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Working Time: The European 48 Hour Working Week Will Be Mandatory

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The European Parliament on 11 May 2005 approved amendments to the Working Time Directive which phases out the right to opt out of the 48 hour maximum working week over the next 3 years. The Parliament also decided that “on-call” time will be counted as “working time”, albeit that average working hours will now be calculated over a full year.

The amendment Directive goes further than the original proposal issued by the European Commission on 22 September 2004. The original proposal provided that the opt-out would remain, subject to conditions. The new Directive approved by the Parliament would entirely remove the derogation provisions by no later than 3 years after its passage into law.

European Parliament votes to amend working time directive:

- ▶ Individual opt-out of 48 hour working week should be scrapped within 3 years;
- ▶ Reference period over which average working week could be calculated is 12 months; and
- ▶ Entire period of time spent on-call including inactive part is categorised as working time.

Background

The Working Time Directive falls under health and safety legislation. This meant that the UK's attempts to avoid the Directive on the basis that its impact could seriously hamper business, were thrown out by the European Council in 1994. The Directive's purpose is to lay down minimum requirements designed to protect workers from the adverse effect of working excessive hours, having inadequate rest periods and leave, and having to work disruptive working patterns. However, the Directive has been unpopular on both sides of industry in the UK with businesses concerned by the threat to flexibility and trade unions concerned by the threat to workers' overtime payments. Originally adopted in 1993, the Directive was amended in 2000 and consolidated into Directive 2003/88/EC.

The original Directive expressly provides for revision of the opt-out provision, and the provisions concerning reference periods used to calculate the average week. However, the review by the European Parliament in 2004 was extended to cover the definition of “on-call time” following European Court of Justice rulings on time

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spent on call by health professionals. The review was initiated when the European Commission found some evidence that the opt-out provision was abused in the UK, the only Member State which had applied it generally from the beginning.

What are the main provisions of the Working Time Directive?

The Directive provides a minimum guarantee of:

- ▶ a maximum average working week (including overtime) of 48 hours (Article 6);
- ▶ a minimum daily rest period of 11 consecutive hours in every 24 hours (Article 3);
- ▶ breaks when the working day exceeds six hours (Article 4);
- ▶ a minimum weekly rest period of 24 hours plus the 11 hours daily rest period in every seven-day period (Article 5);
- ▶ a minimum of four weeks paid annual leave (Article 7); and
- ▶ night work restricted to an average of eight hours in any 24 hour period (Article 8).

What is the opt-out?

Member States have the option not to apply Article 6 laying down the 48 hour maximum working week, subject to certain conditions. These are:

- ▶ the employer must obtain the worker's consent to work more than 48 hours per week;
- ▶ no worker must suffer victimisation if he does not agree to opt out;
- ▶ employer must keep up-to-date records of all workers who opt-out; and
- ▶ records must be available to the competent authorities, which can ban or restrict hours worked in excess of the 48 hour limit if necessary for health and safety reasons.

In 1993, it was the UK which negotiated the opt-out, and it has been the only Member State to apply it on a general basis from the beginning. Subsequently, two new Member States, Cyprus and Malta, have also applied it on a general basis.

What is on-call time?

The original Directive defines only "working time" and "rest time". Time spent on call was dealt with differently by the Member States.

In the SIMAP¹ and Jaeger² cases, the Court found that time spent on call by health professionals had to be counted as working time, in which case, doctors in most Member States worked more than 48 hours a week. After the findings, France, Germany and Spain applied the opt out to their health sectors.

¹ *SIMAP Sindicato de Medicos de Asistencia Publica (SIMAP) v Conselleria de Sanidad y Consumo de la Generalidad Valenciana* [2001] All E.R. (EC) 609

² *Landeshauptstadt Kiel v Jaeger* (C151/02) [2003] 3 C.M.L.R. 16

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European Commission Proposal dated 22 September 2004

Under the European Commission Proposal, Member States would still be able to opt-out under certain stringent conditions. These included that the opt-out needed to be in writing, and that it could not be given at the same time that the employment contract is signed or during probation. Further, all workers are not able to work more than 65 hours.

The Proposal introduced a definition of “on-call time”, in addition to “working time” and “rest time”. On-call time is the “period which the worker has the obligation to be available at the workplace to intervene, at the employer’s request, to carry out his activity or duties”. The “inactive part of on-call time” is the “period during which the worker is on call but is not required by his employer to carry out his activity or duties”. The inactive part of on-call time would not constitute “working time” within the meaning of the Directive, unless Member States chose to include it.

The reference period over which the average working week would be calculated would remain at 4 months, although Member States would have the option of extending it to one year provided they consulted the two sides of industry. The rationale was that firms needed flexibility in calculating the average maximum working week in order to respond to fluctuations in demand or seasonal peaks in activity.

Alejandro Cercas Proposal dated 5 April 2005

By contrast, the proposal put forward by Spanish Alejandro Cercas, with which MEPs have now agreed, stated that the individual opt-out should be scrapped entirely three years after the new Directive enters into force. Further, the entire period of any time spent on-call, including the inactive part, should be regarded as “working time”. However, Member States could allow inactive parts of the on-call time to be calculated in a way which would still allow compliance with the maximum weekly average working time.

The proposal also states that workers who have more than one employment contract are still covered, as the working time is calculated as the sum of the periods worked under each contract. Workers also maintain rights to request more flexible organisation of working time.

The MEPs have agreed with the European Commissions’ proposal that the reference period over which the average working week is calculated can be one year.

Future

The proposal by Alejandro Curcas was voted on by the European Parliament on 11 May 2005 and the amendment Directive was passed by 378 votes to 262 with 15 abstentions. The European Commission may now alter its proposals in light of the European Parliament vote.

Member-states have been divided on the issue with those that want to preserve the opt-out led by Britain, and those that want it scrapped led by Sweden. Member states are likely to discuss the proposals at a Council of Ministers meeting on 3 June, but may not make an immediate decision before the end of June 2005.



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A final decision may take many months unless the Council backs the Parliament's decision. Both will hold second readings, which can be separated by gaps of up to 3 months. Conciliation may be needed in order to reach a compromise between the Council and the Parliament, and if this fails, the legislation will die. While a country which holds the European Union's presidency can help them reach a compromise, with Britain set to take over the presidency from 1 July 2005 little progress on the issue is likely to be made.

Working Time Directive – History

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Original Directive 93/104/EC	1993
Action brought by UK against Council of European Commission, case C – 84/94	1994
Amendment Directive 2000/34/EC	2000
Consolidated Directive 2003/88/EC	2003
EC Review of 2003/88/EC	22/09/2004
Alejandro Cercas Proposal released	05/04/2005
Proposal adopted in plenary	11/05/2005

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