



Working time directive: formerly excluded sectors

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The EC *Working Time Directive* of 1993, implemented in the UK by the *Working Time Regulations 1998*, introduced new rights to four weeks' paid leave a year and limits on the length of the working day and working week. However, both the directive and the regulations originally excluded certain sectors altogether from their scope. These were the transport sectors, sea fishing, offshore work and the work of junior hospital doctors. In June 2000, the EU extended the 1993 Directive to cover the excluded sectors. Member States were given until 1 August 2003 to extend their own legislation to cover the excluded sectors. There are special transitional arrangements in the Directive applying to junior hospital doctors.

The amendment to the directive means that non-mobile workers in the excluded sectors are now fully covered. Mobile workers will qualify for the rights to annual leave, health assessments for night workers and a limit on the length of the working week. Specific provisions to accommodate working patterns in the rail transport, sea fishing and offshore industries are included in the amended directive. There is provision for sector specific arrangements for mobile workers to take precedence over the *Working Time Directive* where these have been agreed at EU level. Such an agreement was reached for seafarers before the directive was amended so they are not covered by the amended directive. An agreement covering mobile workers in civil aviation was reached in March 2000. A separate directive covering certain mobile workers in the road transport sector was adopted on 11 March 2002.

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1 Excluded sectors

The *Working Time Regulations 1998*, which introduced a statutory right to paid annual leave and limits on working time, came into force in Great Britain on 1 October 1998.¹ Parallel legislation came into force in Northern Ireland on 23 November 1998.² These regulations implemented the EC *Working Time Directive*, adopted in 1993.³ At first, the Directive excluded certain sectors altogether and applied to:

All sectors of activity... with the exception of air, rail, road, sea, inland waterway and lake transport, sea fishing, other work at sea and the activities of doctors in training.⁴

The *Working Time Regulations 1998* similarly excluded:

the following sectors of activity:

- (i) air, rail, road, sea, inland waterway and lake transport;
- (ii) sea fishing;
- (iii) other work at sea.⁵

The Directive conferred on adult workers, except those in the excluded sectors, the right to:

- A daily rest period of 11 consecutive hours in any 24 hour period (Article 3)
- A rest break where the working day is longer than 6 hours (Article 4)

¹ SI 1998 No 1833

² *Working Time Regulations (Northern Ireland) 1998*, Statutory Rules of Northern Ireland 1998 No 386

³ Council Directive 93/104/EC

⁴ Council Directive 93/104/EC, Article 1 (3)

- A weekly rest period of 24 hours plus the 11 hours daily rest (Article 5). This can be averaged over 14 days (Article 16)
- A limit of 8 hours on night work (Article 8). This can be averaged over a reference period determined by the two sides of industry (Article 16).
- A limit of 48 hours on the working week (Article 6). This can be averaged over a reference period of up to four months (Article 16).
- Four weeks' paid holiday a year (Article 7)
- Free health assessments for night workers (Article 9)
- Derogations from many of the provisions are permitted, for example, where the worker's place of work and residence are distant from one another; where the worker's different places of work are distant from one another; where security and surveillance activities require a permanent presence; and where continuity of service or production are necessary (Article 17).

The *Working Time Regulations* conferred similar rights in Great Britain, though the Government took up options to limit statutory paid annual leave to three weeks until November 1999, and to allow individuals to opt out of the 48-hour limit on the working week. The opt out is currently under review.⁶

Quite separate to the general sectoral exclusions, the regulations follow the Directive in including many "derogations" or special cases. For example, the limits on the working week and night work and the rights to daily rest periods and breaks and weekly rest periods do not apply to people whose working time is not measured. The limit on the length of night work and the rights to daily rest periods and breaks and weekly rest periods do not apply to a whole range of activities such as security and surveillance and those requiring continuity of service or production, although compensatory rest should be provided. These provisions can also be modified by collective or workforce agreements.⁷

2 Extension to the excluded sectors

The exclusion of whole sectors from the rights conferred by the directive has always seemed rather arbitrary. For example, while there may be objective reasons why it is difficult to impose strict limits on the length of the working day of people working at sea or in long distance transport, there seems little reason why they should be denied the right to paid annual leave. And there seems no reason to treat office workers in the transport sector less favourably than office workers in any other sector.

The European Commission was, therefore, anxious to extend the provisions of the Directive to the excluded sectors, and, on 18 November 1998, published proposals for several Council Directives.⁸ One of these – the so-called "**horizontal**" directive – was designed to amend the

⁵ SI 1998/1833, Regulation 18

⁶ See: SN/BT/2073 [Working time directive: opt out from 48 hour limit on working week](#), 17 December 2008

⁷ See Department for Business, Enterprise and Regulatory Reform, [Your guide to the Working Time Regulations](#): sections 1 – 4 URN No: 08/837/A

⁸ EC Commission *Communication on the organisation of working time in the sectors and activities excluded from Directive 93/104/EC of 23 November 1993*, COM(1998)662 final

1993 Directive and remove the general exclusion of whole sectors from its scope.⁹ The other “vertical” directives dealt specifically with “mobile workers performing road transport activities and...self employed drivers”,¹⁰ and with seafarers.¹¹

The UK Government was not opposed to the general principle of extending the directive to the excluded sectors, but was concerned to protect the competitiveness of the transport sector, and, in particular, the working of the NHS. The DTI Explanatory Memorandum (EM) submitted on 11 January 1999 said:

SUBSIDIARITY

22. The Government believes that, in principle there is no objective difference, in terms of subsidiarity between legislating for the sectors excluded from the Working Time Directive and for those included. However, the Government notes that the organisation and delivery of healthcare is a matter reserved for national Governments.

POLICY IMPLICATIONS

23. The Government is currently seeking views of interested parties of the sectors concerned and will wish to ensure that the proposals are balanced, sensible and accommodate our concerns.

24. In respect of doctors in training, the Government will wish to seek a flexible outcome which ensures that the standard of patient care in the NHS is protected, facilitates proper training and which avoids prohibitive costs to the public purse.

25. The Government will also endeavour to ensure that the proposals take account of the operational requirements of the relevant transport sectors, do not adversely affect competitiveness and do not compromise current safety requirements.¹²

The DTI did not make a separate assessment of the cost of extending the *Working Time Directive* to the excluded sectors, although it did make a broad estimate that 1 million workers will be affected in the UK. The EM explained:

The RIA [Regulatory Impact Assessment] for the Working Time Directive was an assessment of the impact on the whole of the UK, including the excluded sectors. The reason for this approach was that in some of the excluded sectors the number of workers is very small and it was not possible for these sectors to be accurately separated. There are also difficulties in accurately estimating the impact on the different sectors due to problems with the precision of the definitions.

A copy of the RIA produced for the Working Time Directive is attached. It is as yet too early to tell how employers, workers and trade unions are responding to the Regulations, and there is no basis for revising the initial estimates provided in the RIA.

⁹ *Proposal for a Council Directive amending Directive 93/104/EC of 23 November 1993 concerning certain aspects of the organisation of working time to cover the sectors and activities excluded from that Directive*

¹⁰ *Proposal for a Council Directive concerning the organisation of working time for mobile workers performing road transport activities and for self-employed drivers*

¹¹ *Proposal for a Council directive concerning the agreement on the organisation of working time of seafarers concluded by the European Community Shipowners Association (ECSA) and the Federation of Transport Workers' Unions in the European Union (FST) and Proposal for a Council Directive concerning the enforcement of seafarers' hours of work on board ships using Community ports*

¹² EM 13256/98, COM (1998) 662

A broad estimate¹³ of the number of workers in the excluded sectors in the UK as included within the scope of the RIA is 1 million, less than 5 per cent of employees.¹⁴

The original RIA estimated the immediate cost of complying with the legislation at £1.9 billion a year.¹⁵

The horizontal directive was subject to the “co-decision procedure” which involves conciliation with the European Parliament. After a good deal of negotiation and amendment agreement was eventually reached in the Conciliation Committee on 3 April 2000. The directive was finally endorsed by the European Parliament on 17 May 2000,¹⁶ and by the Industry Council on 18 May 2000. The *Horizontal Amending Directive 2000/34/EC* (HAD) was adopted on 22 June 2000.¹⁷

Briefly, the HAD extended the rights and protections of the *Working Time Directive* in full to non-mobile workers in the excluded sectors. Mobile workers now have the basic entitlements to four weeks’ paid annual leave and health assessments for night workers and a weekly working limit of 48 hours. Member States were given until 1 August 2003 to implement the changes, which were brought into effect in the UK by *The Working Time (Amendment) Regulations 2003 SI No. 1684*.

There are special arrangements for extending the 48-hour limit on the working week to doctors in training. Member States have a transitional period starting on 1 August 2004 and lasting until 1 August 2012 at the latest to reduce their working hours to 48 per week. Special provisions relating to specific sectors are outlined below.

2.1 Seafarers

Seafarers remain excluded from the *Working Time Directive* because they have reached a separate agreement on working time which takes precedence over its provisions.¹⁸ Article 1 (3), as amended by the HAD, reads:

This directive shall apply to all sectors of activity, both public and private, within the meaning of Article 2 of Directive 89/391/EEC, without prejudice to Articles 14 and 17 of this Directive.

This Directive shall not apply to seafarers, as defined in Council Directive 1999/63/EC of 21 June 1999 concerning the Agreement on the organisation of working time of seafarers, concluded by the European Community Shipowners’ Association (ECSA) and the Federation of Transport Workers’ Unions in the European Union (FST) without prejudice to Article 2(8) of this Directive.¹⁹

¹³ Estimate based on the Spring 1998 Labour Force Survey

¹⁴ Explanatory Memorandum on the European Commission’s final proposals on sectors and activities excluded from the working time directive, COM (1998) 662, submitted by the DTI, 11 January 1999

¹⁵ Annex E of DTI Consultation Document on *Measures to Implement Provisions of the EC Directives on the Organisation of Working Time... and the Protection of Young People at Work*, April 1998, URN 98/645

¹⁶ “European Parliament casts final vote on Working Time Directive”, *European Report*, 20 May 2000

¹⁷ *Directive 2000/34/EC of the European Parliament and of the Council of 22 June 2000 amending Council Directive 93/104/EC concerning certain aspects of the organisation of working time to cover sectors and activities excluded from that Directive*

¹⁸ *Council Directive 1999/63/EC of 21 June 1999 concerning the Agreement on the organisation of working time of seafarers concluded by the European Community Shipowners’ Association (ECSA) and the Federation of Transport Workers’ Unions in the European Union (FST)*

¹⁹ Article 1(1), 2000/34/EC

Council Directive 1999/63/EC puts into effect the Agreement on the organisation of working time for seafarers concluded on 30 September 1998 between the organisations representing management and labour in the maritime sector (ECSA and FST). It applies to seafarers on board ships that are registered in any Member State and are ordinarily engaged in commercial maritime operations.²⁰ It contains detailed, but flexible, controls on working time. For example, there must be either a maximum number of hours work which must not be exceeded in a given period or a minimum number of hours rest which must be provided in a given period. The maximum number of hours work is 14 hours in any 24 hour period and 72 hours in any seven day period. The minimum number of hours rest is 10 hours in any 24 hour period and 72 hours in any seven day period.²¹ The Agreement also gives every seafarer an entitlement to four weeks' paid annual leave.²² It should have been implemented by 30 June 2002.

The Department for Transport consulted on the implementation of the directive in two stages: the first stage was launched on 22 January 2001,²³ and the second on 20 November 2001.²⁴ The *Merchant Shipping (Hours of Work) Regulations 2002*, SI No.2125, implementing the directive came into force on 7 September 2002.

In addition there is the *Seafarer's Enforcement Directive 1999/95/EC* concerning the enforcement of provisions in respect of seafarers' hours of work on board ships calling at Community ports.

2.2 Rail Industry

The social partners in the rail industry reached agreement on 30 September 1998 on working time.²⁵ They agreed that the provisions of the *Working Time Directive* should be applied to all railway workers, with suitable adjustments to the derogations, provided that similar provisions were applied to other transport sectors at the same time; and that existing conditions concerning working time were applied through legislation to all new entrants to the industry.²⁶

Their agreement has now been incorporated in the HAD which amends Article 17 of the *Working Time Directives* so that rail workers are exempt from the provisions on daily rest, rest breaks, weekly rest and the limit on night work, provided that adequate rest periods are provided. The exemption covers:

in the case of activities involving the need for continuity of service or production, particularly (...) workers concerned with the carriage of passengers on regular urban transport services;

and

in the case of persons working in railway transport [workers]:

(i) whose activities are intermittent;

²⁰ Clause 1 of the Agreement attached to Directive 1999/63/EC

²¹ Ibid, Clause 5

²² Ibid, Clause 16

²³ Department for Transport website, [Implementation of the Working Time Directive in the maritime sector](#) [on 9 March 2009]

²⁴ Ibid

²⁵ *Agreement on some aspects of the organisation of working time in the rail transport sector between the Community of European Railways and the Federation of the Transport Workers' Unions in the European Union, assembled within the Joint Committee on Railways, 30 September 1998*

²⁶ COM(1998)662 final, para 22

(ii) who spend their working time on board trains; or

(iii) whose activities are linked to transport timetables and to ensuring the continuity and regularity of traffic.²⁷

2.3 Civil Aviation

The HAD amends the *Working Time Directive* to allow sector specific agreements to take precedence over its own provisions. It inserts a new Article 14 which reads:

More specific Community provisions

This Directive shall not apply where other Community instruments contain more specific requirements relating to the organisation of working time for certain occupations or occupational activities.

On 22 March 2000, the social partners in the civil aviation sector concluded an agreement which will supplant the Directive's provisions in relation to mobile workers. This is the *European Agreement on the Organisation of Working Time of Mobile Staff in Civil Aviation concluded by the Association of European Airlines (AEA), the European Transport Workers' Federation (EFT), the European Cockpit Association (ECA), the European Regions Airline Association (ERA) and the International Air Carrier Association (IACA)*. The agreement was given legislative force by Council Directive 2000/79/EC of 27 November 2000. This gave Member States until 1 December 2003 to implement the agreement.

The agreement defines "mobile" staff as "crew members on board civil aircraft, employed by an undertaking in a Member State". It gives them the right to four weeks' paid holiday and free health assessments. It also lays down a maximum annual working time of 2,000 hours in which "block flying time" will be limited to 900 hours.²⁸ It also grants them "days free of all duty and standby, which are notified in advance, as follows":

(a) at least 7 local days in each calendar month...; and

(b) at least 96 local days in each calendar year...²⁹

The *Civil Aviation (Working Time) Regulations 2004 SI No.256* came into force on 13 April 2004. The regulations implement Council Directive 2000/79/EC and cover:

- Wrongful disclosure of health assessments
- Maximum annual working time for crew members
- Health and safety protection for crew members
- Rest breaks
- Minimum number of rest days free from all duties
- Information on working patterns which must be kept for 2 years

²⁷ Article 1(5), 2000/34/EC

²⁸ Clause 8

²⁹ Clause 9

2.4 Road Transport

The relevant legislation to use in regard to people who work in the road transport industry will depend on whether someone is classed as a “mobile worker” (essentially someone who works to transport either goods or passengers), and the type of vehicle driven. This means that conditions such as the length of a working week and the length and frequency of rest breaks will vary depending on the relevant legislation.

The proposed vertical directive on mobile workers in road transport published in November 1998 proved very controversial.³⁰ The main sticking point was that it extended to self-employed drivers. Eventually, however, *Directive 2002/15/EC of the European Parliament and the Council on the organisation of the working time of persons performing mobile road transport activities* (the Road Transport Directive) was adopted on 11 March 2002. It was brought into force in UK law by the *Road Transport (Working Time) Regulations 2005* (SI 2005/639) on 4 April 2005, which have been subsequently amended by the *Road Transport (Working Time) (Amendment) Regulations 2007* (SI 2007/853). Article 4 of the Road Transport Directive imposes an absolute limit of 60 hours on working time in any week and an average limit of 48 hours over any four-month period. Working time is defined to cover activities such as loading and unloading, cleaning and maintenance as well as actual driving. It also imposes a limit of ten hours on night work. A separate standard note ([SN/BT/1758](#)) gives more details of this directive’s provisions.

The Road Transport Directive sits alongside *Regulation EC/561/2006* (which replaced long-standing regulation EEC/3820/85) which came into force in April 2007 and is commonly known as “EU drivers’ hours rules”. This regulation takes precedence over the RTD if any provisions should conflict. The EU drivers’ hours rules specify what types of vehicle both this regulation and the RTD applies to and it specifies criteria such as how many hours of continuous driving can be undertaken and how many hours can be driven in a day. It was brought into force in the UK by the *Drivers’ Hours and Recording Equipment Regulations 2007* (SI 2007/1819).

For “mobile workers” who drive goods vehicles over 3.5 tonnes and those who drive passenger vehicles with more than nine seats (other than those used on regular services where the route does not exceed 50 kilometres), both the EU drivers’ hours rules and the Road Transport Directive (RTD) are relevant. The provisions sit alongside each other, unless they conflict, in which case the EU drivers’ rules take precedence.

Self-employed drivers are excluded from this legislation, at least until 23 March 2009. Non-mobile workers and those who drive vehicles not covered by Regulation EC/561/2006 are covered by the provisions of the *Working Time Directive* of 1993 as implemented in the UK by the *Working Time Regulations 1998*, (SI 1998/1833), as amended.

The HAD defines a “mobile worker” as:

any worker employed as a member of travelling or flying personnel by an undertaking which operates transport services for passengers or goods by road, air or inland waterway.³¹

³⁰ COM(1998)0662

³¹ 2000/34/EC, Article 1 (2)

2.5 Inland Waterways

The Commission proposes to bring forward proposals for the inland waterway and lake transport sectors. No formal proposals have yet been published by the Commission.³² Until proposals are agreed, the amended *Working Time Directive* will apply to “mobile workers” in these sectors as it will to those in the road transport sector.

2.6 Offshore workers

The HAD defines “offshore work” as:

work performed mainly on or from offshore installations (including drilling rigs), directly or indirectly in connection with the exploration, extraction or exploitation of mineral resources, including hydrocarbons, and diving in connection with such activities, whether performed from an offshore installation or a vessel.³³

Offshore workers will be exempted from the *Working Time Directive*’s provisions on daily rest, rest breaks, weekly rest and the limit on night work.³⁴ Member States are given the option of extending the reference period over which the 48 hour limit can be averaged from the normal four months to 12 months in the case of offshore workers, as long as general health and safety principles are complied with. A separate standard note ([SN/BT/1001](#)) covers the extension of the *Working Time Directive* to the offshore sector in more detail.

2.7 Sea Fishing

The horizontal directive (HAD) inserts a new Article 17b in the *Working Time Directive* which exempts any worker “on board a sea-going fishing vessel flying the flag of a Member State” from the provisions on daily rest, rest breaks, weekly rest, the duration of night work and the maximum hourly limit on a week’s work. However, Member States must ensure that seafarers’ weekly working hours do not exceed 48 when averaged over 12 months. Further detailed, but flexible, controls are specified. For example, there must be either a maximum number of hours work which must not be exceeded in a given period or a minimum number of hours rest which must be provided in a given period. The maximum number of hours work is 14 hours in any 24 hour period and 72 hours in any seven day period. The minimum number of hours rest is 10 hours in any 24 hour period and 77 hours in any seven day period.

2.8 Doctors in training

Law

The working time limit for junior doctors was initially going to be reduced across the board to 48 hours per week from 1 August 2009. However, the Government decided to take advantage of an allowance in the Directive for a longer period of implementation, so that for certain junior doctors in specified positions the limit will reduce to 52 hours per week from August 2009 to 31 July 2011.

Provisions were introduced in 2003 to phase in the 48-hour working time limit for doctors in training over a period ending on 31 July 2009. These were contained in the [Working Time \(Amendment\) Regulations 2003 SI No.1684](#) which amended the *Working Time Regulations 1998*. They restricted weekly working time limits for doctors in training to:

³² DTI website, http://www.dti.gov.uk/er/work_time_regs/exsectors.htm

³³ 2000/34/EC, Article 1(2)

³⁴ under the amended Article 17 (2.1.a).

- 58 hours from 1 August 2004
- 56 hours from 1 August 2007
- 48 hours from 31 July 2009

For certain junior doctors the relevant regulation for the phased introduction of the 48 hour week for junior doctors read as follows:

Doctors in training

25A. - (1) Paragraph (1) of regulation 4 is modified in its application to workers who are doctors in training as follows -

(a) for the reference to 48 hours there is substituted a reference to 58 hours with effect from 1st August 2004 until 31st July 2007;

(b) for the reference to 48 hours there is substituted a reference to 56 hours with effect from 1st August 2007 until 31st July 2009.

Under Article 3 of the *Working Time Directive* 93/104/EC doctors in training were excluded from the major provisions. The HAD adds a new derogation to the list in Article 17(2) of the *Working Time Directive*. Under the new Article 17 (2) (4), there are special arrangements for applying the 48-hour limit on the working week to doctors in training. Briefly, this part of the directive did not have to be implemented until 1 August 2004 (compared with 1 August 2003 for the rest of the amendments). Following this there has been a three-year period during which junior doctors' hours should not exceed 58 a week. This can be averaged over a period of up to 12 months. After this there came a two-year period during which their hours should be reduced to 56 a week. This can be averaged over six months.

Finally, if there are special difficulties, Member States may be allowed a further three years during which junior doctors' working week should be reduced to 52 hours averaged over six months. The final deadline under the Directive for a 48-hour week for doctors in training is, therefore, 1 August 2012. The Government has decided to take advantage of the possibility to extend the phasing in period, implementing this decision in the *Working Time (Amendment) Regulations 2009 SI No.1567* which were laid under the negative procedure on 25 June and are due to come into force on 1 August 2009. The explanatory memorandum summarises this as follows:

These regulations amend the Working Time Regulations 1998 ("The Working Time Regulations") to provide for an average 52 hour maximum working week for certain doctors in training from 1 August 2009. At present, an average 56 hour maximum working week applies to doctors in training until 31 July 2009, after which an average 48 hour week would apply without these amendments. The amendments are necessary to enable the relevant parts of the National Health Service (NHS) to continue to deliver adequate health services and medical care.

A related question which arose in the European Court of Justice (ECJ) related to doctors who are on call. In *Sindicato Medicos Publica v Valenciana 2001 ICR 1116, ECJ Case C-303/98* (3 October 2000) the ECJ held that doctors on call are to be regarded as being at work for the purposes of the Working Time Directive at any time they are required to be at a "health centre". This does not apply if they are on call at home. In another case in 2003 the ECJ held

that all time on call spent at a hospital counted as working time.³⁵ These judgements are referred to as “SIMAP” and “Jaeger”. As a result of the ECJ decision, many Member States may face infraction proceedings by the Commission since it appears they are having difficulty complying with the judgement:

After the extraordinary EPSCO meeting in November 2006, the Commission threatened to initiate infringement procedures against 23 of the 25 EU Member States at the time. Most of the 25 countries – with the exception of Italy and Luxembourg – are in breach of EU law on the basis of two rulings³⁶

The effect of these cases has been to generate great concern over their impact on staffing levels in the NHS. The question was considered as part of the EU Commission’s review of the opt-out of the 48 hour week which failed to reach agreement in final conciliation negotiations between the European Parliament and Council of Ministers in 2009.³⁷

The Directive allows Member States to legislate domestically for a derogation allowing workers to agree with their employers to “opt out” of the 48 hour limit on the working week imposed under the *Working Time Directive*. This is subject to periodic review by the European Commission. On 22 September 2004, the Commission announced the results of its review of this opt-out and issued a new draft amending directive.³⁸ Its key proposals were:

- The individual opt-out would remain but would be subject to stricter conditions to prevent abuse (including a requirement that it be contained in a collective or workplace agreement where such arrangements are in place)
- Member States would be able to extend the reference period over which the 48 hour limit is calculated from 4 months to one year
- “Inactive” time spent on call would not count towards “working time”

The full title of the EU document was: *Amended proposal for a Directive of the European Parliament and of the Council amending Directive 2003/88/EC concerning certain aspects of the organisation of working time* (“Amended Proposal”). The main developments with links to relevant documents are set out on the [PreLex website](#).

The Commission’s solution was to propose a new category of “inactive” time spent on call which would not count towards “working time”. But this solution is held up by the disagreement over the opt-out; hence the pressure to resolve the disagreements.

Negotiations on the Directive and opt-out had been subject to ongoing deadlock in the Council for around 6 years, with the UK seeking to retain the opt-out and other countries calling for it to be abolished. This deadlock was broken in June 2008 when a Common Position was reached retaining the opt-out. However, on 17 December 2008 the European Parliament voted again supporting amendments to the Council common position abolishing the opt-out (with 421 votes for; 273 against; and 11 abstentions). The Amended Proposal

³⁵ *Landeshauptstadt Kiel v Jaeger* ECJ Case No. C-151/02 (9 September 2003); [2003] IRLR 805 ECJ

³⁶ [EIRO, Deadlock in progress on revision of working time directive, 12 February 2007](#)

³⁷ See: SN/BT/2073 *Working time directive: opt out from 48 hour limit on working week*

³⁸ *Proposal for a directive of the European Parliament and of the Council amending directive 2003/88/EC concerning certain aspects of the organisation of working time*, COM(2004) 607 final, 22 September 2004, http://europa.eu.int/comm/employment_social/news/2004/sep/working_time_directive_proposal_en.pdf

was then subject to the final “conciliation stage”, involving negotiation involving all three EU institutions: the Commission, Parliament and Council.³⁹

When the European Parliament voted to abolish the opt-out there were two main points of divergence with the Council’s common position: the opt-out; and inactive on-call time. The Committee on Employment and Social Affairs (rapporteur: Alejandro Cercas) had outlined 22 Amendments, including some abolishing the opt-out and reversing the proposal that the new category of “inactive on call time” would not count toward the limit.⁴⁰ MEPs voted in the European Parliament on 17 December 2008 to adopt the Cercas amendments.

For many Member States the UK is perceived to have fewer problems finding English speaking doctors, but other countries face urgent problems in health and care services. The UK position was that compliance had been largely achieved, although the Association of Surgeons in Training reported significant problems of false recording to achieve compliance:

1.4 Results from the ASiT survey confirm that there is significant underreporting of hours worked by surgeons in training. As a result, the number of non-compliant posts is far higher than previously thought, making achievement of EWTD targets unlikely.

1.5 Within units purporting to be EWTD compliant, a significant problem has been identified whereby “rota gaps” (created by a failure to recruit non-training doctors), have been filled by rearranging internal cover so that hours may appear compliant “on-paper”. The reality of such solutions however is that individuals are working in excess of the reported 48 hours.⁴¹

There is also evidence that members of the UK medical profession are also keen to see a solution to the *SIMAP* and *Jaeger* decisions. A briefing by NHS Employers submitted to MEPs supported the Council’s common position in terms of compensatory rest and ‘inactive part of on-call time’. This placed the emphasis on those factors rather than the opt-out:

The opt-out is not commonly used in the NHS, but for those workers who do wish to opt-out, we welcome the additional safeguards on its use in the Common Position.

Similarly, a BMA survey of members reported that “nearly half (47%) of all career grade doctors surveyed reported that they worked more than 48 hours per week, of those 9% reported they had signed an opt-out.” This group of “career grade doctors” (everyone except specialists/consultants and trainee (junior) doctors) may account for a substantial number of personnel. In April 2009 15 Member States had availed themselves of the opt-out, many have limited this to specific sectors. This fact and the failure to reach final agreement before the EU elections in June 2009 make the abolition of the opt-out less likely to be achieved in the future.

The working time limit for junior doctors was initially going to be reduced across the board to 48 hours per week from 1 August 2009. However, a number of bodies representing the medical profession, such as the British Medical Association and the Royal College of Surgeons, expressed doubts whether the necessary services and training could yet be delivered within these parameters.⁴² Accordingly, the Government decided to take advantage

³⁹ See: SN/BT/2073 *Working time directive: opt out from 48 hour limit on working week*

⁴⁰ Personnel Today, [Working time opt-out may be under threat from MEPs](#), 27 October 2008

⁴¹ ASiT Position Statement, [Optimising Working Hours to Provide Quality in Training and Patient Care](#), January 2009

⁴² Royal College of Surgeons Press Notice, [Patients are being harmed by working time limits, finds new study](#), 11 October 2009; and British Medical Association Press Notice, [Understaffed rotas are pushing the NHS to breaking point, says new junior doctors leader](#), 19 September 2009

of the allowance in the Directive for a longer period of implementation, so that for certain junior doctors in specified positions the limit will reduce to 52 hours per week from August 2009 to 31 July 2011. These positions have been specified in the following regulations:

- [Working Time \(Amendment\) Regulations 2009 SI No.1567](#) with effect from 1 August 2009
- [Working Time \(Amendment\) \(No.2\) Regulations 2009 SI No.2766](#) with effect from 2 November 2009

Policy⁴³

It may be worth noting here that on 25 June 2009 the Department of Health issued a press notice saying that most junior doctors would be compliant with the EWTD by 1 August 2009 and that a small number of services would need more time to fully implement the Directive.⁴⁴ A Written Answer given by Lord Darzi on 23 June explains the position in more detail:

*Asked by **Baroness Finlay of Llandaff***

To ask Her Majesty's Government whether they have revised their forecast of the level of compliance in the National Health Service with the European working time directive in August 2009 in light of the latest data from strategic health authorities; and, if so, when they expect to achieve full compliance; and by what means. [HL4198]

The Parliamentary Under-Secretary of State, Department of Health (Lord Darzi of Denham): Our overall aim is to ensure that, consistent with patient safety, the maximum number of services are supported to achieve compliance by 1 August.

The National Health Service (NHS) is compliant with the exception of junior doctors in training. Two-thirds of junior doctors are already working a 48-hour week averaged over 26 weeks. There will be a small number of 24-hour immediate care services, supra-specialist services and units in rural and isolated areas that may need support beyond 1 August. These services formed the basis of the United Kingdom's notification of derogation to the European Commission in January and now inform the statutory instrument that will be laid in Parliament on 24 June 2009. Information will be published in due course.

Derogation means that the directive allows a possible 52-hour week until 2011 (exceptionally until 2012) in services that may require more time to achieve the average 48-hour week. This flexibility represents good NHS management.⁴⁵

As suggested by the question, postgraduate training of doctors is based on achieving a number of competencies. It starts with two years of Foundation Training.⁴⁶ The NHS

⁴³ By Jo Roll (ext. 5751)

⁴⁴ <http://nds.coi.gov.uk/Content/Detail.aspx?NewsAreaId=2&ReleaseID=404069&SubjectId=2>

⁴⁵ HL Deb 23 June 2009 WA 276:

<http://www.publications.parliament.uk/pa/ld200809/ldhansrd/text/90623w0003.htm#09062388000211>

⁴⁶ The national coordinating body for the Foundation Programme is the UK Foundation Programme Office, which has been commissioned by the four UK Health Departments. The General Medical Council (GMC) and Postgraduate Medical Education and Training Board (PMETB) are responsible for the approval and quality assurance of the first and second years of the Foundation Programme respectively. Postgraduate deaneries are responsible for implementing and managing the programmes through foundation schools

Foundation Programme website gives details,⁴⁷ including a section on training and assessment,⁴⁸ and a set of FAQs.⁴⁹ As I understand it, there is no minimum number of hours that have to be spent “hands on” but it generally expected that the Foundation Training will be completed in two years.

The next stage is specialty registrar (StR) training for either general practice or hospital-based specialties. The length of time this takes depends on the specialty. I spoke to the curriculum section of the PMETB⁵⁰ who told me that there was no maximum time limit in which such training has to be completed. Some people develop skills quicker than others and this is possible under the system although in practice, if someone was repeatedly failing to make the grade, they would be unlikely to continue indefinitely.

A number of concerns have been expressed that the EWTD would have a negative effect on the training of doctors, for example by the Royal College of Physicians and the Royal College of Surgeons, and the Government has now set up a review to look into the issue.

The concerns have been raised in Parliament, for example, to during Oral Questions on 23 June 2009

Dr. Richard Taylor: Two of the serious casualties of the shift system are continuity of care for patients and continuity of learning for junior doctors. How can these matters be specifically addressed within the 48-hour week?

Andy Burnham: The hon. Gentleman raises an important point. He will know that my predecessor asked NHS Medical Education England to look again at junior doctors' training, to ensure that, as part of their new working environment, they would get a grounding in all the necessary subjects. A review is under way into junior doctors' training, and I hope that I can give the hon. Gentleman an assurance today that it will pick up precisely the point that he has raised.

A news item on the Department of Health's website dated 5 June 2009 provides some information about the establishment of the review:

A review into the quality of training for junior doctors in the light of the implementation of the European Working Time Directive was announced today.

The review will consider the concerns raised by some professionals that the introduction of a 48-hour working week may have a detrimental effect on junior doctors' training, particularly on the training they receive while at work.

The Health Secretary has asked Medical Education England (MEE), the independent advisory board on medical training, to commission the Postgraduate Medical Education and Training Board (PMETB), the independent regulator of standards of training, to work with stakeholders to identify areas where changes to training might be necessary as a consequence of reduced working reduced hours.

Alan Johnson said:

⁴⁷ <http://www.foundationprogramme.nhs.uk/pages/home/about-the-foundation-programme>

⁴⁸ <http://www.foundationprogramme.nhs.uk/pages/home/training-and-assessment>

⁴⁹ <http://www.foundationprogramme.nhs.uk/pages/home/faqs>

⁵⁰ See footnote 2 above. The PMETB is responsible for most postgraduate medical training in the UK and is due to merge with the GMC. See <http://www.pmetb.org.uk/index.php?id=607> for details of its role.

'Everyone's overriding objective is the quality and safety of patient care. We are also concerned for our workforce and the hours they work. We want to provide doctors with a good work life balance and we do not want a return to junior doctors working excessive hours.

'There is no evidence that greater numbers of trainees are failing their end of year assessments where 48 hour working has been introduced.

'Also no junior doctor can become a consultant until the appropriate Royal College has issued a Certificate of Completion of Training (CCT). This is an essential safeguard, ensuring medical training remains of the highest standard.

'However, given the concerns raised by some professional groups it is important that there is an independent and objective assessment of whether the introduction of the European Working Time Directive fully into the NHS will necessitate changes to the current system of postgraduate medical training.'

Chairman of Medical Education England, Sir Christopher Edwards, said:

'MEE is delighted that the Secretary of State for Health, by asking MEE to commission a review by PMETB, is being proactive in trying to ensure that the introduction of the European Working Time Directive does not have an adverse effect on high quality medical training.

'This will be discussed as a main agenda item at the next meeting of MEE on June 8th. After this we will be submitting to the Secretary of State Alan Johnson our proposals for both the programme and the timetable for this review.'⁵¹

⁵¹ **Review of the effect of European working time directive on junior doctor training** Last modified date: 5 June: http://www.dh.gov.uk/en/News/Recentstories/DH_099740