

European Commission's Second Phase Consultation on Revising the Working Time Directive

A. Draft Response from EPSU

Below are the summary responses to the specific questions posed by the European Commission's Communication. Background information and justification for these responses are included on the following pages.

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

Any changes to the Working Time Directive need to address the question of an abolition or phasing out of the individual opt-out and so cannot be limited to the issues of on-call time and compensatory rest.

- 2) *Bearing in mind the requirements of Article 153 TFEU do you consider that:*
 - a) *the options set out in section 5.1 regarding on-call time and compensatory rest,*
 - b) *some or all of the options set out in section 5.2 regarding other issues raised by social partners and the current review could provide an acceptable overall framework for addressing the concerns set out in your replies to the first phase consultation?*

Neither the options set out in section 5.1 nor those included in section 5.2 provide an acceptable overall framework for addressing EPSU's concerns over working time. There are several reasons for this but primarily because the starting point of the Commission on-call time at work is not full implementation of the European Court of Justice rulings in SIMAP, Jaeger and Dellas and because the Commission appears to be ruling out the possibility of abolishing or phasing out of the individual opt-out.

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

EPSU considers that several of the key working time issues, including the individual opt-out and on-call time, have implications for several sectors of the economy and so that if negotiations were undertaken they should be at cross-sectoral level. However, on the basis of the issues set out in the Communication, EPSU can see little incentive to enter into negotiations at any level. EPSU would set as minimum requirements for negotiation the abolition or phasing out of the individual opt-out, the codification of the SIMAP, Jaeger and Dellas rulings into the Working Time Directive, the need for compensatory rest to be taken at the earliest opportunity and retaining collective bargaining as the requirement for any extension of reference periods.

B. Background to EPSU's response to the second phase consultation on working time

1. *The social and economic context*

The Commission's proposals on working time have to be seen in the current context of the pressures facing workers across Europe and particularly those in the public services. The idea that those who run and regulate the finance sector are responsible for the economic and financial crisis seems to be fading fast and all we are faced with is pressure for fiscal consolidation as argued by most national governments across Europe, co-ordinated by the European Commission and soon to be further institutionalised in the structures and processes of economic governance.

Social and employment protection along with social dialogue and collective bargaining are increasingly seen by the European Commission as among the labour market bottlenecks that need to be unblocked to increase competitiveness and growth. The European Commission's approach to the Working Time Directive threatens to water down this key piece of social legislation with the same message that protecting health and safety is acceptable only in as far as it doesn't undermine what employers say is the flexibility needed to increase competitiveness and productivity.

The impact assessment for the European Commission carried out by the consultants Deloitte, provides some significant evidence in support of trade union arguments about working time and health and safety (see the specific points below). Furthermore it fails to make a convincing case on the need for greater flexibility of working time rules for the sake of competitiveness or productivity. The evidence on productivity and working hours is inconclusive from most sectors but where the findings are clearer (textiles and financial intermediation) the conclusion is that, in fact, shorter working hours increase productivity.

As pressure mounts from governments to do more with less, public service workers are being called on to work harder and longer as jobs are cut and services threatened. A weaker Working Time Directive will only allow governments and employers to intensify that pressure. In a number of instances the report from Deloitte provides important reminders of the basic rationale behind the Directive and what full and proper compliance means in practice: "Intervention studies have shown that working hours in accordance with the provisions of the WTD can lead to a reduction in medical errors and thus to an increase in patient safety." (Section 4.2.1, page 34)

EPSU would also agree with two important points highlighted by the ETUC. Firstly, there is the fact that now the debate about working time has to be seen against the context of the Charter of Fundamental Rights which has become legally binding. Specifically, Article 31 of the Charter says that: "every worker has the right to working conditions which respect his or her health, safety and dignity". In its second paragraph, it says "every worker has the right to limitation of maximum working hours, to daily and weekly rest and to an annual period of paid leave".

Secondly, the Lisbon Treaty includes a clause on gender mainstreaming (Article 8) and a general social clause (Article 9) that should be read in conjunction with the overall social objectives of the European Union enshrined in Article 3. EPSU would agree with the ETUC

that the Commission has failed to take on board the idea that in developing social policies it should look to social progress and a high level of protection and that, in several respects, it did not take into account the results of the impact assessment or even took an opposite approach.

2. Specific issues

The following are specific comments on the issues raised by the Commission's Communication, considered in the light of the evidence that has been published by the Commission in terms of the implementation and impact assessment of the Directive.

2.1. The individual opt-out

The point has been repeatedly made by EPSU, the ETUC and other trade union organisations that it is wholly inappropriate to allow individuals to opt out of health and safety legislation. The legislation is not there just to protect them but also to ensure the protection of their work colleagues and members of the public who may be affected by the actions of workers whose judgement and actions may suffer from long hours at work.

The report from the Deloitte consultancy stresses that even the notion that individuals may work longer hours voluntarily is no reassurance about health and safety risks that arise:

"It can thus be concluded that even for those working long hours "*voluntarily*", the risk of health problems will increase as the numbers of hours they work goes up, as is the case with self-employed workers. Therefore, this will most probably apply also to those using the opt-out feature, although the data and reviews available do not take this into account. We have not found empirical data or empirically-based evaluations to test this hypothesis. So this must remain a hypothesis, although one that is well founded." (Section 4.2.2, page 35)

Neither the European Commission nor Deloitte could throw any light on the use of the opt out because as the Commission's own implement report revealed there was: "... a serious shortcoming is the apparent absence, in many of the Member States concerned, of any requirement to monitor or record the hours actually worked by opted out workers, the sectors and types of jobs in which the opt-out is used, and for how long workers continue to work hours exceeding 48 hours per week."

2.2. On-call time at work

The three European Court Judgements established very clearly that on-call time at work should be counted, hour-for-hour, as working time. Both the European Commission and employers' organisations have tried to claim that there is some legal uncertainty about the rulings and so this is why the judgements have not been fully implemented or codified in the Directive. EPSU, along with most trade union organisations, would argue that there is, in fact, no lack of clarity and that the protection afforded by the judgements. It is a step forward that the Commission no longer regards it as viable to differentiate between active and inactive on-call time, however the fact that on-call time at work need not be calculated hour-for-hour as working time is similar in approach and would mean legislating to weaken the protection afforded by the Dellas judgement.

2.3. *Compensatory rest*

The basic point at issue here is the importance of not postponing any periods of compensatory rest. The Commission Communication highlights the problem but doesn't provide any firm recommendations on how to deal with it. The Deloitte report underlines the need to avoid postponement by referring to "the theoretical and empirical long- and well-founded ergonomics concept, implying that rest periods should not be postponed, but taken as early as possible in order to avoid the development and accumulation of fatigue or other impairing effects."

2.4. *Greater flexibility for new working patterns*

This section of the Communication focuses on the reference periods over which the 48-hour maximum working week can be averaged. EPSU regards the currently already existing flexibility allowing for reference periods of four, six or 12 months as adequate to deal with the requirements of most industries. Significant fluctuations in working time have been the norm in many sectors for many years – agriculture, manufacturing and services. A convincing case has not been made that recent changes in working time arrangements require greater flexibility in this area. It is of particular concern that the proposal from the Commission is for increased flexibility without the protection of collective bargaining.

In fact, the Deloitte report provides good arguments for why the changing nature of work requires a stricter application and enforcement of rules to protect workers from excessive working hours: "The trend towards individually arranged working time agreements inevitably results in new risks for workers in the 21st century. Workers will be more vulnerable to negative outcomes from the increasing intensification of the work process at the workplace and from the blurring of the home/work boundary." (Section 3.4, page 32)

It also warns specifically on changes to the reference periods: "All this would caution against an extension of reference periods for calculating average work hours (or rest periods) since longer reference periods allow for a greater accumulation of work within certain time spans within the reference period and thus for an accumulation/increase of fatigue, instead of avoiding negative effects like fatigue right from the outset by providing adequate work-rest dynamics." (Section 4.4, page 39)

Furthermore, the Deloitte report reaffirms the fundamental argument behind working time legislation and the risks associated with any watering down of the Directive: "In any event, extending working hours beyond the limits of the current WTD would result in an increased risk of health impairments – while a reduction of working hours should lead to a reduction in health problems." (Section 4.2.2, page 35)

2.5. *Work-life balance for new demographic realities*

There is no doubt that working time regulations could be improved to allow workers more control over their working time to improve their work-life balance. This applies in particular to how a more effective Working Time Directive could contribute more effectively to changing the long-hours culture and ensure that men have more time to take up domestic and caring responsibilities. The problem is that the Commission's proposals as formulated are far too weak and talk only of encouragement of agreements on work-life balance and requiring employers to examine requests for flexible working from employees. The Deloitte report was clear in its assessment that even applying the limits of the Working Time Directive as it stands, makes it more difficult to reconcile work and private life: "It is thus not surprising that the results of the vast majority of studies show that family life and/or work-life balance are

clearly negatively affected by increasing the number of working hours per year, especially beyond 40 hours per week." (Section 4.2.3, page 36)

The proposal for improved rights to consultation on substantial changes to working time is another step in the right direction but again would need to be drafted more clearly and firmly to ensure that trade unions had real rights to meaningful consultation.

2.6. *Autonomous workers*

It is positive that the Commission concedes the need to refine the definition of autonomous workers in recognition of the risks that employers will exploit this to allow for a broad definition to cover large groups of managerial staff. EPSU would agree with the ETUC formulation that autonomous workers should be defined as "chief executive officers (or persons in comparable positions), senior managers directly subordinated to them and persons who are directly appointed by the board of directors."

2.7. *Multiple contracts*

The European Commission has agreed that Working Time Directive should be revised to clarify that the provisions, particularly the 48-hour maximum average working week, should apply to individual workers and all the contracts on which they are employed at any one time. The Commission acknowledges the practicalities of enforcement where a worker has more than one contract with a single employer but poses problems where a worker may have two or more contracts with different employers. The Commission proposes that this be an issue to be dealt with through exchanges of information and good practice whereas EPSU believes that more could be done to tackle this problem as it goes to the heart of the need to cap working hours for health and safety reasons.

2.8. *Sectoral problems – voluntary firefighters*

The Commission raises the issue of specific groups of workers whose status and coverage by the Directive may be unclear. It cites in particular voluntary firefighters and this poses the question of how to monitor and regulate the working time of people who usually have a full-time job but then also provide local firefighting services as part timers or volunteers. As a general principle EPSU would argue that as health and safety legislation, the Working Time Directive needs to apply as comprehensively as possible to all groups of workers and above all to those in occupations which include responsibilities for the safety of members of the public. The Working Time Directive was introduced on the basis that it would apply across the public services with some derogations to take account of the exceptional circumstances faced by civil protection services. In essence, the periods when professional or volunteer firefighters are at the workplace or on active duty should be counted as working time.