



ECEG POSITION PAPER

on the second-phase consultation of the social partners under Article 154 of the TFEU reviewing Directive 2003/88/EC of the European Parliament and of the Council of 4 November 2003 concerning certain aspects of the organisation of working time

As per: 24 February 2011

Summary

- It is necessary to review the Working Time Directive. This review should, however, be limited to the revision of a few key objectives and have the form of a “recast”.
- The objective of a revision must be to eliminate the imbalances and problems resulting from the ECJ ruling with regard to on-call time and annual leave in practice. The different rules that have historically grown in the individual countries and sectors must be respected, as far as they do not conflict with the directive’s key objective of protection of health.
- In view of the known political positions, demands for a comprehensive review of the directive indicate that another failure of the procedure is accepted and are thus not conducive to the objective.

General notes concerning the second-phase consultation of the social partners

By presenting its consultation document on 21 December 2010, the European Commission officially initiated the second-phase consultation of the European social partners on a possible review of the directive 2003/88/EC concerning certain aspects of the organisation of working time (Working Time Directive). The European Chemical Employers Group (ECEG) already participated in the first-phase consultation of the social partners with its own position paper. The comments made in that paper with regard to the question of a review of the European Working Time Directive and its content-related focus are hereby reaffirmed by the chemical employers. A review of the Working Time Directive is necessary and desirable from ECEG’s point of view. As already described in the position paper for the first-phase consultation of the social partners, this review should however focus on the directive’s key objective (the workers’ health and safety) and concentrate on the obvious problem areas concerning the application of the directive that were created in particular by various rulings of the European Court of Justice. We reject a more comprehensive review of the Working time Directive is rejected at present, even if it would be desirable here and there. Particularly in view of the experience with the first “failed” review procedure from 2004 to 2009 we consider a review appropriate that is limited to a few specific issues in order to bring a political compromise into the realms of possibility at all. We therefore believe that a proposal for a revision of selected areas of the directive in the form of a recast is the right way to proceed.

With respect to the specific questions of the European Commission to the social partners, ECEG comments as follows:

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?**

A key concern of ECEG in connection with a review is that the Working Time Directive must enable the continued application of proven **on-call time** models which are desired by the workers and enterprises alike and do not pose an obstacle to health protection whatsoever. For this purpose, to correct the ECJ ruling (Simap/Jaeger), it is necessary to introduce an instrument that provides for the differentiation of different forms of on-call time. For example, the working times of factory fire services in the chemical industry, in particular, are characterized in that they are of a largely “inactive” nature. Operations during on-call time take place very few times per year, rather than several times during a single on-call time phase, as would be the case for other occupational groups. Therefore, it must be possible to subject on-call time to a differentiated assessment with respect to the principles of health and safety protection. A review of the directive must furthermore respect the existing national, historically grown approaches for assessment of on-call time models. The social partners at sector or company level should thus be able to lay down provisions regarding the exact definition and modalities of the differentiated assessment of on-call time models and an introduction of a new time category for inactive phases of on-call time.

Another issue that should be dealt with together with the review of the directive within the scope of correction of the application difficulties caused by the ECJ ruling is the **annual leave** (Schultz/Hoff) addressed in the consultation document of the European Commission. The entitlement to paid leave must be based on years again. It must be possible for the entitlement to leave to lapse if leave is not taken during a calendar year (or a short transfer period that may be stipulated by national law). It is incompatible with the purpose of annual leave – i.e. to ensure rest periods – if this entitlement is automatically preserved and accumulates over long periods of time if a worker cannot make use of his entitlement to leave in the year in question, e.g. due to a long-term illness. The rulings to the contrary have led to legal uncertainty for enterprises and workers and threatens to have a negative effect on the employees affected.

In view of the different political positions that all stakeholders are aware of with respect to the remaining areas of review mentioned in the first-phase consultation of the social partners and the present consultation, respectively, the continued insistence on inclusion of these topics – including the “opt-out” – in the review will, according to the conviction of ECEG, result in another failure of the political procedure. To enable a successful review proposal on the part of the European Commission, the chemical employers are therefore

in favour of endeavouring to achieve a recast proposal of the directive that is limited to the issues described above.

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?

In accordance with the comments made with respect to question 1, the chemical employers are convinced that only a recast proposal of the European Commission that is limited to a few issues – specifically on-call time and annual leave – would lead to an acceptable overall frame in the political process. Demands for more comprehensive revisions of the directive are prepared to accept another failure of the political process or this may, under certain circumstances, even be their goal. It should not be the objective of a proposal put forward by the European Commission.

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?

Negotiations between the European social partners at cross-sectoral or also sector-specific level (as far as it is possible to define topics and issues delimited according to individual sectors) concerning the topics indicated in our response to question 1 of the European Commission are conceivable to ECEG. Our comments given in the response to question 2 naturally also apply to these negotiations and discussions within the social dialogue, i.e. that demands for a more comprehensive review of the directive have no chance of success and agreement. Demands of that nature could thus not be a basis for common negotiations.

In this context, ECEG vigorously rejects the comment made by the European Commission it would, in the case of commencement of negotiations in the social dialogue make its own behaviour conditional on these negotiations being “sufficiently” comprehensive. Whenever the social partners decide to regulate this matter or other

matters by means of the social dialogue, the agreement on scope and type of regulation content is the sole responsibility of the social partners. An assessment and control of an agreement of this kind by the European Commission combined with the threat to develop additional legislative proposals, is contrary to the spirit of the European treaties.