

Brussels, 22 September 2004

Frequently Asked Questions about working time

The Commission has today adopted a proposal for a modification to the existing Directive concerning certain aspects of the organisation of working time. This background note is intended to provide detailed information about the issue of working time and the Commission proposal.

For background on the existing directive, its provisions and its workings, please see [MEMO/04/01](#).

Why is the Commission proposing a revision to the Directive now?

The Working Time Directive was adopted in 1993 and has been amended several times since. The original directive requires the revision in 2003 of two aspects of the Directive. The first is the reference period, i.e. the time over which the average 48-hour weekly limit on working time is calculated. The second concerns the application of the so-called "opt-out" that allows Member States to put in place measures to allow individuals to agree not to be subject to the 48 hour limit.

The Commission conducted this review last year and extended it to cover two other areas: the definition of working time in the wake of European Court of Justice (ECJ) rulings on time spent on-call by health professionals and the possibility of introducing measures to promote the work/life balance.

The Commission review identified problems with certain aspects of the directive.

It found some evidence that the opt-out was being misapplied in the UK, the only Member State which had applied the opt-out generally from the beginning.

The absence of a definition of on-call time in the directive also caused problems. It led to the ECJ case-law mentioned above which stipulates that on-call time must be counted as working time. This has major financial and organisational implications for many Member States.

What will be the objectives of the Directive?

The Directive aims at protecting workers from adverse health and safety risks, laying down provisions for a maximum 48-hour working week, rest periods and breaks and a minimum of four weeks paid leave a year. There is a clearly negative effect of long working hours on health and safety of workers. Research has shown that fatigue and loss of concentration increase with the number of hours worked and that the risk of industrial accidents is higher during the final hours of work. At the same time, the Directive will provide Member States and firms with the greatest flexibility possible for handling working time in order to improve the firm's competitiveness. Unnecessary and harmful constraints on the firm's way of dealing with working time should be avoided, especially for smaller firms. The challenge is to find a balance between worker's rights and firm's legitimate interests.

What are the main problems with the opt-out?

The 1993 Directive provides Member States with the possibility not to apply the 48 hour limit to the average working week. At that time, only the UK put into place general national measures to allow an individual to opt-out. On the accession of 10 Member States in May 2004, Cyprus and Malta also introduces a generalised opt-out. Luxembourg, Spain, France and Germany have all put in place measures to allow opting out in specific sectors (hotel and catering, health). Therefore the widest use of the opt-out, and thus the basis for drawing conclusions on its use, is in the UK.

It appears in the UK not all the guarantees implicit in the directive have been provided. For example, employees are often asked to sign the opt-out agreement at the same time as the contract of employment. This can put them under pressure to agree to opt out and undermines their freedom of choice.

The directive requires employees to keep records of the hours actually worked by employees who have opted out of the 48-hour limit but national legislation only requires that records of the opt-out agreement itself are kept.

Figures show that 33 per cent of the UK workforce have signed an opt-out but only about half that proportion - 16 per cent - say they actually work more than 48 hours a week (compared to 15 per cent at the beginning of the 1990s).

What were the implications of the Court of Justice rulings on on-call time?

The current directive only defines "working time" and "rest time". Member States dealt differently with the time spent on call, which is not defined in the current directive.

This led to two Court of Justice rulings seeking to clarify the issue. In the SIMAP and Jaeger cases in 2000 and 2003, the Court ruled that time spent on call by health professionals had to be counted as working time, if they are required to be at their place of employment, even if they are resting. Currently, doctors work more than 48 hours a week in most Member States if on-call time is considered entirely as working time.

ECJ interpretations of existing Community law are binding on all Member States. Most Member States need to adapt their national law as a result of the above rulings. The rulings affect the health sector most seriously but not exclusively. In some Member States, it was estimated that tens of thousands of extra medical staff would have to be recruited. Following the rulings, France, Germany and Spain applied the opt-out to their health sectors.

What is the importance of the reference period?

For many firms it is very important to organise working time flexibly in order to respond to seasonal or demand fluctuations. Sometimes, there might be more work to do and employers could ask workers whether, for a certain period, they want to work more than the 48-hours limit a week. Therefore, the 48 hours are not calculated over just one week, but over a reference period. The current Directive sets the reference period for the average weekly working-time at not more than four months. However, the reference period can be increased to six months and, if there is a collective agreement or agreements concluded between the two sides of industry, up to twelve months.

The use of collective agreements varies widely between different Member States and sectors, so many firms have not been able to make use of an extended reference period. The new proposal keeps the basic reference period at four months, but Member States now have the possibility themselves to increase it up to one year, while respecting the general principles of protection of worker's health and security. Member States will have to consult social partners and promote social dialogue, but a collective agreement is no longer necessary. In any case, the reference period cannot be longer than the duration of the working contract.

Why is the Commission now proposing more legislation?

The Commission consulted the two sides of industry (also known as the social partners) on the need to revise the existing directive and asked them to negotiate an agreement on amendments to it, as it is required to do under the Treaty (Article 137). However, the European social partners were unable to find sufficient common ground to start negotiations and declined the Commission's invitation to do so. The new proposal nonetheless gives the social partners a role in implementing some key provisions of the directive, where this fits with national law and practice.

What will change under the new Commission proposal?

The new proposal changes the provisions regarding the opt-out, "on-call time", the reference periods for calculating the maximum working week, and the time limits for granting compensatory rest.

Opting out

The conditions attached to the worker's individual consent are tightened:

- it cannot be given at the same time as the contract of employment is signed or during any probation period,
- it has to be given in writing
- it is valid for a maximum of one year (renewable).
- no worker can work more than 65 hours a week.
- employers are obliged to keep records of the number of hours actually worked and make these records available to the responsible authorities, if required.

Member States will be able to apply the opt-out if it is:

- expressly allowed under a collective agreement or an agreement between the social partners; and
- if the individual worker consents.

However, if no collective agreement is applicable and no workers' representation normally negotiates terms and conditions on the workers' behalf, individual consent can be obtained by the employer directly.

The proposal states that workers' representatives can be used to decide on the opt-out in line with existing national law and practice.

On-call time

The proposal introduces a new category, "on-call time", in addition to working time" and "rest time" and states that the inactive part of on-call time does not constitute working time within the meaning of the directive.

However, it also gives Member States the option, under national law or by collective agreement or agreement between the two sides of industry, of counting the inactive part of on-call time as working time.

Under the Commission proposal, on call time is defined as that period during which a worker must be available to work, if required to do so by his/her employer. The proposal further defines the inactive part of on-call time, which is when a worker who is on call is not actually carrying out his duties. Any on-call time which is not classified as inactive should count as working time.

Time limits for compensatory rest

The current Directive allows the rest periods laid down by the Directive to be waived under certain circumstances and in certain sectors, and to be taken later. The proposal sets a limit of 72 hours for the taking of these compensatory rest periods. The ECJ judgements referred to above had interpreted the existing Directive to mean that compensatory leave had to be taken immediately.

Reference periods for calculating the working week

The standard reference period over which the average working week is calculated remains four months.

However, Member States have the option, in the proposal, of extending it to one year, provided the social partners are consulted and social dialogue is encouraged.

The proposal also states that the reference period can in no circumstances be longer than the duration of the employment contract.

Is the Commission using this directive to impose a harmonised system of industrial relations on all Member States?

There is no intention to try to impose a harmonised industrial relations policy, either through this Directive or by any other means. The proposal will allow the issues raised by the Directive to be addressed in the most appropriate way for a given situation in a given Member State or sector. Some make widespread use of collective agreements – in some Member States coverage by collective agreement is over the 90% mark. Other countries do not have such a tradition, and the proposal leaves them free to introduce the opt-out by other means, according to their national practice.

How were the social partners included in the policy-making process?

In line with the EC Treaty, there were two phases of consultation of social partners at European level. In the first phase a wide-ranging consultation process took place, where the social partners were asked whether changes of the existing legislation were desirable. The Commission also invited all interested parties at national level to express their opinion about a modification of the Working Time Directive, an option that was widely used. In a second phase the social partners were invited to negotiate a collective agreement at European level covering the issues identified by the Commission. Since the social partners did not make use of the latter option, it is now up to the Commission to propose a revision to the existing Working Time Directive.

What happens next with the proposal?

It passes to Council and Parliament, which have to agree the new legislation under the co-decision procedure.