



EUROPEAN COMMISSION COMMUNICATION - DIRECTIVE ON THE ORGANISATION OF WORKING TIME

March 2004

The Association of Licensed Multiple Retailers (*ALMR*) welcomes the opportunity to submit comments to the European Commission as part of its scheduled review of Directive 93/104/EC concerning certain aspects of the organisation of working time (Working Time Directive). We are particularly concerned with the review of the opt-out from the maximum working week provisions and the need to ensure that the Directive provides flexibility for business as well as protection for workers.

The *ALMR* believes that the provision of an individual opt-out from the Directive's provisions is an important one and should be maintained. This enables those genuinely wishing to work longer hours to do so and also provides businesses, such as licensed retail outlets, which need to open for long periods of time with the flexibility to do so. We would therefore urge the Commission to resist any revisions which would remove this provision or increase the complexity and red tape surrounding its use.

We acknowledge the suggestion in the communication that the opt-out may be over or inappropriately used in many circumstances, but believe that this is largely due to the complexity of directive as a whole and a desire on behalf of employers to avoid inadvertently breaking the law. We therefore welcome the focus of the communication on reviewing and revising other aspects of the directive – notably the reference periods to be applied. We strongly recommend that the opportunity is taken to clarify and refine the directive to avoid unnecessary red tape.

Background

The *ALMR* is the only trade body dedicated to representing the interests of the licensed retail trade in the UK. Currently just under 100 companies are in membership, between them owning or operating over 30,000 outlets – around half the UK pub and bar estate. Members include major pub companies such as Punch Taverns, Unique Pub Company and Enterprise Inns, managed operators such as Regent Inns and Laurel Pub Company, the retail estate of regional brewers. However, the bulk of our membership is made up of small, independent companies operating 50 or less pubs under their own branding.

Leisure is one of the fastest growing industries and one of the UK's primary economic sectors. Almost 250,000 companies in the UK are dependent on leisure and the majority of these are independent small businesses. The pub trade is no exception, with over three-quarters of all outlets being owner operated (either freehold or leased). Despite these positive levels of growth, pubs are coming under increasing pressure as a result of increasing levels of regulation and red tape.

A recent survey of over 2,500 pub tenants – that is individual self-employed businessmen – found that 83% felt that the level of red tape had increased over the past two years. Employment law costs are a major component of this and the complexity of the law is seen as the single biggest cost in terms of compliance. Three quarters of respondents now felt that they had no choice but to employ a specialist external adviser on employment law matters.

In light of the above, we believe that it will be particularly important that the European Commission uses the revision to give firms greater flexibility in this area and avoids imposing unreasonable constraints or additional red tape. We welcome this stated approach.

Article 18.1 – individual opt-out

The opt-out is a valuable tool to allow workers who do genuinely want to work longer hours to do so and to enable businesses which need to open long hours to manage staff rotas. In the licensed retail sector,



it is particularly used by pub managers and, to a lesser extent, deputy managers who may themselves need to work long shifts but who may also be required to be on-call. It is vital, therefore, that it is maintained.

The systematic offering of the opt-out and high level of take up amongst UK workers identified by the Commission should not in themselves be taken as an indication of abuse. Nor should the fact that relatively few workers appear to be working significantly longer hours be taken as an indication that the opt-out is not needed. The high take up rate can, in part, be explained by the culture of employment law within the UK.

- Contract terms are agreed on an individual basis with very few UK workers being covered by collective bargaining. This means that few UK workers are able to average their working time over the period of a year and hence there is a greater concern in sectors such as ours where working time is variable, that an individual may breach the limit.
- Penalties for failure to comply with employment law are stringent and employers are therefore keen to ensure that they do not inadvertently fall foul of these provisions. The fact that the UK is one of the few countries to translate accurately the provisions of the directive relating to reference periods exacerbates that and the opt-out may, therefore, be used as a safety net
- The directive is complex and many of its provisions are unclear – managing executives and derogations for the tourism industry may mean that many of the workers in our sector currently covered by an opt-out would not be in danger of breaching the Directive's provisions, but employers are unsure of that. The existing level of red tape and opaqueness means that the opt-out is used as an easy means of minimising administrative constraints.

The special circumstances in the UK and the desire by employers to ensure that they do not break the law mean that the opt-out is often used where it is not absolutely necessary.

The *ALMR* believes that revisions to the directive in two key areas would help many employers understand better which workers genuinely need to be covered by an opt-out and which do not – amendment to the reference periods and clarification of certain definitions. Changes in these areas may help to reduce inappropriate use of the opt-out.

Conditions Surrounding the Use of the Opt-Out

We note the Commission's observations in respect of the translation of the Directive's provisions into UK legislation, and in particular the requirement to maintain a record of the actual hours worked by someone who had signed an opt-out. The *ALMR* does not wish to comment on this beyond noting that it will be important to ensure that the criteria for using the opt-out are not so rigid as to frustrate the desire of individuals and the needs of business to work more flexibly. We further note the Commission's stated aim to avoid imposing unreasonable constraints on firms.

Reference Periods

The fact that few workers within the UK are covered by a collective agreement means that in most cases working time can only be averaged over 17 weeks. In sectors such as hospitality, where there are seasonal peaks in trade, this inevitably means that workers may be more at risk of breaching the maximum working week provision at certain times, even though their working hours at other times may be far lower. For this reason, many employers and employees look to use an opt-out to ensure that the law is not breached.



Greater flexibility in terms of averaging working time would undoubtedly enable employers and employees to even out their working hours over time and would take account of genuinely busy periods. The *ALMR* believes that allowing working time to be averaged over a period of a year would be more appropriate, provides clarity and certainty and reflects the situation in many other member states. We further believe that such an extension would see the removal of the opt-out from many workers who do not strictly need to benefit from it.

We would urge the European Commission and Member State Government's to provide greater information and guidance to business and in particular small firms, to ensure that they are aware of any averaging periods and their use. This should also be extended to cover the interpretation of the reference to "managing executives or other persons with autonomous decision-taking powers" which again leads many people to reach for an opt-out when they may not necessarily need it.

We also note that adoption of this recommendation would meet the Commission's objective of giving firms more flexibility in the way in which they manage working time whilst at the same time avoiding imposing unreasonable administrative constraints on them.

Definition of Working Time

Clarification from the European Court of Justice on the definition of working time is helpful and further reinforces the need for the opt-out to remain an option for certain individuals. The use of on-call time is not just limited to the medical profession and the implications of the court judgments are far wider than that. In the pub trade, many managers will remain on-call at the end of their shift to deal with particular emergencies or difficulties which may arise. The situation is complicated by the fact that for many of them, their place of work is also their home and technically, therefore, they will remain on the premises when on-call. We therefore believe it will be important for the court judgment to be interpreted sympathetically when translated into the directive itself, and for detailed guidance to be provided to small businesses.

Conclusion

The *ALMR* does not believe that the review of the Working Time Directive suggests that a fundamental revision of its provisions is required. In particular, we do not believe that there is justification for a removal of the ability of an individual to opt-out of the 48 hour working week. The opt-out should be maintained but care will be needed to ensure that any associated revisions of the directive do not mean that the criteria for its use as so onerous as to negate the benefit.

We believe that many of the concerns surrounding the use of the opt-out could be resolved by extending the reference periods used to calculate average working time and clarifying the definition of managing executives.