

28th February 2011

HOSPEEM (European Hospital and Healthcare Employers' Association) response to the second-phase consultation "Reviewing the Working Time Directive" under Article 154 of the TFEU

> About HOSPEEM

1. The European Hospital and Healthcare Employers' Association (HOSPEEM) was formed in 2005 in order to represent the interests of European Hospital and Healthcare Employers on workforce and industrial relations issues. Since July 2006 HOSPEEM has been officially recognised by the European Commission as a European Social Partner in the Hospital Sector Social Dialogue alongside the European Federation of Public Service Unions (EPSU).
2. HOSPEEM has members across the European Union (EU) both in the state or regionally controlled hospital sector and in the private health sector. HOSPEEM members are health employer organisations with the powers to negotiate on pay and on terms and conditions of service with their respective Trade Union partners. HOSPEEM members are also concerned with ensuring good employment practice for healthcare staff. HOSPEEM is also a member of CEEP.
3. HOSPEEM responded in May 2010 to the first-phase consultation of the social partners.

> Introductory comments

4. HOSPEEM welcomes the second stage consultation¹ published by the European Commission and the report on the implementation by Member States of Directive 2003/88/EC². The two documents provide a deep and interesting analysis on the implementation of the Directive and on the response of each Member State in complying with the Directive. The Consultation paper has pointed out the main issues of relevance and HOSPEEM is pleased to read from the consultation that the concerns raised with the response to the first consultation in May 2010 have been addressed by the European Commission.
5. As highlighted in HOSPEEM's response to the first phase consultation, the interpretation given by the European Court of Justice to cases SIMAP (C-303/98), Jaeger (C-151/02) and Dellas (C-14/04) has challenged the ability of health service employers to properly organise healthcare

¹ COM (2010) 801 final Communication from the Commission to the Parliament, the Council and the Committee of the Regions Reviewing the Working Time Directive (Second-phase consultation of the social partners at European level under Article 154 TFEU)

² COM (2010) 802 final Report from the Commission to the Parliament, the Council and the Committee of the Regions on implementation by Member States of Directive 2003/88/EC ('The Working Time Directive').

services in the EU 27, especially hospital services delivering 24/7 patient care, some highly specialised services and small and remote units.

6. HOSPEEM made clear in the previous response that more flexibility is needed in order to provide hospital managers with the necessary resources, in terms of staff, to organise health services efficiently. As underlined on several occasions³, the current and the future shortages of health professionals is one of the main issues of concern for our sector and it needs to be addressed in order to ensure that European healthcare services will be able to deliver high quality healthcare to an increasingly ageing European population.
7. HOSPEEM as a European Social partner is committed to develop strategies to encourage young people to undertake jobs in the health sector, in particular by enhancing the attractiveness of the health care sector as a place to work. This work needs to be supported by a European legislation that allows flexible and modern working patterns.

> **Developments since the Directive was introduced**

8. The 20th century working time directive is becoming increasingly irrelevant to the operation of hospitals in the 21st century.

Changes in working life

9. The Commission's communication acknowledges that the world of work has changed very significantly in the last twenty years. Evidence collected from Member States demonstrates that whilst hours worked have gradually been falling across Europe, this has more to do with an increase in part-time working than with a significant fall in full time hours of work. It is now possible for many people to perform work remotely or from home and to be contactable away from their place of work, potentially all the time, thereby blurring the boundaries between working time and personal time and bringing into question the concept of the "workplace".
10. The Commission's communication recognises that these developments are fundamentally altering the way in which working time is planned and organized and that legislation in this area needs to take account of these wider societal changes. We welcome this recognition, and are keen to work with the Commission and other social partners to update this area of European law so that it is fit for purpose in the 21st century.

The European workforce for health

11. The European Commission's Green Paper on the European Workforce for Health issued in December 2008, the follow-up report in December 2009 and the Council conclusions adopted in December 2010 all highlight the challenges facing European healthcare systems in the 21st century, such as increasing demand owing to the ageing population, coupled with an ageing workforce and shortages of healthcare workers. In some Member States, these shortages are severe and have been exacerbated by the consequences of the ECJ judgements on on-call time and compensatory rest, which require higher staffing levels than envisaged. There is an urgent

³ "Report on the open consultation on the Green Paper on the European Workforce for Health", December 2009;

"Council conclusions on investing in Europe's health workforce of tomorrow: Scope for innovation and collaboration", December 2010;

"HOSPEEM and EPSU Framework of Action on Recruitment and Retention", December 2010.

need to invest in tomorrow's workforce by attracting, recruiting and retaining healthcare workers.

12. An important part of this strategy involves creating an attractive working environment that enables people to balance their work and family lives. Therefore, flexibility in working arrangements is an important element of this. The rigid rules enshrined in current working time legislation sometimes makes this more difficult because they assume working patterns which no longer reflect the reality of many people's lives. The recent sectoral social partner agreement "A Framework of Action on Recruitment and Retention", signed in December 2010 by HOSPEEM and EPSU, underlines the need to continually modernise working conditions, if the healthcare sector is to remain competitive in a challenging employment market.
13. The current economic climate and the need to deliver the "Europe 2020" targets mean that the healthcare sector has to operate as efficiently and effectively as possible if high quality services are to continue to be delivered during a time of financial pressures. Working time legislation needs to support, not hamper, this strategy.

> Response to the consultation

Question 1

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?

14. HOSPEEM believes that the major issues of concern for the hospital and healthcare sector are the issues of on-call time and compensatory rest. However, HOSPEEM does not exclude in principle that other issues could also be discussed for a revision of the Directive, bearing in mind that this should not jeopardise the possibility to reach an agreement on on-call and compensatory rest.
15. HOSPEEM recognises that the organisation of working time is a highly complex issue. It is also very sensitive, in particular considering the past attempts undertaken by the European Parliament and the Council to find a compromise for a revision. HOSPEEM is concerned that any further effort to find a solution through a co-decision procedure will fail again because of diverging views.
16. With regard to the two models presented by the Commission for reviewing the Working Time Directive, both these models have their attractions. A wide ranging review of the Working Time Directive would modernise and update it. It will also take into consideration changing work patterns and the modern way in which healthcare is organised in the 21st century. However, the danger of this option is that it may open up a whole new set of problems that we had not envisaged, including possible new ECJ rulings in the future.
17. On the other hand, a focused review of the Working Time Directive would be seen to be a tempting way forward because it may resolve the current problems. However, the criticism of this is that it would not modernise the Working Time Directive and might require further action to modernise the Directive at a later date.
18. HOSPEEM believes that the best way to resolve the problem is through negotiations and does not think it would be helpful in taking any action which would tie the hands of future

negotiators. Therefore, HOSPEEM believes the best way forward is not to make any firm decision on these two options for the present.

Question 2

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?

19. HOSPEEM recognises the hard work made by the European Commission in identifying the issues of concern for the European social partners and the solutions suggested to pave the way for a revision of the Directive 2003/88/EC.

20. HOSPEEM has addressed in the paragraphs below the core issues for our sector, giving its comments on the framework provided by the European Commission in its consultation paper.

The on-call time and compensatory rest

21. HOSPEEM especially welcomes the Commission's recognition that the SIMAP and Jaeger rulings on on-call time and compensatory rest have created significant difficulties in implementation for Member States, and that these difficulties are especially acute in sectors such as healthcare where it is essential for some services to be provided twenty four hours a day, seven days a week. HOSPEEM's view is that the case law results in a very rigid application of the rules which benefits neither workers nor patients. For example, services such as outpatient clinics or operating lists may be cancelled or disrupted the following morning if a health worker is obliged to take compensatory rest immediately as a result of having been called out for a relatively short period the previous night – even though they may have spent most of the night asleep and have had an adequate amount of rest.

22. HOSPEEM would welcome a solution to the issues of on-call time and compensatory rest which would allow greater flexibility in the calculation and timing of work and rest periods, so that services to patients can be planned more easily whilst still protecting the health and safety of staff. Our view is that the Directive's current provisions focus too narrowly on duration of hours worked and do not take into account the differing intensities of work during periods of working time. This is especially the case in healthcare services, where there may be unpredictable peaks and troughs in demand, particularly overnight and at weekends.

23. In revising the Directive, HOSPEEM would like to return to the fundamental principle which underpins it – the protection of workers (and by extension the public they serve) from excessive tiredness and its consequences, on the grounds of health and safety.

24. HOSPEEM supports the proposal made by the European Commission to *"introduce a derogation, limited to sectors where continuity of service is required, which would allow periods of on-call time to be counted differently (i.e. not always on a hour-per-hour basis: the 'equivalence' principle) subject to certain maximum weekly limits and provided that the workers concerned are afforded appropriate protection"* which could represent a good starting point for a discussion on a possible satisfying solution to the current impasse.

25. HOSPEEM also welcomes the Commission's proposal to leave *"to social partners the flexibility to find solutions at local or sectoral level and identify the most appropriate method for counting on-call time"*. It would give to the appropriate level or sector the possibility to assess the extent of risk involved and the degree of flexibility needed (e.g. taking into account the differing intensities of work during periods of working time. This is especially the case in healthcare services, where there may be unpredictable peaks and troughs in demand, particularly overnight and at weekends).
26. HOSPEEM supports Commission's statement which underlines that more flexibility is needed with regard to compensatory rest, in a range of specific situations.
27. It should be left to the social partners to decide on the flexibility needed, which is required to deal with on the one hand, by the specific workload and on the other hand, the work-life balance of the employee.

The opt-out

28. HOSPEEM agrees with the analysis provided by the European Commission. It is not realistic to ask Member States to renounce to the use of the opt-out, especially as 16 Member States now make use of this derogation. HOSPEEM supports the retention of the opt-out. However, HOSPEEM believes that alternative solutions, including more flexible forms of work organisation, individualised working hours and more flexibility on compensatory rest would reduce the need to use the opt-out.

Question 3

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?

29. HOSPEEM believes that social partners are in the best position to resolve this contentious issue. The Working Time Directive has a cross-industry application and affects many sectors of the economy in the EU. Given these facts, HOSPEEM views is that the cross-industry social partners are the obvious candidates to negotiate an agreement on the amendment of the Directive.
30. Should negotiations at cross-industry level not be possible HOSPEEM will consider if other options are available.

> Conclusions

31. HOSPEEM would like to see the outstanding issues on on-call and compensatory rest resolved as a matter of urgency, as it is detrimental to the efficient functioning of European healthcare systems. The problems caused by the European Court of Justice with the SIMAP, Jaeger and Dellas rulings must be resolved.
32. Furthermore, HOSPEEM would like to reiterate its position on the opt-out, which is a fundamental instrument of flexibility for the hospital sector and any attempt to restrict it would cause huge consequences for the operation of the healthcare services in the EU 27.

33. Finally, HOSPEEM is convinced that the instrument of social dialogue between social partners, as envisaged under article 155 of the Treaty on the functioning of the European Union, is the best solution to address the concerns raised.
34. Cross-industry social partners should be given the opportunity to resolve the problem. If they are unable to do so, HOSPEEM will consider if other options are available.