



WORKING TIME DIRECTIVE REVIEW

February 2004

- The Working Time Directive lays down minimum requirements with regard to the organisation of working time, with the aim of ensuring health and safety of workers. In particular it provides for minimum daily and weekly rest periods, an entitlement to annual paid leave and maximum working hours of 48 hours.
- There are two specific derogations from the maximum working week which are subject to an automatic review seven years after the Directive took effect and the European Commission has published a document initiating this review. The review also takes account of recent Court cases in this area regarding the definition of on-call work and how it is to be accounted for.
- This briefing note provides an overview of the Commission's consultation document together with an assessment of the likely next steps with regard to any changes to the directive and the impact this will have on the licensed trade.

Background

- The maximum working week provisions of the directive are applied by averaging working time over a 4 month period. The Directive allows this reference period to be extended to 6 months and it may be further extended to a year but only by collective agreement between worker and trade union representatives. This enables workers to work substantially more than 48 hours at a particular time due to the nature of the job, provided that working time is reduced to compensate at other times.
- Given the fact that few workers in the UK are covered by a collective bargaining agreement, the ability to make use of this derogation is limited and its impact minimal. However, if UK workers were able to average their working time over the course of a year, few would appear to work longer than 48 hours.
- The Directive also allows workers to individually opt-out of the restriction on their weekly working hours. This must be on a voluntary basis and the employer must keep up-to-date records of the time actually worked by employees who have signed an opt-out. The UK is the only country to make substantial use of this opt-out provision.

The Review – Conclusions

- The European Commission is obliged to review both exemptions from the weekly working limits, assess their effectiveness and make recommendations for any changes it believes are required to ensure a high level of worker protection. The Commission's review concludes that few Member States have accurately transposed the provisions of the Directive.
- Most Member States apply an annual reference period for calculating time but only 4 apply the requirement for this to be introduced via collective bargaining. The UK is one of these. In general, therefore, there is a tendency towards expressing working time as an annual figure rather than one averaged over 4 months.



- With regard to the individual opt-out, the European Commission is concerned that UK legislation has recently been revised to remove the requirement to keep detailed records of actual time worked. Instead employers are only required to keep records of the workers who have opted-out and of their agreement to this.
- There is also a concern that the opt-out is becoming a generally applied clause in work contracts and this may call into question the requirement for the decision to be made freely and voluntarily by the employee. The Commission believes that when workers may feel obliged to sign when they sign their contracts.
- In practice, the Commission notes that this has meant that large number of workers are being excluded from the Directive even though their work patterns mean that their average working time would fall below the limit. It notes that 16% of UK workers currently work more than 48 hours a week but 33% have signed an opt-out.
- It concludes that the unique situation in the UK means that the ability to vary the reference period for calculating average working time by collective agreement is limited and hence the directive is less flexible in its implementation, requiring greater use of the opt-out than in other Members States. It also notes that other applicable derogations – for workers whose working time is not measured and or who have management responsibilities – are unclear and are not being used effectively.

Next Steps

- Having completed its initial review, the European Commission will now turn its attention to identifying solutions to overcome the problems it has identified and it is inviting public comment on these. The document itself contains no specific policy suggestions but there are clear steers of likely changes or amendments
- There is no suggestion in the document that the individual opt-out will be removed and indeed there has been extensive lobbying from the UK Government and CBI to ensure that it is retained. It is clear from the Commission's analysis, however, that changes will be required to existing UK legislation and concessions will need to be offered in order to retain the opt-out in some form.
- The conclusion that the UK legislation fails to follow the provisions of the Directive in requiring detailed records of working time to be kept means that we can expect significant changes here and an increase in bureaucracy and administration to ensure that records of actual time worked are available for all workers. Failure by the UK Government to make this change would lead to action before the European Courts.
- In addition, however, the European Commission suggests that further additional requirements to be introduced as a condition of using the opt-out. A ban on standard waivers of rights in contracts of employment appears most likely. This is comforting in that it implies the opt-out will continue, but overburdensome administrative requirements may mean the costs outweigh the benefits.
- The acknowledgement of the problems of applying a longer reference period to the calculation of working time and the need for greater clarity with regard to other derogations do provide additional hope, however. There appears to be scope for arguing for the ability to extend the reference period to a year without the need for a formal collective agreement.



- Comments are invited by 31 March 2004 and the European Commission will then come forward with proposals for any changes to the existing Directive later this year. The changes will need to be debated and agreed by the European Parliament and Council of Ministers, which will take time. However we should expect unilateral action by the UK Government to address concerns about their interpretation of the Directive sooner rather than later.