to problems employers in general and especially for small companies without collective agreements.

The Directive provides at Articles 17 and 18 for derogations by means of collective agreements or agreements concluded between the two sides of industry. Please indicate how you evaluate the experience in this regard. Are there any examples which you consider as providing possible models of good practice?

The possibility to derogate by means of collective agreements or by means of agreements between the two sides of industry are positive, as they allow some flexibility and the possibility to find effective solutions for workers and employers. Unfortunately due to the implementation of the directive employers had to pay once more to get back collectively agreed solutions earlier agreed upon. However, since possibilities for flexible working arrangements are very important to the competitiveness of the European companies, in the future the Directive should make it possible to agree on flexible working hours arrangements more widely with individuals or workers representative at company level.

The possibility to extend the reference period for calculating weekly working time from four to twelve months by collective agreement is good, but as mentioned above only possible for employers with collective agreement, making it difficult for some companies to use it. This concerns in particular SMEs where workers are often not unionised, and those companies which have difficulties in negotiating collective agreements with trade unions.

3. MONITORING OF IMPLEMENTATION

Please indicate whether you consider that the enforcement and monitoring of the Directive at national level is satisfactory. If you see any problems, please indicate their overall impact and make recommendations for improvement.

There are problems with the EU court rulings which count all of on-call time at the workplace as working time, whereas two different components of on-call time (active and in-active) need to be recognised.

There is as mentioned above a complexity of the national regulations implementing the directive that causes legal uncertainty for companies.

Can you identify any examples of good practice as concerns monitoring and enforcement?

-

4. EVALUATION

Please describe any evaluation work carried out under your authority. Please indicate what were the main conclusions as regards the socio-economic impact of the transposing measures, in particular on:

- ***workers' health and safety***
- ***work/life balance***
- ***business flexibility/competitiveness***
- ***consumers/service users***
- ***SMEs***
- ***administrative/regulatory burden.***

The measures to transpose the Directive meet its objectives in terms of protecting workers' health and safety, however that they go beyond what is necessary in this regard. This creates administrative burdens for companies.

The rigidity of the legislation also hampers the possibilities for better work-life balance for employees.

The transposing measures do not allow for adequate business flexibility, in particular the need for companies to compete globally by adjusting rapidly to demand.

The transposing measures are not in line with the needs of customers and service users, for example, users of public and private care services and on road transport.

Does the practical application of the Directive in the Member States, in your view, meet the objectives of the Directive (i.e. to protect and improve the health and safety of workers, while providing flexibility in the application of certain provisions and avoiding imposing unnecessary constraints on SMEs)?

See response to previous question. Whilst the practical application of the directive meets the objective of protecting the health and safety of workers, it does not meet the objective of providing flexibility in application of the provisions of the directive. This flexibility is important for both employers and employees.

There is inadequate flexibility regarding application of provisions on on-call time and compensatory rest, due to ECJ judgements stipulating that all on-call time at the workplace (active and in-active) has to be regarded as working time. This has serious consequences not only for the health and care sector, but also in transport and other industrial activities. One other example are when people employed in public sector also are involved in volontary publicly organised fire brigades. Considering inactive periods at the workplace during on-call duty as working time also raises costs for many sectors - for example due to the need for increased manpower.

There are also unnecessary constraints imposed on SMEs, making it difficult for them to introduce working time schemes. For example, they are constrained in using the derogation to a 12 month reference period, partly due to lack of collective bargaining possibilities.

5. OUTLOOK

Please indicate:

- ***any priorities for your organisation in this subject area;***
- ***any proposal for additions or changes to the Directive, stating the reasons;***
- ***any flanking measures at EU level which you consider could be useful.***

Flexibility is crucial for companies' competitiveness, particularly in the context of new technological developments and the trend towards individualisation of working time models to increase work/life balance.

It is also important that the directive gives room for national solutions and allows member states to take account of specific national situations, for example through the use of derogations. It should be possible to agree on flexible working time arrangements at all levels – between the employer and individual employee, between the employer and worker representative and through collective bargaining. The further application of existing collective agreements should not be impeded.

UK

Confederation of British Industry – CBI

The basic regulation of working hours, rest periods and paid annual leave is accepted by British business. The Working Time Directive has been adequately transposed in the UK in this regard – setting minimum standards and providing a floor to the labour market on the grounds of health and safety.

But regulating workers' rest periods, putting a soft cap on weekly working hours and providing for paid annual leave is a significant cost, and the Directive is officially measured as one of the most costly EU regulations.[1]

While the CBI has always argued that working time is an issue best legislated on at national level, and that current EU working time rules are too prescriptive, the major difficulties come not from the Directive itself but from on-going challenges to the existence of the individual opt-out and from European Court of Justice rulings widening the obligations stemming from the directive far beyond original intentions.

Resolving these difficulties remains an urgent priority for British business but a new directive is not the answer.

Instead the focus must remain on retaining and maximising existing flexibilities:

- **A flexible approach is key to ensuring the Directive works for business**
- **The first principle of this flexible approach is the preservation of the opt-out...**
- **...the second is finding ways in Europe and the UK to stop the ECJ rewriting our law.**

A flexible approach is key to ensuring the Directive works for business

The world of work has profoundly changed since the Working Time Directive was agreed in 1993. The trend over this period to a more diverse range of working patterns means modern labour market regulations must meet the need – from both businesses and employees – for flexible and adaptable employment arrangements.

But more than ten years of unsuccessful discussion and negotiation have demonstrated that a broad review of the Working Time Directive cannot succeed. Instead the focus must remain on retaining and entrenching existing flexibilities to allow for effective implementation by businesses and Members States.

Creating further uncertainty or inflexibilities must be avoided. More flexible labour markets mean detailed and prescriptive rules around working time are increasingly irrelevant to the reality of both business needs and the requirements of individual workers. Detailed rules simply cannot take account of the wide variety of individual demands and preferences of both businesses and workers.

Working time flexibility is crucial to business, jobs and living standards

Flexible employment arrangements are essential for UK business success with 97% of firms believing that a flexible workforce is either vital or important to the competitiveness of the UK labour market and the prospects for business investment and job creation (**Exhibit 1**).[2] On

no other employment issue does our Employment Trends Survey produce such unanimity of views across business.

The UK's flexible labour market has a good record on job creation, not only helping create jobs during the good times – but also helping to protect them during the recession. And by February 2014 800,000 more jobs had been created than were lost during the recession, despite weak growth and an uncertain throughout most of this period.[3] The latest labour market statistics show strong private sector job growth and falling unemployment. The unemployment rate is now 6.2% and at its lowest since the end of 2008.[4]

While the recent squeeze on wages has been tough our flexible labour market also has a strong history of raising living standards through pay growth. Between 1990 and 2008 the UK achieved faster real wage growth than most other major economies – including both the US and more regulated countries like Germany and France (**Exhibit 2**).[5]

Exhibit 1: Importance of flexible employment patterns for the UK economy (%)

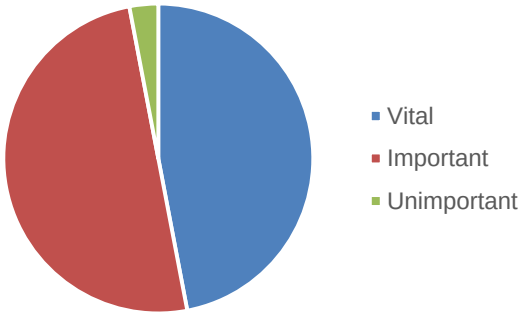
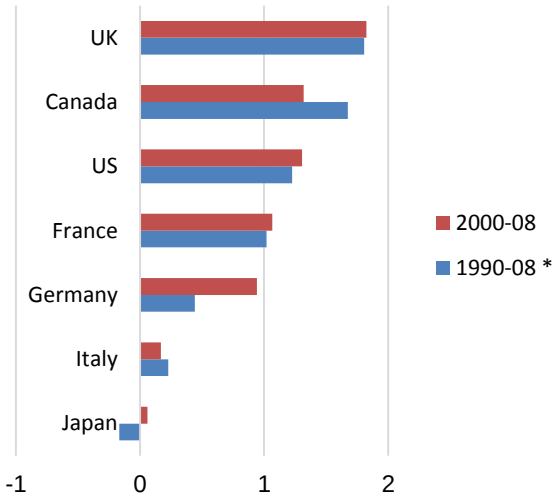


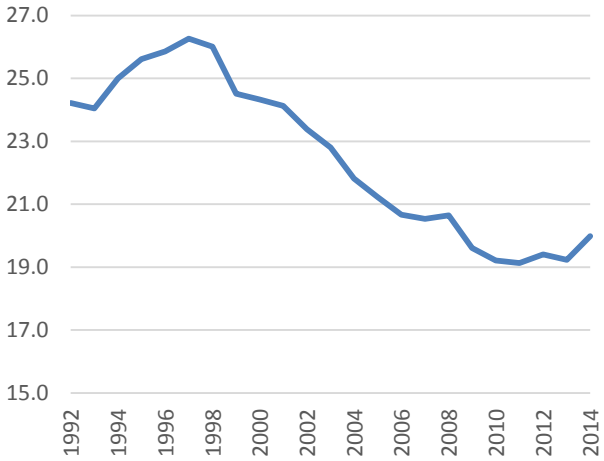
Exhibit 2: Average annual growth of real wages (%)



And our labour market is creating more highly-skilled and better paid jobs. Between 1992 and 2012, the proportion of UK jobs that required highly-skilled workers increased from 33.6% to 43%. The latest forecast by the UK Commission for Employment and Skills predicts that this will continue over the next decade so that by 2022 almost half (47.6%) of all jobs in the UK will require highly skilled workers.[6]

This flexibility has not resulted in an increase in the number of people working long hours. Despite a recent uptick following the recession and recovery, there is a clear long-term decline in the number of people working over 45 hours a week (**Exhibit 3**).[7] Full-time workers average around 37.6 hours per week and part-time workers average around 16.1 hours per week, with a fifth of people in employment working more than 45 hours a week.[8]

Exhibit 3: percentage of those in employment working over 45 hours



Tackling the burden of employment regulation is a key business concern…

For the EU to compete globally, grow and create jobs in Europe all regulations – both existing and new – must support growth, working in a global context and for businesses of all size. In line with this goal the priority of firms when regulating working hours is that they retain a degree of flexibility to be able to manage their workforce effectively. 81% of businesses report that the capacity to respond rapidly to growth opportunities is an important benefit of a flexible workforce, and 87% of businesses cite the ability to cope with a fluctuating demand as a key benefit.[9]

Yet two thirds of businesses (68%) see the burden of employment regulation as the biggest threat to the competitiveness of the UK's labour market and worry that increased regulation could reduce flexibility and damage the attractiveness of the UK as a place to invest and generate jobs. These concerns extend across companies of all sizes, with SMEs and larger organisations alike identifying it as the biggest threat to UK labour market competitiveness.

Close to half of firms (45%) are also concerned about the impact of EU regulation on the UK labour market.[10] Membership of the EU's single market remains fundamental to the UK's economic future and business is clear that, in order to effectively function, any Single Market needs some commonly agreed rules to allow full access to the market on equal terms.[11] But despite the benefits of some commonly agreed rules, social policy remains one of the most controversial areas of EU competence. When asked to rank their priorities for reform of the EU, tackling the burden of some regulations – particularly employment law – was the top priority of CBI members. 49% of businesses report that attempts to create similar employment law across the EU has had a negative impact on their own business, compared with just 22% reporting a positive impact.[12] 52% of businesses believe that, were the UK to leave the EU, the overall burden of regulation on their business would fall.[13]

Member states must restore the principle of subsidiarity in EU policymaking by signalling to the Commission that it should refocus its activities based on a more limited interpretation of its remit. Until this is fully restored, there should be a moratorium on any new regulation where adequate legislation already exists or there is a strong argument for national decision-making, including in the area of social and employment law.

…and employees value the right to work flexibly

The regulation of working time should not hamper workers' individual choice to work in more flexible and diverse ways. The positive trend of businesses accommodating those who wish to work more flexibly must allow employees the opportunity to request to work longer hours

through increased overtime as well as the right to request to reduce or change working hours.

While much of the discussion around employment flexibility is focused on different forms of employment contracts, flexibility in the workplace takes many forms. Increasingly there is flexibility over the location for work, with nearly nine in ten firms reporting remote, mobile or home working by at least some staff, and more than eight in ten businesses report the use of temps, freelancers and contractors to cope with fluctuations in activity levels and the periodic need for specialist skills.[14]

"Individuals, provided they are subject to appropriate health and safety regulations, should be free to choose to work longer hours if they wish"

Over the past decades many firms have taken on the challenge of supporting more diverse career paths and structures. The right to request flexible working, for example, supported a major change in our labour market, with a massive upsurge in the availability of different forms of flexibility to working parents. Its extension beyond parents to all individuals will further normalising the idea of working flexibly. In many cases the issue is now not whether flexibility is possible, but what the structural changes that will enable flexibility are. Businesses are challenging outdated assumptions of traditional working patterns, as a benefit for both the firm and the employee. Many companies are now making it clear that they have a presumption in favour of flexibility and are open to candidates' proposals for how they would fulfil the role so long as the key tasks are met.[15]

The first principle of this flexible approach is the preservation of the opt-out...

The individual opt-out from the Working Time Directive's 48-hour maximum working week is an integral part of the UK's flexible labour market. Individual workers must be allowed the choice of opting out from maximum weekly working hours if they so wish. The retention of the opt-out remains a critical issue for business, with our Employment Trends Surveys consistently showing that losing the opt-out would have a negative impact on businesses.

But the future of the opt-out repeatedly comes under review. This continual speculation about how long it will remain a provision of the Directive and whether new conditions on its use will be imposed is disruptive and damaging to investor and business confidence. It is vital that the individual opt-out from the maximum 48-hour working week must be retained as a permanent provision of the Directive. Under no circumstances could businesses accept its removal and speculation about its future is damaging.

Firms need to be able to plan ahead, confident that they will be operating within a stable regulatory framework. The government has an essential role to play within the EU in bringing this uncertainty to an end and ensuring that the future of the opt-out is secure for the long term.

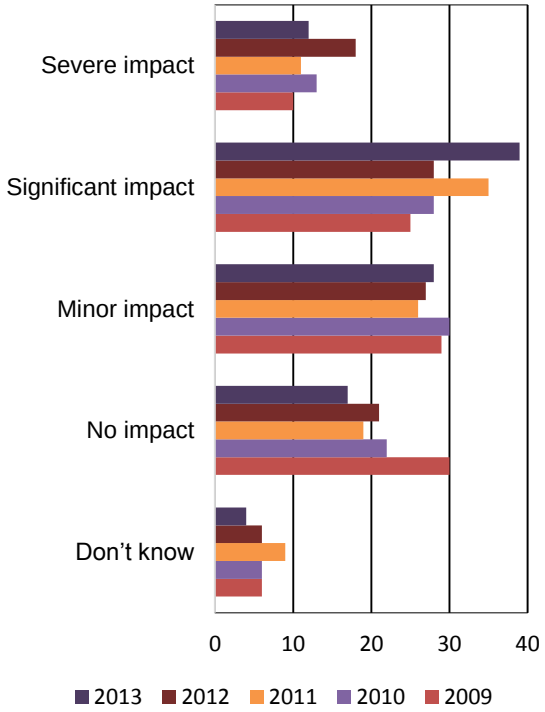
The opt-out is essential to UK business competitiveness…

An overwhelming number of CBI members regard the individual opt-out as an essential mechanism for labour flexibility – for the benefit of employee and employer alike. For the individual employee, it gives the freedom to choose when they want to be available for work, while allowing businesses to operate a flexible workforce which can be critical to their success, managing changes in demand and increasing flexibility as well as improving employee motivation through the availability of overtime.

The 2013 CBI/Accenture Employment Trends Survey shows the importance businesses attach to retaining the opt-out. Nearly four in five respondents (79%) report that its loss would have an impact on their business (**Exhibit 4**). Moreover, the proportion of businesses

reporting that its loss would have a severe or significant impact has climbed from just over a third (35%) of firms in 2009 to more than half (51%) today.[16]

Exhibit 4: Business impact if the UK lost the working time opt-out (%)



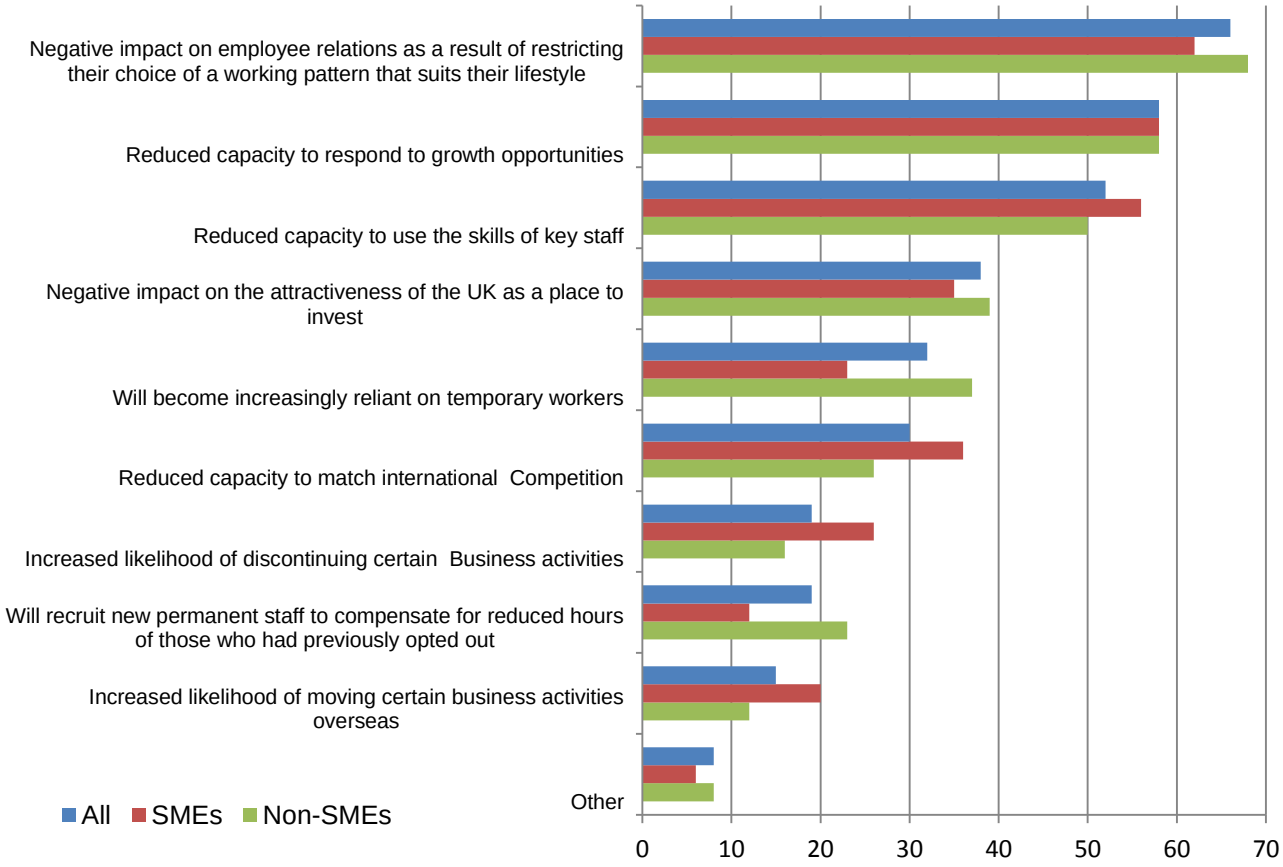
The removal of the opt-out would have significant adverse economic consequences for the both the UK and EU economies. As global competition becomes more intense, the ability of UK businesses to adapt quickly and to be able to respond flexibly to customer demand and market opportunities is crucial. Almost three fifths of firms reporting an impact (58%) believe losing the opt-out would diminish their capacity to respond to growth opportunities (**Exhibit 5**).[17]

Any threat to the opt-out could also have damaging consequences for inward investment to the UK. Two in five firms (40%) believe its removal would have a negative impact on the attractiveness of the UK as a place to invest. Our results show that those who suggest removal of the opt-out would generate extra jobs are on weak ground. Under one in four firms reporting a potential impact (23%) say they would respond by taking on new permanent staff, while almost as many (17%) report that loss of the opt-out would increase the likelihood of discontinuing some business activities.

…and its loss would damage employee relations…

Individual workers should have the opportunity to work more than 48 hours a week, through the opt-out, if they wish to do so – empowering employees to make the choice about what is the right work-life balance for them. Indeed the single most frequently cited impact of the loss of the opt-out is that it would have a negative effect on employee relations as a result of restricting employees' choice of a working pattern that suits their lifestyle (68%). The opt-out is popular with many employees who exercise their right to work longer hours. Its removal would adversely affect a variety of individuals, ranging from those who want to boost their earnings to those working in industries with cyclical peaks and troughs. Loss of the opt-out would deprive employees of the freedom to make these types of choices.

Exhibit 5: Nature of the impact if the UK lost the working time opt-out (%)



…and hit some firms particularly hard

Loss of the opt-out would affect firms of all sizes. More than four in five larger companies would be affected (86%), with over half reporting that the impact would be significant or severe. Among SMEs, the proportion reporting an impact is only a little lower (at 78%), with just under half (49%) saying the effect would be significant or severe.

Were the opt-out to be removed, it would hit SMEs in terms of their ability to make full use the skills of key staff harder than larger businesses (47% of SMEs cite this as an impact as compared to 35% of larger firms). This potentially bigger impact is perhaps unsurprising given the smaller workforces of SMEs, making it more difficult for them to flex their people resources. With their greater experience of alternative overseas locations as sites for investment, larger firms are more likely than SMEs to highlight the potentially negative impact of loss of the opt-out on the attractiveness of the UK as a place to invest. In all, more than two in five larger firms (43%) see this as a consequence as against a third (36%) of smaller firms.

...the second is finding ways in Europe and the UK to stop the ECJ rewriting our law.

European Court of Justice (ECJ) rulings continue to widen the obligations stemming from the directive far beyond the original intentions of Member States – demonstrating the serious implementation problems posed by the directive and providing evidence that the complex and prescriptive rules were not well designed in the first place. It is vital that the EU finds an effective means of dealing with these judgements and the possibility of further adverse

judgements. Resolution and prevention of the legal uncertainty and difficulties caused by these expansive rulings – which impose unnecessary burden and rigidity to employers and employees, and damaging competitiveness – is vital.

"The UK must resist these expansive judgements extending the scope of the legislation"

As we said in our report on the UK's relationship with the EU last November, it is time to stop back-door EU employment law being made by the ECJ.[18] Member States should not face the major difficulty of transposing ECJ rulings that go well beyond the health and safety considerations required by the Directive. Resolving the difficulties caused by these cases would not entail a reduction in protection for workers but instead would bring the Directive back into line with what was originally intended by Member States, consistent with the legal basis of the Directive as a health and safety measure.

Challenges to the UK's definition of holiday pay leave businesses facing the risk of major liabilities reaching to tens of millions of pounds

Businesses are currently facing the risk of significant additional costs – and potentially millions of pounds of backdated claims – from tribunal cases challenging the normal calculation of holiday pay. On 22 May the ECJ handed down a judgement on how holiday pay in the UK should be calculated – redefining holiday pay to include an allowance for commission.

The ECJ's ruling could have a major financial impact on employers who pay commission. Firms may have to change the way they calculate holiday pay to take account of commission payments and could face retrospective claims – claiming unlawful deduction from wages or a breach of contract – relating to earlier periods of annual leave with the potential of going back 6 years or possibly even as far back as 1998. This could raise related issues such as backdated tax and pension contributions.

UK businesses are now facing an anxious wait to see how the UK courts interpret the ECJ decision on commission, and on the outcome of related tribunals on how holiday pay should be calculated to account for overtime. If liabilities on holiday pay are backdated, individual firms may face bills of tens of millions of pounds, with some medium-sized businesses reporting that backdated claims could push their otherwise profitable businesses into insolvency, resulting in significant job losses.

The potential long-term effects of any changes are hugely significant – including a reduced ability to deliver major infrastructure projects and a negative image of the UK as a place to invest. Any change will also have significant implications for jobs, hours and pay. Commission and overtime payments are popular with employees, offering workers the chance to increase their pay packet. These changes could result in opportunities for overtime replaced with increased use of temporary or agency staff, or by the removal of commission schemes which reward high performance.

The UK Government must vigorously defend the existing UK law on holiday pay. These rulings go far beyond what could have been foreseen when the working time rules were introduced, and do not respect the EU treaty – which reserves matters of pay to the Member States.

Difficulties caused by the redefinition of rest and on-call time must also be resolved

Rulings in SiMAP (2000) and Jaeger (2003) have caused severe problems in businesses which rely on on-call time to manage their workforce effectively by concluding that time spent on call must be counted as working time if a person is required to be at their place of

employment, even if they are resting. This treatment of on-call time as working time has had damaging consequences across the EU – imposing significant costs, application difficulties and rigidities. The impact has been particularly damaging to the public sector, but has also caused difficulties for the private sector – in areas such as IT, security and care services.

On-call operations are important to service delivery and the competitiveness of the EU and changes in working patterns require a more flexible approach to rest periods. It is essential that the lack of flexibility brought about by these judgments is addressed. Member States must be free to make a distinction between 'active' and 'inactive' on-call time, and have more freedom to determine when compensatory rest should be taken.

Similarly the definition of 'rest' should be restored to its simplest definition –the absence of the requirement to work. Rulings on the interaction between annual leave and other types of leave (Schultz-Hoff, Stringer and Pereda) have also had a significant impact on the effect of the Directive, causing real difficulties and uncertainties.

*****

Footnotes

1 In an assessment based on Regulatory Impact Assessments produced by DTI and BERR, the CBI estimated in 2009 that the Working Time Directive costs British Businesses approximately £2.6 billion per year. CBI, *Jobs for the future*, July 2009

2 CBI/Accenture, *On the up*, December 2013

3 CBI, *Making Britain work for everyone*, June 2014

4 ONS, Labour market statistics, September 2014

5 CBI, *Making Britain work for everyone*, June 2014

6 CBI, *Making Britain work for everyone*, June 2014

7 ONS, Actual weekly hours worked, 13 August 2014

8 ONS, Usual weekly hours worked, 13 August 2014

9 CBI/Accenture, *On the up*, December 2013

10 CBI/Accenture, *On the up*, December 2013

11 CBI – *Our Global Future: the business vision for a reformed EU*, November 2013

12 CBI/YouGov survey – September 2013

13 CBI – *Our Global Future: the business vision for a reformed EU*, November 2013

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15 CBI, *Building on progress: boosting diversity in our workplaces*, 2014

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