



European Trade Union Confederation (ETUC)
Confédération européenne des syndicats (CES)

The Working Time Directive: Limitation of working hours and more influence of workers, for healthier working lives

Position of the ETUC on the Communication of the European Commission of 24 March 2010, being the first stage consultation of the social partners at EU level on the review of the Working Time Directive

Approved by the ETUC Executive Committee, Brussels, 3 June 2010

Introduction

- 1) On 24 March 2010, the Commission adopted a Communication on the review of the Working Time Directive (WTD), which constitutes the first stage in consulting the EU social partners (again) on the '*possible direction of EU action regarding the Working Time Directive*'. The Commission proposes a **comprehensive review** of the WTD, the objectives of which are set out in the consultation paper, and invites the social partners '*to reflect broadly on the kind of working time regulation the EU will need in order to cope with the challenges of the 21st century.*'
- 2) Directive 2003/88/EC (revising the original Directive 93/104/EC) is a very important element of the EU's social policy acquis, and is based on a 'health and safety' legal basis. However, the Directive must be understood as being firmly embedded in a wide range of international standards and fundamental rights (ILO conventions, the European Social Charter, the Charter of Fundamental rights, etc.).

With the entry into force of the Lisbon Treaty, the Charter of Fundamental Rights (Charter FR) has become legally binding. Article 31 of the Charter deals with '*fair and just working conditions*'. According to this Article, "***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***".

The ETUC is of the opinion, that the Commission does not give due consideration in its Communication to this legal framework, and its implications for the current re-examination process.

- 3) The starting point for any debate on the WTD must be the recognition that the EU and all its Member States have a double legal obligation, i.e. to ensure that every worker has a right to limitation of his working hours which is implemented in a way which respects his health, safety and dignity (Article 31 Charter FR), and to progressively reduce (long) working hours, while improvements are being maintained (Article 151 TFEU ¹).

Also, as mentioned in the preamble of the WTD: ***“the improvement of workers’ safety and health at work is an objective which should not be subordinated to purely economic considerations”***.

These obligations give direction to the scope for a ‘comprehensive review’ of the Directive, which must clearly respect and build on this Community acquis. Any attempt to extend, working time practices, involving long, irregular and unhealthy hours for business and/or financial reasons must be considered to be not in conformity with these legal obligations.

- 4) The Working Time Directive is based on Article 153, 1 (a) TFEU (former 137 EC), allowing the Union to take measures on health and safety. Long and irregular hours, unilaterally imposed on workers, are unhealthy² and outmoded forms of work organization. The protection against such working hours must continue to be the main goal of the WTD also in the 21-st century. Its minimum regulations should be consistent with modern insights with regard to the health and safety needs of workers.
- 5) As mentioned by the ECJ in its judgement of 12 November 1996 (UK vs Council of the EU) and confirmed in the Jaeger-case, the **concept of health and safety** used in the Treaty should be interpreted in a wide sense, as **embracing all factors, physical or otherwise, capable of affecting the health and safety of the worker in his working environment**,

¹ Article 151 of the TFEU: “The Union and the Member States, having in mind fundamental social rights as those set out in the European Social Charter (...) and the 1989 Community Charter of the Fundamental Social Rights of Workers, shall have as their objectives the promotion of employment, **improved living and working conditions, so as to make possible their harmonization, while the improvement is being maintained**, proper social protection, dialogue between management and labour (...) etc.

² Just one example out of many: A recent study shows that overtime work is related to increased risk of incident coronary heart disease, CHD independently of conventional risk factors. Marianna Virtanen, Jane E. Ferrie, Archana Singh-Manoux, Martin J. Shipley, Jussi Vahtera, Michael G. Marmot, Mika Kivimäki; “Overtime work and incident coronary heart disease: the Whitehall II prospective cohort study”, European Heart Journal, March 2010 <http://eurheartj.oxfordjournals.org/content/early/2010/05/04/eurheartj.ehq124.abstract>

including in particular certain aspects of the organization of working time. The Court makes reference to the Constitution of the World Health Organization (to which all Member States belong) in which health is defined as a state of complete physical, mental and social well-being that does not consist only in the absence of illness or infirmity.

- 6) This brings into the picture the health and safety dimensions of new forms of flexible and precarious working time arrangements (broken hours, unpredictable on call duties, etc.), unsocial working hours (shift work, night- and weekend work), intensification and higher paces of work, and working time patterns that make it difficult or impossible for workers to enjoy a proper family life and reconcile work with care obligations for children and other dependents. According to recent research, all these working time patterns can lead to increased stress and illnesses leading to absenteeism, related to strong feelings of lack of control over and influence on one's work and life.
- 7) Protection against long and exhausting working hours and patterns is important to protect the individual worker and provide him/her with fair and just working conditions. However, rules on maximum working hours and minimum rest periods are also very important to limit competition on working conditions to the detriment of the worker and possible third parties that could fall victim to the mistakes and accidents that could be caused by an exhausted worker (in traffic, in health care, etc.).
- 8) In a context of globalization and Europeanizing labour markets, clear rules providing for a bottom in competition, both nationally and cross border, are key, to ensure fair competition and the support of workers for open borders and markets. The EU, at the forefront when it comes to defending fundamental social standards in international trade and development, has an important responsibility to give the right example in its internal regulation.

It is therefore fully inappropriate from a health and safety perspective, and not defensible towards the outside world, to allow for provisions that make it possible for Member States and/or their companies to get a blanket exception from the rules, on the single condition that an individual worker agrees to it...

- 9) The WTD is a health and safety Directive and only deals with the organization of working time, and not with how any specific working time arrangement is paid. However, it is clear that in the socio-economic reality pay is strongly related to working hours. When workers are not sufficiently paid per working hour to be able to lead a decent life with a normal full time working week, they will be under pressure to work long hours and overtime.

Decent levels of pay are therefore an essential pre-condition underpinning health and safety protection against long and irregular working time patterns.

The Working Time Directive, fit for the 21-st century ?

- 10) The WTD is based on a long and turbulent history of more than 150 years of trade union struggle and scientific evidence, claiming long and irregular hours as damaging for the health and safety of workers and third parties, detrimental for family- and social life and negative for productivity. More recently, the long term negative effects on economies and societies, in relation to demographic change (dropping fertility rates and ageing of the population) have been brought to the fore. There is no basis in recent research supporting the view that protection of workers against long and irregular hours is outdated.

However, new practices in the organization of work and new forms of contractual arrangements are raising questions if the current provisions are sufficiently capable of protecting workers against unhealthy and unsocial working hours (see point 6 above). ETUC would welcome a genuine effort of the European Commission to investigate these risks and the necessary responses to them, which in ETUC's view call for strengthening the WTD.

- 11) The WTD 1993 was a difficult political compromise, shown in its far reaching possibilities for 'flexible' working time arrangements and derogations from the general rules. Already its central standard, the 48 hour working week, was introduced as a flexible provision, i.e. an average maximum of 48 hours, related to a reference period of 4 months. This allowed the working week to go far beyond 48 hours per week (!), if averaged out on a longer period. On top of that, additional room for flexibility was allowed on the basis of collective agreements, up to a reference period of 12 months. However, an even more striking compromise was the option given to the UK (although potentially open to every MS), to allow employers the possibility not to apply the maximum 48 hours at all, on the basis of an individual agreement with a worker, the so called individual opt-out. Both provisions were seen as so far reaching, that they had to be evaluated after 10 years(!)
- 12) The research reports, provided to the Commission in 2003 to prepare its evaluation, showed: a) that the implementation of the opt-out in the UK was very problematic, and led to serious forms of abuse and lack of protection (while the UK even not properly applied the basic rules on the opt-out itself.....) ;

b) that the collective bargaining practices, based on the 12 month reference period, were in general considered to be acceptable, as they often led to balanced and innovative forms of working time arrangements.³

In the meantime the EU and MS's were confronted with new challenges: the ECJ had, in a series of judgments, given a clear and unambiguous interpretation of the concept of working time, clarifying that on-call time in the workplace had to be considered as working time. The practices in a number of MS's, especially in the healthcare sector, were not in conformity with this jurisprudence, and MS's were reluctant to adapt their laws to the jurisprudence.

In addition, the Commission came across some MS's interpreting the WTD as if it protected maximum hours per contract of work, rather than taking the worker as the reference point. This could be considered as clearly not in line with the aims and objectives of the WTD and its health-and-safety basis, as this would make the protection of the worker against long hours in practice illusory.

13) In this context, it would have been logical for the Commission to propose

- an end to the opt-out
- keeping in place the rules on the reference period
- codification of the ECJ jurisprudence on on-call work in the workplace
- clarifying in the Directive that it had to be applied 'per worker'

Instead, the Commission sought from the very beginning of the revision process compromises with MS's that were unwilling to change their practices, for mostly ideological and/or short term economic/financial reasons.

14) For the last 7 years, ETUC and its member organizations have mobilized against this approach and its negative consequences for workers and their families, but also for the long term interests of economies and societies at large. In this, the ETUC got the support of the majority of the European Parliament (EP), until the very end, i.e. the failure of the conciliation process with Council in spring 2009.

One year later, in ETUC's view, the Commission cannot just ignore this history, and simply ask from all stakeholders to move '*beyond the unsuccessful debates of the last conciliation process*'. Trade union members did not go out in the streets in masses to defend outdated interests, and MEP's did not fight for their majority position because they had wrong ideas about the needs of workers and companies and about EU social policy!

15) The ETUC cannot and will not abandon the fundamental and essential notions and concepts underlying a long history of health and safety research and regulation, which continue to underpin our major demands:

³ See for examples of innovative working time arrangements, including examples of annualised hours, the report of the ETUC project "Challenging Times, innovative ways of organising working time, the role of trade unions", July 2006, www.etuc.org/a/2807

- a) **Workers' safety and health at work cannot be subordinated to purely economic or financial considerations.** The WTD must provide a level playing field of minimum standards and prevent downward competition at the expense of workers at national and European level, and can therefore not be put on the same footing as arguments of 'competitiveness'. As President Barroso said when accepting his new term: *"if globalization puts pressure on our competitiveness, our response should never be to lower our standards"*.
- b) **The individual opt-out is not compatible with the basic principles of health and safety protection,** which must protect the individual against undue pressure put on him by his employer or by circumstance to accept working conditions that are detrimental to the health and safety of him/herself and of others dependent on his/her proper work performance. The opt-out, once meant as a temporary compromise for one MS in order to help it adapt to the mainstream Community approach, has now become a virus infecting working time regulation throughout the EU. It serves as an exit strategy, preventing negotiations on more sustainable solutions for working time challenges. It also provides the MS's making extensive use of it a competitive advantage vis-à-vis other MS's that don't use it. This must be stopped.
- c) **On-call work in the work-place is working time, and not rest.** In the reality of workers' living and working situations, there is no category between the two, and the ETUC will not accept the introduction of one (such as the notion of 'inactive' working time...), which – as also said by the ECJ – would not be in line with the objectives of the Directive.
- d) **The notion of 'equivalent compensatory rest' in the WTD is fundamental,** in the sense that it is the condition on which derogations allowing for more flexible working time arrangements are allowed. The ETUC cannot accept a hollowing out of this principle.
- e) The 'average 48 hour maximum' is already a very flexible concept, and a reference period of 4 months gives ample scope for modern needs of companies and workers. **Longer reference periods without proper safeguards** can lead to unilaterally imposed extremely long and irregular working time patterns, which are **unacceptable**.
Derogations from this basic rule, when inevitable, must be put in such a form that they promote **negotiated** solutions between sufficiently strong bargaining parties which can guarantee a balanced outcome. Keeping **collective bargaining as a pre-condition** for derogating from the 4 month reference period is therefore the best safeguard.

- f) The average maximum of 48 hours of the WTD must be understood to be applied **‘per worker’ and not per contract**, regardless if the worker has more contracts with the same or another employer. This is the only interpretation compatible with the health and safety objective of the Directive.

The ETUC is of the opinion that the Commission, rather than suggesting the necessity of giving up or relaxing these boundaries and safeguards, should develop more activities to draw attention to the innovative working time practices and good practice examples on the basis of collective agreements and other social partner arrangements, benefiting both employers and workers, that have flourished in the last two decades since the WTD was adopted!

- 16) In addition to the end of the opt-out, the codification of the ECJ jurisprudence on on-call working time, and clarification of the application of the WTD ‘per worker’ there are other reasons why the WTD might need to be reviewed in terms of its relevance for the 21-st century:
 - a) Updating the notion of **‘adapting the work to the worker’**, acknowledging that the average modern worker is no longer a full time available breadwinner, but a worker (male/female) with other obligations in life than work (see below under 17-20);
 - b) Introducing provisions that **strengthen the bargaining position of workers** to influence working time patterns adapted to their needs (see below under 17 and 21-23);
 - c) Recognizing **‘better working time’** as a factor to improve productivity and reduce absenteeism (see under 24);
 - d) **Clarifying the definition of ‘worker’** covered by the WTD, limiting exclusions from the scope for higher and managerial staff, tackling bogus self employment, and considering to extend protection to own-account workers;
 - e) Calling on MS's to **strengthen enforcement**, by investing in labour inspection and support social partner initiatives.
- 17) An important principle of general health and safety regulation is the concept of ‘adapting the work to the worker’ (and not vice versa), which is laid down in the WTD in Article 13. This should be urgently ‘updated’ to take account of the feminisation of the workforce, and expected ageing of the working population. If we want more women on the labour market, more babies to be born, and workers to remain in employment until their pension age, it is not possible to demand from workers at the same time longer working hours, days, weeks, months and lives! With regard to the future of social policy, the EU is at a cross roads here: either to fight the battle for competitiveness and growth with a limited work force making long and exhausting working hours, or with a broad workforce making reduced and healthy working hours.

18) As long as working time practices in Member States are continuing to demand from 'normal' (=male) workers to make long hours, and do not allow them to share family duties with their partners, women will continue to juggle and struggle with the combination of work and family life, will continue to be excluded from adequate career-perspectives, and will either leave the labour market for long periods in their lives, or refrain from having children. The current situation in many Member States, in which there is increasing pressure on families to ensure that both parents have a paid job without providing for the necessary supportive framework in terms of childcare facilities and working conditions, leads to **increased stress** for men and women both at home and in the workplace. In this context, increasingly also the issue of **shared social time** for families is becoming an important issue, which is reflected in new calls for respecting the work-free weekend/Sunday.

19) The same issue is at stake with regard to the objective of increasing the employment rate of older workers, which is only possible if workers are not exhausted by long working hours many years before the actual pension date. **Reduced and adaptable working hours throughout working life are important preconditions for a healthier working life.**

20) Policy coherence at EU level when it comes to gender equality and the employment agenda in relation to demographic change demands for different and more sustainable working time policies at all relevant levels. These issues are of particular relevance for the public sector (especially health care and social services), with an increasing female workforce and increased needs and demands for services supporting working families and the ageing population.

Recruitment and retention, and ensuring public services as attractive workplaces delivering high quality services, are of key importance for the quality and sustainability of EU's societies.

21) **Taking account of the needs of workers in a way which is fit for the 21-st century requires a 'modernisation' of the WTD indeed.** Some elements of such modernisation were already proposed in the previous stages of the debate by the European Parliament with ETUC's strong support,

- **limitation of excessive hours** will contribute to more well being of families and more gender equality;
- giving workers the **right to request adaptation of their working hours** to their needs does not only recognize the importance of giving workers influence in the scheduling of their working hours, but also provides them with a tool to put pressure on their employer to negotiate a better outcome;
- the obligation for employers to **notify workers in time about changes** in their working schedules is a first step to reduce the negative impact of irregular and unpredictable working hours.

22) More could however be done, to give more and better minimum protection to workers that are confronted with stressful and unhealthy working time patterns, such as broken day shifts etc., and work intensification.

Research shows, that it is the lack of control and influence over their working situation and consequently their life, from which they are suffering most. At the same time, modern insights show that the needs of workers change with the seasons in their lives. This is a further argument to provide workers with individual tools and collective support that allow them to evaluate and negotiate adaptations to their working time patterns with their employers. Such a “life course approach”, in which working time patterns are potentially regularly adapted, can lead to a win-win approach also from an employer’s perspective.

- 23) The economic crisis is giving a particular edge to the debate on working time and adaptability. ‘Old’ instruments, such as collective arrangements for temporary short term working, helping ailing industries to overcome a temporary fall out in demand while keeping their skilled workers in employment so as to make use of their skills as soon as demand increases again, show that ‘adaptability’, given form in a balanced way taking into account interests of employers and workers, is much more important than accommodating the cry for working hours without limits. Moreover, these experiences can form stepping stones for more extensive practices and experiments with **smart working time arrangements**, combining working time reduction and innovation.

However, another dimension of the crisis is the effect on the public sector, which is under severe threat of budget cuts, while workers are called upon to provide the same level of production or services with longer hours for the same or even lower wages.

With unemployment on the increase in many EU countries, the logical thing to do is to promote solutions which keep as many workers as possible in employment, **rather than putting pressure on workers to work longer hours!**

- 24) Promoting healthy working hours is not just ‘the right thing to do’ in the interest of workers but can also serve as an effective competitiveness strategy. Work organisations and businesses can benefit through increased productivity, reduced rates of absenteeism and staff turnover, and improved motivation and morale of workers and more efficient use of time leading to better work performance.

Official statistics show remarkable differences in **productivity** per hour worked, with the countries having the longest working hours (such as the UK) ranking lowest on the productivity scale. Advocating more possibilities for long working hours is therefore also from an economic point of view not viable, and contradictory to EU-policies.

On the contrary, seeking innovative working time arrangements which combine business efficiency with increased worker influence over the scheduling of their working hours seems to be particularly successful.

- 25) The paragraphs above show, that, in addition to arguments of health and safety, **there is a legal, an economic, and a demographic case for a win-win approach, in which there is a combined effort to put limitations to long working hours in the framework of offering more ‘adaptability’ to employers and workers.**

26) The ETUC urges the Commission to ensure that all relevant research and evidence, of the ILO, Dublin Foundation and others, underpinning the above mentioned issues is investigated and integrated in its upcoming social and economic impact assessment, and taken into account while drafting its proposals on the revision of the Working Time Directive.

This impact assessment should be available before the next stage of the debate, i.e. before the second stage consultation of the EU social partners, to ensure that they can take an informed position on the proposals of the Commission.

Response to the specific questions

Based on the above, the ETUC responds as follows to the questions raised by the Commission in its consultation document:

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

For the last 7 years, ETUC and its member organizations have fought against a weakening of the Directive and the preservation of its basic principles, with the support of the majority of the European Parliament (EP), until the very end, i.e. the failure of the conciliation process with Council in spring 2009. One year later, in ETUC's view, the Commission cannot just ignore this history, and simply ask from all stakeholders to move '*beyond the unsuccessful debates of the last conciliation process*'.

The ETUC reiterates its key demands from the previous rounds of discussion, because they are based on the obligations of the Union according to the Treaty and the, legally binding, Charter of Fundamental Rights, and regard fundamental principles of health and safety protection (see above under 14). However, according to the ETUC, it should be possible to move forward at EU level towards a sustainable working time policy, if all stakeholders would agree that 'unilaterally imposed long and irregular hours' are outdated and will not provide Europe with a highly competitive knowledge economy, nor with solutions for the demographic challenges and ageing of the workforce.

In ETUC's view, sustainable working time arrangements need a basis in strong and clear legal minimum rules, at both national, European and global (ILO) level, which can prevent that workers are put under undue pressure of market forces to give up on the protection of their health and safety, and are incentives for negotiations that can adapt the rules to the needs of work organisations and workers. Such rules must take into account that modern workers are men and women with care obligations, for themselves, their families and other dependents, and their communities, and with the need to continuously educate themselves and to take active part in society. Their needs will differ throughout their life course, which means that it must be possible to adapt their working pattern accordingly, which must be properly safeguarded in collective agreements, social security and other arrangements. **Limitation and adaptability in smart working time arrangements** are key words for the future of working time organisation.

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

The Directive is complex, because of all the compromises that were made in the past in attempts to reconcile contradictory interests. This complexity does not help to improve application in practice. However, the most detrimental to its proper application has been the practice of public authorities both at national and European level, which have allowed the erosion of this important piece of social legislation, leading to a situation in which the majority of MS's is not applying the Directive properly or is even clearly infringing its rules.

The European Commission must now urgently take full responsibility, as guardian of the Treaties, to not let this situation grow further out of hand, and call the MS's to order in all possible ways including launching infringement procedures.

The progressive de-standardisation of individual working time in most cases has not led to more workers with time-sovereignty, but a more generalised feeling of time pressure and lack of control. Although there is indeed also a growing group of 'knowledge workers' with a certain degree of autonomy regarding the organisation of their work, employers have developed also new ways of exerting control on result and output, and have developed new technologies which can also monitor workers when working from home or elsewhere.

With regard to changes in working patterns and practices, it is not so much that certain provisions have become obsolete, but **additional safeguards and rules are necessary**, especially in terms of procedural safeguards and provisions ensuring that the worker can exert influence on his/her working time pattern, to ensure that modern workers are properly protected against health and safety risks related to long, irregular and stressful working time arrangements.

It is important to mention here, that the existing provisions of the WTD already provide for such limited protection and extensive flexibility when it comes to the scheduling of working hours and rest breaks, by averaging maximum hours over long reference periods and allowing for many derogations, that even without applying an opt-out certain groups of workers in some countries, such as urban bus-drivers in the UK, could be left with dangerously long and exhausting working patterns.

- c) *What is your experience to date on the overall functioning of the Working Time Directive? What has been your experience regarding the key issues identified in section 5 of this paper?*

In ETUC's view, the overall functioning of the Directive is still of great importance and should not be underestimated. In all EU MS's, working time regulation is based on the WTD. However, ETUC and its member organisations have major concerns about the perverse effects of the 'individual opt-out' which is spreading like a contagious virus throughout Europe and which prevents stakeholders at all relevant levels to make use of normal negotiating procedures and social dialogue traditions to address new challenges and solve problems in the area of working time.

With regard to the key issues identified in section 5, the ETUC takes the following position, as explained more extensively above:

- i) **Working hours should be maximized to 48, without opt-out.** The British TUC has given extensive evidence⁴ that this can be introduced and implemented even in the UK without major economic or other problems given a transition period.

The **derogation for autonomous workers must be further limited**, to only include genuine senior management positions.

The **definition of 'worker' should be clarified**, and guidelines developed to prevent circumvention of working time rules by bogus-self-employment.

Maximum working time should be **counted per worker**, not per contract, regardless if the worker has more contracts with the same or different employers.

- ii) **On-call time in the workplace**, according to the ECJ in constant jurisprudence since 2000 (!), **is working time**. It is high time that this is now considered to be the Community acquis, and properly implemented and enforced throughout the EU. Attempts to legislate in contradiction to the ECJ judgments have not worked out. The existence of the opt-out has provided an easy exit-strategy, has prevented social partners in the relevant sectors to negotiate solutions adapted to their needs, as well as has been used as manipulation tool to put pressure on workers and unions to accept drastic changes to fundamental principles of health and safety protection.

On-call working time in the work place is currently a key issue for the public sector and in particular the provision of health and residential care and emergency services (but also other frontline services such as fire fighters and police). Experiences in important health care systems (NHS, UK⁵), and research into possible working time systems (Deutsche Krankenhausinstitut, Germany⁶) have shown that working time arrangements in health care that respect the ECJ judgements are possible, if social partners are willing to negotiate innovative systems.

⁴ See, for example, "Ending the opt-outs from the 48 hour week - easy steps to decent working time", TUC, 2008: <http://www.tuc.org.uk/extras/48houroptout.pdf> ; "Slaying the working Time Myths", TUC, 2009 <http://www.tuc.org.uk/extras/workingtimemyths.pdf>; or indeed the joint guide "Managing change: practical ways to reduce long hours and reform working practices", Department of Trade and Industry; CBI, TUC, 2005: <http://www.berr.gov.uk/files/file14239.pdf>

⁵ The UK National Health Service has dealt with the full implementation of the Working Time Directive by introducing a range of innovative new working patterns, as reported in "the Hospital at Night", "24/7" and a range of other projects under the banner of "Skills for Health". In March 2010 the NHS published a final report on these initiatives: <http://www.healthcareworkforce.nhs.uk/workingtimedirective.html>

⁶ Auswirkungen alternativer Arbeitszeitmodelle, Abschlussbericht, Deutsches Krankenhausinstitut e.V. in Zusammenarbeit mit der Universität Düsseldorf, February 2004

However, with the European Commission promising reversal of the ECJ judgments in a revision of the WTD, MS's and public sector employers have not been sufficiently interested to invest in such solutions, and have instead introduced the individual opt-out.

In health care, workers' health and safety is closely linked to patient safety. It is vital that health and emergency services are provided by fit and healthy workers, whose skills and judgment is not undermined by exhaustion and stress resulting from long periods of continuous service. A day-shift, followed by an on-call night shift, and then immediately followed by another full day's work is no exception for certain groups of workers. This is unacceptable. This issue is closely linked to the issue of compensatory rest (point iv. below). It cannot be addressed only from the perspective of short term staffing problems which would require workers to overwork themselves. Long term sustainable solutions can only be found if issues like the feminisation of the health workforce and increasing recruitment and retention problems are properly taken into account.

If we all still want to be cared for by quality staff when we are sick and/or old, more sustainable working time and work organisation models will have to be developed. On-call working time should be progressively integrated into regular shift-work and roster systems that safeguard workers' long term health and safety and the attractiveness of the sector. Creative and innovative models can be developed by social partners to address specific problems with made-to-measure solutions.

Such negotiated solutions will only come about, if easy exit strategies, such as the opt-out and the defining away of the problem (by inventing a new category of working time, i.e. inactive on-call time) are made impossible.

- iii) **Flexibility in averaging weekly working hours** is already possible in a far reaching manner on the basis of the current WTD. A general reference period of 4 months and a 12-months reference period on the basis of collective bargaining offer ample scope for flexibility, while safeguarding the protection of workers against unilaterally imposed long and irregular hours. The ETUC considers the argument that SME's and companies without collective agreements are 'disadvantaged' by the condition that longer reference periods than 4 months can only be regulated by collective agreement a perverse way of putting the world upside down. The 12-months reference period is a derogation of an already quite flexible rule, which potentially can lead to working patterns that are very disadvantageous and harmful for workers. Rather than introducing rigid and detailed rules accompanying such derogation to prevent abuses, the **pre-condition of collective bargaining is a very flexible solution**, allowing made-to measure-arrangements benefiting both employers and workers. Experience has shown that such provisions promote negotiated and balanced solutions. Employers and companies interested in such solutions can freely seek a collective bargaining partner, or adhere to an employers' organisation concluding such agreements. This approach is fully compatible with the EU's tradition and obligation to promote social dialogue and collective bargaining.

- iv) **Flexibility on the timing of minimum daily and weekly rest periods** is already possible on the basis of the current Directive. This issue is of extreme importance for the practical meaning of working time protection, especially because other provisions in the WTD are already given a very flexible form.

In the context of an **average** 48 hour maximum, averaged out over 4 months, with further rules only saying that a worker needs at least 11 hours rest per 24 hours (which allows for a working day of 13 hours!) and 35 hours uninterrupted rest per seven days which allows for a working week of up to 78 hours ⁷, ensuring that rest periods are safeguarded is essential. The Directive already allows derogation of these rules, as long as 'equivalent compensatory rest' is provided. The rules on rest periods have come under attack especially because of the on-call rulings of the ECJ.

The ETUC considers the judgments of the ECJ, stating that compensatory rest must follow immediately on periods of on-call working time, as fully in line with the objectives of the Directive, which should be upheld.

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

The ETUC has not extracted a clear analysis from the Communication, as most issues are addressed in a 'on the one hand, on the other hand' approach. However, what does stand out is the attempt of the Commission to argue in favour of 'modernisation' of EU working time regulation, although it is not clear in which precise direction the Commission is thinking. The ETUC and its member organisations are not convinced that the current Directive is outdated, and find its basic provisions still very necessary and up to date.

However, they do agree that the Directive could better accommodate the needs of 21-st century workers by providing them with tools and procedural safeguards to exert more control and influence on their working time patterns, and thereby allow them more say in the organisation of their lives.

One consistent mistake made in the analysis is, to address the needs for flexibility of companies and workers in one breath, as if they are the same thing and can be accommodated by the same solutions. The ETUC proposes to replace the word 'flexibility' (with its multitude of contradictory meanings) with the word 'adaptability', which allows for a more accurate description of the different needs of companies and workers.

The ETUC does not agree with the Commission's analysis, that there would be '*insufficient legal clarity on how to interpret a number of issues left unresolved by the lack of decision by the co-legislators*'. On most issues at stake (opt-out, reference periods, on-call work, counting working time per worker or per contract), it is not the lack of legal clarity but the lack of political will or courage to deal with the consequences of this clarity which has been the problem for the last 7 years.

⁷ In specific circumstances, it is even possible to reduce the weekly rest to 24 hours, and increase the maximum scope of the working week to 89 hours!

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

The ETUC wants to emphasize that **an initiative to amend the Directive is only desirable if it would genuinely address the need to put an end to the opt-out and to find balanced and sustainable solutions for on-call working time which respect the ECJ jurisprudence.** If it does not do so, workers around Europe will be extremely worried about further deregulation and weakening of working time protection. In such a situation, they will rather want to focus on better implementation and enforcement of the current Directive and jurisprudence, and raise awareness and mobilise at all relevant levels against the use of the opt-out and other bad working time arrangements in practice.

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

The Commission mentions in its Communication the increasing polarisation of working time between groups of workers and especially the increase of part time work. ETUC recognizes indeed the need to address the situation of workers who, rather than being confronted with too many working hours, have jobs in which they have **not enough working hours** to earn a decent living. Involuntary part time and precarious jobs are on the increase. And an increasing amount of workers, in particular women, have part time jobs in which the volume of working hours does not match their wishes and needs. The ETUC has in recent times addressed this matter on several occasions⁸, and argued in favour of an evaluation of the Part time Directive with a view to a possible revision to strengthen its provisions on quality part time work.

Increasingly workers have an interest in a variety of temporary exits from work, for education, to prevent a burn out, to take care of dependent relatives, etc. In a life-course approach to working time, the various needs for leave and how to integrate them in a sustainable long term organisation of work and time and income security is an important issue that should be urgently addressed at all relevant levels including the European level.

In the above (point 15) the ETUC has also addressed the problems with enforcement of minimum working time standards in many MS's. The Commission should address this matter as part of a wider debate on lacking enforcement of labour standards throughout the EU, and call on MS's to invest in labour inspection and support social partner initiatives.

⁸ [ETUC reply to the European Commission's consultation on the follow-up strategy to the Roadmap for equality between women and men 2006-2010.](#)

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

The ETUC is currently not considering to initiate a dialogue with the European level employers' organisations on the review or revision of the WTD. Recent exchanges of views, including in a meeting with Commissioner Andor for Employment and Social Affairs, have confirmed that the positions of the European social partners are too far apart to expect a fruitful exercise. In ETUC's view, the conditions are currently not there for addressing the matter in the social dialogue.
