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

> About HOSPEEM

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. HOSPEEM was created by the members of the European Centre of Enterprises with Public Participation and of Enterprises of General Economic Interest (CEEP) who felt that there was a need for a separate, distinct voice on health workforce issues at European level. As CEEP has a remit covering the whole public sector, CEEP's hospital and healthcare members established HOSPEEM as a sector association. CEEP has an observer status within HOSPEEM. HOSPEEM is a full member of CEEP.
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).
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.

> Introductory comments

The European Commission, following the provisions of article 154 of the Treaty, has launched the Consultation "Reviewing the Working Time Directive". The aim of this document is to seek the social partners' views on possible action that could be undertaken at Community level regarding any revision of Directive 2003/88/EC[1] "Working time Directive".
HOSPEEM contributed to the earlier consultation focusing on the organisation of working time in the healthcare systems of the Member States. This is an issue of great importance to the health sector that delivers a 24-hour service, 365 days a year. Patient safety and the safety of health workers are of paramount importance to HOSPEEM members. As the health sector is a 24-hour service, it needs flexibility to deliver high quality care. Therefore HOSPEEM believes that, in order to run efficient health services in the European Union, it is important that any future changes to the directive should include real flexibility to ensure well functioning health services, able to match European citizens' needs in the 21st century, as well as proper protection measures to ensure the health and safety of all those who work in health services.

[1] DIRECTIVE 2003/88/EC of the European Parliament and of the Council, 4 November 2003, concerning certain aspects of the organisation of working time.

As a general premise, HOSPEEM members believe that fair working conditions have to be ensured for all workers and that patients should not be treated by over-tired staff. This responsibility is shared with workers themselves, who have to ensure they are sufficiently rested to enable them to look after the well-being of their patients. In recent years, healthcare employers have faced increasing costs related to the organisation of working time, in particular due to European Court judgments in the SIMAP (C-303/98), Jaeger (*C-151*/02*)* and Dellas (C-14/04) cases, which interpreted resident on-call time, including inactive times, for example time spent sleeping, as 100% working time and required workers to be given immediate compensatory rest. The consequent reductions in the amount of time medical staff are able to be present in healthcare facilities has led to demands for extra medical staff, contributing to a shortage of skilled medical staff across Europe. This has, in many cases, been detrimental to the quality of healthcare services, as well as increasing costs. These increasing costs, alongside budget reductions resulting from the current financial crisis, have caused many problems for health services, including, in some cases, the closure of hospitals, leading to poorer services for citizens.

The Communication requests that the social partners play a proactive role, as indicated in Article 154 of the TFUE (Treaty on the Functioning of the European Union). HOSPEEM members replied to the six questions proposed by the European Commission. This paper summarises the responses received from our members to the Commission's consultation.

> Response to the Consultation

(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?

HOSPEEM members consider that the hospital sector is particularly sensitive to changes in the provisions regulating working time. Indeed, in the hospital sector flexibility is required to:

- ensure an essential 24/7 service;
- provide a work life balance (e.g. more flexibility in working time patterns and self rostering); and
- organise an effective and efficient workplace, overcoming the shortage of the healthcare staff;

Furthermore, the changes that our society is experiencing directly affect our sector. In particular demographic changes, such as longer life expectancy and the ageing population, will have major implications for the healthcare sector. Moreover, as underlined in the Consultation, the European labour market is in evolution, for example, there are an increasing number of part-time workers. Alongside this, European citizens' expectations and demands for high quality health services are increasing. Reductions in health budgets and the shortage of staff resulting from the SIMAP, Jaeger and Dellas cases, make it increasingly difficult to deliver high quality health services and to meet patients' needs. For all these reasons, the Working Time Directive plays a fundamental role in the framework of the organisation of healthcare services.

(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?

HOSPEEM members have developed a range of solutions aimed at making the healthcare sector an attractive employer. For example the NHS in England implemented the "Improving Working Lives" (IWL) standard, which helped NHS organisations develop their human resources policies and practices in a range of areas including flexible working, with a view to making the NHS a better to work.

As already stated in the previous response on the practical implementation of Directive 2003/88/EC, the Working Time Directive has been fully implemented by HOSPEEM members. However, HOSPEEM members are of the view that greater flexibility is required in relation to compensatory rest and that inactive parts of resident on-call time should not be counted as working time. In order to operate efficient health services in the EU, HOSPEEM members think that it is important to retain the opt-out, subject to reasonable safeguards. HOSPEEM members believe that as a free European citizen, it is an individual right to make the decision whether or not to work over 48 hours. Whilst it remains appropriate that, outside of exceptional or emergency circumstances, medical and healthcare professionals, and their patients, should be protected by reasonable controls on working hours, HOSPEEM members do not accept it is helpful to have rigid rules at EU level, and believe it is imperative to retain the opt-out in order to maintain efficient health services in the European Union. The ECJ rulings in the SIMAP and Jaeger cases have caused serious problems for the operation of health systems and have led the Members States to recruit extra staff at extra cost without improving productivity. In order to solve the problems of shortages of staff caused by the SIMAP, Jaeger and Dellas judgments, some HOSPEEM members were obliged to recruit staff from outside Europe (including Sub-Saharan Africa which can ill-afford to lose their trained staff) as well as healthcare staff from the new Member States. HOSPEEM members do not believe it right that European legislation and case law have contributed to some of the poorest country on earth losing their experienced staff. The flow of healthcare professionals from new to the old Member States has also created serious problems to the organization of the healthcare systems in countries like Latvia, Lithuania and Poland.

(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?

As stated above, in point (b), the European healthcare employers have experienced difficulties with the issues identified in the section 5 of the consultation. In particular:

- With regard to on-call time, the application of SIMAP and Jaeger ruling imposes unnecessary financial burdens on healthcare providers because of the need to recruit additional staff to make 24-hour services work effectively. As set out above, HOSPEEM members are particularly concerned about the interpretation of the Working Time Directive in the SIMAP, Jaeger and Dellas cases. The ECJ has ruled that resident on-call time must be regarded as working time, even where time is inactive, for example, when a worker is resting. HOSPEEM looks positively upon the proposal to introduce the concept of inactive on-call time, as it would avoid unreasonable costs for healthcare employers and could contribute to more desirable working patterns for staff, with potential improvements in work-life balance and access to training and professional development opportunities. In England for example, the NHS has implemented the 48-hour working week for the vast majority of staff. However, some services, such as maternity and paediatrics which are staffed by specially trained doctors who need to be in the hospital to respond to emergencies, continue to face particular challenges. Furthermore, concerns have been raised about the impact of new working patterns on medical training.
- Severe difficulties could be created by any restriction of the opt-out. For example in Germany, there is already a shortage of 5000 doctors. A restriction on the use of the opt-out would lead to a requirement for approximately 10000 more doctors and would compromise the quality of services.

(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?

HOSPEEM members agree with a broader approach to the regulation and organisation of working time. It is important for the safety of both patients and staff to avoid having over-tired workers. However, HOSPEEM's view is that the consultation document does not provide a clear and evidence-based assessment of the impact of flexible working arrangements on the health and safety of staff. In particular, HOSPEEM members do not agree with the analysis indicating that flexibility represents a threat to workers' wellbeing. In our view, the potential benefits to workers of flexible working arrangements need to be taken into consideration; in many cases, flexibility allows workers to realise a better work-life-balance. HOSPEEM's view is that flexibility, when combined with health and safety protection for workers and their patients, will make hospitals safer places, give a better work-life-balance and better access to training and development opportunities, and help to save jobs during a period of financial turmoil.

(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?
HOSPEEM members are concerned about the detrimental consequences of maintaining the *status quo*. In particular, as stated above, the application of ECJ rulings has had very serious implications for the functioning and the financial situation of European healthcare systems.
HOSPEEM considers that the unsuccessful outcome of the previous process of revision needs to be taken into account before further steps are undertaken. HOSPEEM members consider the Social Partners could have an important role in the process. A negotiation between the social partners may provide the best opportunity to achieve a balanced and successful solution for all the parties involved in the process.

(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?
HOSPEEM members believe that any actions that increase the exchange of experiences between the EU countries would be useful. Further work is also required to ensure that all Member States have an adequate supply of medical staff, and EU action to support this may be helpful.

(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?
HOSPEEM believes that a Social Partners negotiation at cross-sectoral level might be the way forward and supports the CEEP position on this issue. If this is not possible, all possibilities, including other negotiations, should be considered.

> Conclusion

HOSPEEM members believe that in order to operate safe and efficient European health systems and to avoid the unnecessary closure of hospitals and healthcare services in the EU it is important to resolve the problems caused by the SIMAP and Jaeger cases and to retain the flexibility provided by the opt-out.
Any attempt to remove the opt-out would lead to serious consequences for the operation of health services in the EU, as the implementation of ECJ case law already has. HOSPEEM also takes the view that it is important not to have tired staff treating patients. Therefore sensible rules are necessary to ensure the health and safety of both patients and staff. HOSPEEM considers that the retention of the opt-out, accompanied by sensible rules on its operation, together with the introduction of the concept of "inactive on-call time", an extended reference period, and greater flexibility on the timing of compensatory rest would better satisfy the need for flexibility that our sector requires and presents the best way forward to resolve the current impasse at EU level.