

# The European Working Time Directive

The full impact of the European Working Time Directive (EWTD) is almost upon us. From August 1st 2009, this Europe-wide, European Union Health and Safety legislation will introduce a maximum 48-hour working week for all doctors. Currently doctors in training are regulated by EWTD legislation to having a maximum 56-hour working week.

The original legislation, including timescales for implementation, dates back to 1993 but was only adopted by the UK in 1998. In relation to the working arrangements of doctors, provision was specifically made that deferment could be sought by governments of individual member states to extend the timescale of the directive implementation to 2012 for doctors in training. If granted, any derogation would allow an interim 52-hour maximum working week between 2009 and 2012. It is thought that the current Labour government has no plans to apply for such derogation, but no official statement exists. The Conservative Party, however, has indicated that they may apply for derogation if elected in the interim.

## Contentious issues

**The opt-out:** This is a measure which allows workers to agree to opt out of the 48-hour week. Employers in a number of states make use of the opt-out, but it is most widely used in the UK and Malta.

## Time spent on call:

The European Court of Justice (ECJ) has ruled on two occasions that on-call time for doctors should count as working time, which has left many countries struggling to keep doctors' average weekly working hours below the agreed limit. These two rulings were known as the "SiMAP" and "Jaegar" rulings. As a result of these judgements, staff who are required to be resident in hospitals or other places of work out-of-hours, and who are provided with on-call facilities, are considered to be 'working' during their period of duty.

The whole of the resident on-call period counts as working time whether or not the member of staff is actually working. In order to meet the rest requirements of the directive, many doctors have



migrated to working full-shift patterns where they are expected to "work" for all of their duty period (usually 12 – 14 hours) and indeed not rest on duty within the hospital – since rest is legally working time.

### **What else does the Working Time Directive do?**

Among other things, it guarantees at least four weeks paid annual leave; a minimum period of 11 hours rest every 24 hours; one day off per week; a rest break if the working day is longer than six hours; a maximum of eight hours night work, on average, in each 24 hour period, and health assessments for night workers.

### **What will happen to the opt-out?**

The European Commission is reviewing whether to allow the opt-out to continue, although it has suggested measures that would make it harder for employers to press staff into working more than 48 hours against their will. However, some countries want this option to be phased out, as does the European Parliament. Other states, in particular the UK, want it to continue. They argue that labour market flexibility helps reduce unemployment. The UK does not have a veto in this area, so could be outvoted, but so far support from Germany and Poland has helped the opt-out remain viable.

### **What about time spent on call?**

The European Commission proposed making a distinction between "active" and "inactive" time on duty. Inactive time on duty would not count as working time. Most countries agree with this, but the European Parliament does not. The Parliament does suggest that inactive time could be calculated differently, but no firm decision has as yet been made. An eagerly awaited report from the European Ombudsman may influence the continuing debate on the opt-out and time spent on call.

At this time, 25 out of 27 EU member states are failing to meet the requirements of the legislation; therefore a huge challenge is ahead to have the directive implemented in full by the 2009 deadline.

In England the latest figures available (September 2006) indicate that 59% of junior doctors were being paid Band 2 salaries, therefore were working in posts with duty hours over 48 hours duration which are not 2009 EWTD compliant.

### **European Ombudsman**

In 2007 a report was issued by the European Ombudsman which heavily criticised the European Commission for failing to take action on the issue of working time. The report specifically concerned a complaint that was submitted by a German doctor who was unhappy with the fact that EU member states were not implementing the (ECJ) rulings on working time.<sup>1</sup> The issue has now been taken up by the European Parliament's petitions committee who will provide a non-legislative opinion on the matter. This report will be debated in the European Parliament over the next six months with a final version due to be published in July. The report will not carry any legal weight but is an interesting indication of the political atmosphere surrounding working time and the intense pressure from MEPs and other stakeholders to find a solution to the problem.

The Portuguese Presidency in 2007 presented a compromise text, similar in content to previous texts, which aimed to maintain the opt-out (under strict conditions) and to overturn the ECJ rulings on on-call time (SiMAP and Jaegar rulings). At a Council of Employment Ministers meeting on 5-6 December 2007, EU Ministers debated the package but were unable to reach agreement. In EU terms, the decision has been 'postponed' and the official minutes of the meeting suggest that both member states and the European Commission are keen to continue negotiations under the 2008 Slovenian and French EU Presidencies.<sup>2</sup> This means that, for the time being, the

status quo will prevail and that the ECJ rulings on on-call time stand and must be implemented. In the interim period the European Commission planned to launch infringement proceedings against all 25 member states who do not implement the ECJ rulings in full. The UK is one of these countries and argues that implementing the rulings in the medical sector would cost the NHS £250 million annually.

If further negotiations are carried out in 2008 and an agreement finally reached, it is important to remember that this will not be the end of the political process. In the event of an agreement, the dossier will need to return to the European Parliament for a 'second reading'. MEPs are unlikely to endorse an agreement which maintains the opt-out and which overturns the ECJ rulings. By thus delaying the procedure, the dossier may well fall foul of the European Parliament elections scheduled for June 2009. The newly elected MEPs will have the right to return to a 'first reading' on the EWTD and to effectively re-start the whole process.

It now remains to be seen whether the European Commission will start the infringement proceedings in early 2008. It is under intense political pressure both from the European Ombudsman who wishes the ECJ rulings to be implemented and from member states who do not wish to respect the rulings.

**Peter Maguire**  
**Consultant Anaesthetist**  
**Newry**

### **References**

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