CESI
ALL WORKERS COUNT

EN

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Answer to ad-hoc social partner consultation

Input for a interpretative communication on the implementation of the Working Time Directive (non-legislative)

Preliminary remarks

CESI is a recognised social partner and represents more than five million workers across different sectors, including workers in the transportation, health, education, justice, security and administration sectors. CESI positioned itself the previous consultation processes on EU working time legislation in 2010-2012 and 2014/2015. Even if the social partner consultation hearing on January 19 2017, which this contribution refers to, was restricted in terms of participation, CESI considers that as a European trade union confederation, in the spirit of trade union pluralism, it should have been invited to the event nonetheless.

What is CESI's view on the non-legislative initiative on the Working Time Directive as presented by the European Commission to the social partners in January 2017? (Note for a hearing on January 19)
Which provisions of the Working Time Directive are to be clarified in the interpretative communication in view of the needs and challenges that social partners may identify when the Directive is implemented on the ground?

According to CESI, opening up the Working time directive for a revision would at present not be desirable, even if the directive has not brought an effective regulation of working time for all workers in all respects and even if work organisation has in recent years seen new challenges for workers which the directive does not address explicitly and clearly, partly because many of them were difficult to anticipate and foresee when it was adopted. CESI fears that amending the directive could lead to a lowered protection level for workers.

Instead, CESI considers that many of the challenges related to working time could be addressed and remedied in a practical and rather fast way if the EU ensured a full transposition, implementation, application and enforcement of the existing rules, putting them into the context of recent developments and evolutions in the labour markets.

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In this respect, CESI welcomes the initiative of the European Commission to bring forward a single text (Communication) which synthesises interpretative considerations and case law of the European Court of Justice (CJEU) in the field of working time. This would help not only authorities but also trade unions better understand and highlight improper transpositions, derogations and flexibilities contained in the directive, thus safeguarding quality working conditions for employees.

Overall, CESI agrees with the analysis of the challenges presented in the European Commission's note on a non-legislative initiative on the Working time directive. In particular, CESI shares the opinion that, with a view of securing and effective protection for the widest possible range of workers in rapidly evolving labour markets and new patterns of work organisation:

- certainty should be established concerning the implications and wider applicability of relevant recent CJEU case law across different sectors and professions, which applies especially to paid annual leave and the personal scope, timing of compensatory rest and definition of working time and on-call time under the directive.
- clarity should be achieved about requirements under the directive in the context of new and emerging challenges in employment and labour markets.

In this context, CESI proposes that the European Commission's work on an interpretative communication be guided by the following considerations:

Applicability of the directive

- The directive should apply as broadly as possible, making its provisions applicable to the widest range of professional groups from all sectors as far as possible, with a view to equal treatment. In terms of transposition measures by the Member States, CESI agrees with the Commission's finding that there are persisting problems in a number of Member States concerning specific groups of workers, in particular public sector workers such as armed forces, police staff and firefighters.
- Generally, the directive's Art. 17 on derogations should be interpreted strictly in the sense of the directive itself and as aiming at social justice, equality and a high protection of health and safety, with the interests of workers considered more important than those of employers. CESI rejects an application of exceptions to, and deviations from, Art. 17 wherever these unilaterally serve for an arbitrary establishment of working conditions by the employer.

Opt-outs

- Situations in which employers take advantage of weak positions of job applicants and make them sign 'voluntary' opt-outs as a precondition for a job offer should be discouraged and minimised as much as possible. If possible, exceptions to regular working time patters should be agreed upon between social partners and not via individual contractual agreements between employers and individual workers.

On-call time

- The reasoning provided in the SIMAP and Jäger judgments of the CJEU, which stipulates that all the time a worker is at the employer's disposal either in his workplace or an established place is unreservedly to be considered working time, should be conclusive. The same should apply to the judgment in case C-266/14 (Federación de Servicios Privados del sindicato Comisiones obreras v Tyco), which ruled that the journeys made by workers without fixed or habitual place of work between their homes and the first and last customer of the day constitute working time and that if a

worker who no longer has a fixed place of work is carrying out his/her duties during his/her journey to or from a customer, that worker must also be regarded as working during that journey. After all, during this time, a worker cannot freely choose how he or she spends his or her time, and the aim of the rest period is not provided for. The time during which a worker provides his or her services at the request of the employer should naturally be wholly considered working time, regardless of the actual usage of the services.

Concurrent contracts

- In cases of people engaged in employment relationships for several jobs to earn their living, the maximum cumulative weekly working time allowed should, naturally, remain at 48 hours (the threshold set by the directive for people with one contract).

New ways and forms of work

- Globalisation and digitalisation of the economy have created new, flexible and mobile forms of employment, challenging traditional employment and working time patterns. New digital and mobile ways of working should be used to ensure that workers can benefit from flexible work organisations. Persons becoming economically active in newly emerging, atypical and flexible forms of employment like crowdworking, job-sharing or employee-sharing (including those in forced bogus self-employment, which is used to circumvent the directive) should not be left behind.
- At the same time, mobile work solutions should rule out constant availability and include a right to disconnect in order to prevent increasing or unpaid working hours. Tasks performed at the place of work and away from it should not entail additional working time. The directive should apply as broadly as possible.

With a view to addressing these challenges, the interpretative communication should be complemented by and closely synchronised with measures flowing from the European Commission's Work-life balance (on e.g. flexible working arrangements) and Social Pillar initiatives (e.g. in the context of a possible Directive on decent work). The working time directive alone cannot ensure a modern, forward-looking and comprehensive approach to healthy and decent working conditions for all.