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28 February 2011

Dear Sir/Madam,

FSB response to:

THE SECOND-PHASE COMMISSION CONSULTATION ON THE REVIEWING OF THE WORKING TIME DIRECTIVE

The Federation of Small Businesses (FSB) would like to take the opportunity to respond to the above named consultation of the European social partners.

The FSB is member of the European Small Business Alliance (ESBA) and is not represented as a social partner at European level. However, the issues that will be addressed in the review of the Working Time Directive (WTD) are of vital importance to our members.

The FSB is the UK's leading business organisation. It exists to protect and promote the interests of the self-employed and all those who run their own business. The FSB is non-party political and, with 210,000 members, it is also the largest organisation representing small and medium sized businesses in the UK.

Small businesses make up 99.3 per cent of all businesses in the UK, and make a huge contribution to the UK economy. They contribute up to 50 per cent of the GDP and employ over 59 per cent of the private sector workforce.

We are very happy to see that the consultation documents are available on the Europa website. This means that stakeholders not represented by a social partner are able to follow how the review of the WTD develops.

The UK department for Business Innovation and Skills (BIS) has encouraged us to contribute to the second-phase consultation, pointing out that another non-social partner from the UK sent their response to the first consultation.

We trust that you will find our comments helpful and that they will be taken into consideration.

Yours sincerely,

Tina Sommer

Chairman for EU and International Affairs

Federation of Small Businesses



**FSB
response to
the second-
phase
Commission
consultation
on the
review of
the Working
Time
Directive**

February 2011



EUROPEAN COMMISSION SECOND-PHASE CONSULTATION ON THE REVIEW OF THE WORKING TIME DIRECTIVE

Question 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?

Both FSB research and discussions with members have revealed that in addition to on-call time and compensatory rest other issues are of concern.

On-call time

The SiMap judgment defined **all time when the worker was required to be present on site as actual working hours**. The Jaeger judgment confirmed that this was the case even if the worker was allowed to sleep when their services were not required.

For some FSB members this judgment is problematic. For example for businesses in the funeral services industry or members that guarantee a 24/7 garage break-down service. A fifth of FSB member business with staff have employees formally 'on call' outside of normal business hours. Therefore, the FSB would very much like to see on-call time to be counted differently for sectors where continuity of service is required.

FSB stats:

- 22 per cent of FSB members said that any of their employees (excluding themselves) are formally on-call or on-standby outside of normal working hours;
- While 68 per cent said their staff was not on-call or on-standby outside of normal working hours.

Compensatory rest

Under the terms of the WTD, employees are entitled to take minimum rest periods:

- 11 consecutive hours per 24 hours
- 24 hours per each seven-day period plus the 11 hours' daily rest.

If an employee misses any of their minimum rest periods, they are entitled to make up their missed rest period immediately. The Court held in Jaeger that missed minimum daily rest periods should be taken immediately after the extended work shift ends and in any event before the next work period begins ('immediate compensatory rest').

The FSB is in favour of balancing private life and working life, and we recognize our duty of care as employers. In fact, small businesses are able to offer more flexible working to their employees than other employers. However, the Jaeger case is problematic for our members. They find this unnecessarily restrictive. While minimum rest periods neither have a positive or negative impact on business operations, just under half of members indicate that their staff does not take compensatory rest.

During busy times, such as the period before Christmas, it is a problem when employees start work later because of missed rest periods. In addition, seasonal workers may want to work as much as possible to make the most of the season, and the same may be true for employees that are on a short-term contract. Therefore, we ask for a more flexible approach with regard to missed rest periods and we propose a voluntary opt-out for seasonal workers and workers on short-term contracts from the requirement of immediate compensatory rest.



FSB stats:

- Five per cent of members said their staff had taken compensatory rest, while 48 per cent of members said their staff had not taken compensatory rest.
- For the vast majority, minimum rest periods have had neither a positive nor negative impact on business operations;

Reference period

In the UK employees have the possibility to opt-out from the 48 hour-rule under directive 2003/88/EC. For those employees that did not sign the opt-out the reference period for calculating the average working time is four months. UK small business employers have no immediate access to a social dialogue to agree a reference period of twelve months as foreseen in the current directive. Therefore, the FSB would welcome a general extension of the reference period to twelve months.

At the same time, we don't consider this extension to twelve months as a possible compromise for not having the opt-out. The FSB is aware that the Commission does not find it realistic to ask 16 countries to refrain from the opt-out. However, this derogation could resurface in negotiations between the Parliament and the Council. FSB members have indicated that they don't want to lose the opt-out. In fact, the opt-out is the small business equivalent of a social dialogue.

FSB stats:

- 75 per cent of FSB members employ staff;
- Of those, a quarter (27%) have between 1 and 4 staff who work over 48 hours a week;
- 1.2: average number of staff working 48+ hour weeks (exc. themselves).

To summarize, the FSB welcomes an extension of the reference period to 12 months for workers who have not signed the opt-out. We would be against losing the opt-out for workers who would like to work more than 48 hours. Acknowledging that there needs to be a balance between private and working life, we would not want to deny workers to work longer hours if they want to. For example, losing the opt-out would particularly affect seasonal workers who have to benefit to the maximum from the available work in one period of time.

Interplay annual leave/sick leave

Recent European Court judgments mean that changes are necessary to the existing Working Time Regulations concerning the way that annual leave and sick leave are treated (Pereda/Stringer cases).

- statutory entitlement to paid annual leave continues to accrue during sick leave, even if the employee is on sick leave for the whole year and does not work;
- workers can take their statutory annual leave at the same time as sick leave and receive their normal rate of pay;
- Payments in lieu of leave upon termination of employment must include any untaken statutory annual leave even if the employee has been on sick leave for the whole of the leave year.

FSB figures show that this is an important issue for our members.

FSB stats:

- The Stringer ruling affects the way FSB members employ: 38 per cent of members would be more cautious about taking on staff with health problems;



- 54 percent said that the same ruling, stating that if an employee is sick during a period of annual leave they can choose to take the missed annual leave at a later date, will impact negatively on the operation of their business.

The lack of clarity on whether a worker on long-term sick leave could accumulate paid annual leave entitlements over successive years is a particular problem. First, it is a problem for small businesses if, after a long period of sick leave, an employee is again absent from work because he or she is taking holidays. Second, it is a burden for businesses to keep track of holiday entitlements over the years.

The FSB proposes to look at a situation of an employee on long-term sick leave *per year* and offer the following options:

- The employee takes his/her annual leave entitlement during sick leave
- The employer pays out the annual leave entitlement at the end of the year

In the UK, the latter option has the advantage that paying out holidays *in lieu* can be offset against statutory levels of sick pay.

The FSB would like to draw the attention to the fact that the problem of accumulating holidays during sick leave also presents itself with regard to maternity leave. The principle here is that it should be possible to pay out holiday entitlements *in lieu* should both parties wish to do so. The second principle is that a year should be taken as the unit of account, avoiding accumulating leave over years, burdening and disadvantaging small businesses. We realise that the issue of paying out leave should be dealt with on a national level, but we think it is worth pointing out how it interacts with EU rules on leave.

Counting of working hours

The FSB is of the opinion that the obligation to know how many hours their employees work in total should not be with the employer. In addition, we think that such an obligation would be very difficult in practice. Employees could have several different smaller or bigger jobs next to each other. For example, they work in a pub at night, or in several pubs, on and off. It is impossible for the employer to know whether an employee is having other paid activities in their free time.

We assume that the current directive takes the employee as a starting point for counting the total hours he/she works. However, we don't assume it should automatically be the employer who keeps track of all his/her employee's contracts and paid activities.

Question 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?***

See question 3.



Question 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?

As mentioned before, the FSB is not represented by a social partner on EU level. However, given the number and variety of businesses we represent, we think it is essential that the opinions of business organisations such as the FSB, that are not represented by UEAPME, are heard, even if we will not take part in a social partner agreement.

For the FBS, it is very important that the issues above are addressed and allow more flexibility for small businesses in the future. In this respect we would like to point out that under the Social Policy title, article 153 2b TFEU requires the institutions to avoid passing laws which impose administrative, financial and legal constraints which hold back the creation and development of SMEs.

Finally, a repetition of the clash between EP and Council on the opt-out should be avoided. We find it very important that the review process remains open and transparent and we are more than happy to comment on solutions and feed in real-life examples.

Tina Sommer

Chairman EU and International Affairs
Federation of Small Businesses

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