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COMMISSION OF THE EUROPEAN COMMUNITIES

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COMMISSION OPINION

of 28.9.2009

**within the framework of Article 17(5) of Directive 2003/88/EC of the European
Parliament and of the Council concerning certain aspects of the organisation of working
time
(‘The Working Time Directive’)**

**Extension of transitional arrangements for the working time of doctors in training in the
United Kingdom**

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1. INTRODUCTION

This Opinion is based on Article 17(5) of Directive 2003/88/EC of the European Parliament and of the Council¹ concerning certain aspects of the organisation of working time (‘The Working Time Directive’). It concerns a notification by the United Kingdom, under this Article, of its wish to continue transitional arrangements until 31 July 2011 as concerns working time limits for doctors in training.

Doctors in training were excluded from the scope of the first Working Time Directive in 1993. This was changed in 2000 by an amending Directive, and doctors in training are now covered by the consolidated Working Time Directive, in the same way as other workers². Normally, Article 6 of the Directive limits working time to a maximum of 48 hours per week on average³, including any overtime. However, Article 17(5) of the Working Time Directive allows transitional arrangements for applying these limits to weekly working time in the case of doctors in training.

The relevant parts of Article 17(5) are as follows:

‘...With respect to Article 6 [limit of 48 hours to average weekly working time] derogations [regarding doctors in training] shall be permitted for a transitional period of five years from 1 August 2004.

Member States may have up to two more years [from 1 August 2009], if necessary, to take account of difficulties in meeting the working time provisions with respect to their responsibilities for the organisation and delivery of health services and medical care. At least six months before the end of the transitional period, the Member State concerned shall inform the Commission giving its reasons, so that the Commission can give an opinion, after appropriate consultations, within the three months following receipt of such information. If the Member State does not follow the opinion of the Commission, it will justify its decision. The notification and justification of the Member State and the opinion of the Commission

¹ Directive 2003/88/EC of the European Parliament and of the Council of 4 November 2003 concerning certain aspects of the organisation of working time, OJ L 299, 18.11.2003, p. 9. The Directive consolidates and repeals two earlier Directives, 93/104/EC and 2000/34/EC.

² Directive 2000/34/EC was to be transposed into national law, as regards doctors in training, by 1 August 2004.

³ Under Articles 16, 17, 18 and 19 of the Directive, the average may be calculated over a ‘reference period’ not exceeding 4 months (basic rule), 6 months (by legislation or collective bargaining, in specified activities which include the activities of doctors in training), or 12 months (by collective bargaining only.)

shall be published in the Official Journal of the European Union and forwarded to the European Parliament.

Member States may have an additional period of one year, if necessary, to take account of special difficulties in meeting the responsibilities referred to in the [previous] subparagraph. They shall follow the procedure set out in that subparagraph.

Member States shall ensure that in no case will the number of weekly working hours exceed an average of 58 during the first three years of the transitional period, an average of 56 hours for the following two years, and an average of 52 for any remaining period. ...

With respect to Article 16(b) [reference period for calculating average weekly working time] derogations [regarding doctors in training] shall be permitted provided that the reference period does not exceed 12 months, during the first part of the transitional period [2004 - 2007], and six months thereafter.'

Article 17(5) also provides for consultation between employers and employees' representatives about the implementation of any transitional arrangements: 'the employer shall consult the representatives of the employees in good time with a view to reaching an agreement, wherever possible, on the arrangements applying to the transitional period.' Such an agreement must respect the limits set out in Article 17(5), but it may set out, in particular, the measures to be adopted to reduce weekly working hours to an average of 48 by the end of the transitional period.

These transitional arrangements are summarised in the table below.

Table: Summary of the transitional provisions for doctors in training, under Article 17(5)

<i>Period</i>	<i>Derogation possible</i>	<i>Conditions</i>
1 August 2004 – 31 July 2009	Derogation from 48-hour limit to average weekly working time	Transitional limits will apply to average weekly working time: <u>1 August 2004 - 31 July 2007:</u> May not exceed average 58 hours/week. The reference period* may not exceed 12 months. <u>1 August 2007 – 31 July 2009:</u> May not exceed average 56 hours per week. The reference period may not exceed 6 months. *The reference period is the maximum period over which average weekly working time may be calculated.
1 August 2009- 31 July 2011	Extension of above derogation from 48-hour limit	If necessary to take account of difficulties in meeting the working time provisions, given the responsibilities for organising and delivering health services/medical care. A Member State wishing to use this derogation must notify Commission (with reasons) by 31 January 2009. The Commission gives an opinion on the notification. In any event, average weekly working time may not exceed 52 hours per week. The reference period may not exceed 6 months.
1 August 2011 – 31 July 2012	Possible further extension of above derogation	If necessary, to take account of special difficulties in meeting the above responsibilities.

		<p>A Member State wishing to use this derogation must notify Commission (with reasons) by 31 January 2011. The Commission gives an opinion on the notification.</p> <p>In any event, average weekly working time may not exceed 52 hours per week. The reference period may not exceed 6 months.</p>
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2. THE NOTIFICATION BY THE MEMBER STATE

By letter dated 28 January 2009, and registered 29 January 2009, the national authorities of the United Kingdom notified the Commission services that they intended to use the possibility under Article 17(5) of maintaining special transitional rules, in order to allow an average weekly working time of up to 52 hours for doctors in training, for '*up to three years*' starting on 1 August 2009.

The notification makes the following points:

- The UK states that it is fully committed to achieving compliance with the 48-hour limit to average weekly working time as regards doctors in training, in partnership with health services and organisations representing doctors. The 'New Deal' social partnership agreement on pay in the public health sector already contains strong financial incentives for hospitals to reduce working hours of doctors in training. The national authorities also fund a very substantial ongoing programme to support health authorities in reaching full compliance with the Directive.
- The UK considers that it has made considerable progress towards achieving compliance with the 48-hour limit to the average weekly working time of doctors in training. It states that the majority of doctors in training in the UK already worked an average week of 48 hours or less before 1 August 2009 (no overall figures are provided) and it expects to improve on this proportion by that date.
- The UK states that some doctors in training will still exceed the 48-hour average after 1 August 2009, due to the following factors:
 - an imbalance between demand for, and supply of, doctors in training (up to 5% of medical training posts were vacant at the close of 2008 recruitment)
 - a shortage of medical locums (both UK recruits and internationally-recruited) to fill these vacancies
 - in a small number of locations, reconfiguration of hospital services can lead to staff temporarily having to provide services at two different sites,
 - all the above factors impact more heavily in hospitals which need to deliver services on a 24-hour basis; in small, remote and rural medical units; and in certain highly specialised services.
- To address these factors, the numbers of doctors in training are being further expanded, and the national authorities are also taking measures to expand the supply of medical locums, and to help hospitals manage the demand for locums more efficiently. However, the national authorities expect some shortages of medical staff to continue during the next two to three years.

- The UK intends to ensure that only a minimum number of medical services would make use of the possibility of doctors in training working up to 52 hours per week on average. The national authorities intend to identify by 1 August 2009 exactly which services need longer transitional arrangements, and will monitor the situation carefully after that date with a view to achieving full compliance.

3. THE OUTCOME OF CONSULTATIONS ON THE NOTIFICATION

When the present Article 17(5) was adopted, the Commission made a statement that it would interpret the expression 'after appropriate consultations', in the second paragraph of this provision, as intending that the Commission should '*consult management and labour at European level and representatives of the Member States...*' before giving an Opinion regarding extended transitional arrangements for working time of doctors in training.⁴

The Commission services duly consulted all Member States and the European social partners about the notification received from the United Kingdom.

Replies were received from eight Member States (Bulgaria, France, Greece, Lithuania, Luxembourg, the Netherlands, Spain and Sweden). No Member State indicated any objection to the United Kingdom availing of the extended transitional period.

No reply was received regarding the United Kingdom from European social partners representing management.

The ETUC replied to the consultation, indicating that its affiliated federation, the TUC, did not agree with the intention notified by the United Kingdom.

The following points were made by the TUC on behalf of several affiliated unions representing doctors in training, and of the affiliated union of hospital consultants responsible for training (the Hospital Consultants and Specialists Association)⁵:

- the TUC itself had not been consulted by the national authorities,
- working hours for doctors in training in the UK had progressively decreased in recent years and a number of hospitals had declared that they already complied with the 48-hour limit,
- the TUC considers that there are sufficient doctors in training within the UK to fill the available posts, and does not agree that staff shortages would necessitate extending transitional arrangements beyond 31 July 2009.

4. ASSESSMENT OF THE NOTIFICATION IN THE CONTEXT OF THE DIRECTIVE

The Working Time Directive was adopted by the European Parliament and the Council under Article 137(2) of the EC Treaty, which provides for Community measures to improve the working environment by protecting workers' health and safety. The Directive's main purpose is to lay down minimum safety and health requirements for the organisation of working time.

It should be noted that, while the United Kingdom's notification mentions extended transitional arrangements for *three* years from 1 August 2009, the provisions of Article 17(5) do not appear to envisage such a procedure.

⁴ Commission statement regarding implementation of Article 1, paragraph 6 of Directive 2000/34/EC, OJ L 195/41 at p. 45, 1.8.2000.

⁵ The TUC indicated that it had also consulted with the British Medical Association, which is not affiliated to the TUC.

Rather, Article 17(5) specifies that transitional arrangements may be extended for '*up to two more years*' from 1 August 2009 to take account of difficulties in meeting the working time limit, and adds that '*Member States may have an additional period of up to one year, if necessary, to take account of special⁶ difficulties [in meeting that limit]*'.⁷ In the latter situation, Article 17(5) specifies that Member States are to '*follow the procedure*' already indicated in a previous subparagraph for a two-year extension.

It follows that, if a Member State notifies in 2009 its wish to avail of extended transitional arrangements to take account of difficulties in complying with the 48-hour limit, that notification should relate to the period 1 August 2009 – 31 July 2011. The national authorities should then monitor what progress can be made over that period towards the 48-hour limit and, based on that information, should evaluate whether they expect that by 31 July 2011 they will be able to comply with the 48-hour limit, or whether (and to what extent) they will face '*special difficulties*' in doing so. If, based on this evaluation, the Member State considers that a further period of one year is required, it should so inform the Commission by 31 January 2011 at the latest, giving its reasons.

It appears from the information available to the Commission that the position under national law in the United Kingdom is as follows:

- Weekly working time (including overtime) in the UK is limited to 48 hours, averaged over up to 6 months (up to 12 months where a collective agreement so provides)⁸. The national courts have applied the Court of Justice's rulings on the treatment of on-call time at the workplace, which is fully counted as working time for this purpose. This position also applies to the health sector.

- The United Kingdom allows use of the opt-out under Article 22 of the Directive in all sectors of activity. However, both the national authorities and the TUC state that the opt-out is not widely used in hospitals in the UK, and that health service policy, as well as the New Deal sectoral agreement, focus instead on moving away from long-hours working through changes to the organisation of work in the hospital sector.

It appears from the foregoing that the United Kingdom has already made considerable progress towards achieving compliance with the 48-hour limit to weekly working time. There seems to be general agreement that this limit already applies to the majority of doctors in training, even though no precise overall percentage has been provided.

Moreover, it is to be welcomed that the applicable social partnership agreement seeks to move away from traditional reliance on very long working hours for doctors in training, and to develop alternative solutions which guarantee high quality training and patient care, while avoiding the need for use of the opt-out, which is not generally used by doctors in training in the UK.

Taking account of these factors, of the reasons given by the national authorities, and of the replies by social partners, a need to continue extended transitional arrangements until 1 August 2011, in respect of a limited number of exceptional situations, does not appear unreasonable. It seems from the explanations given by the national authorities that the use of the 52-hour week can be expected to be rather limited, that it will be closely monitored, and that they expect further progress towards full compliance during the two-year period.

⁶ Note that '*special difficulties*' appear to be a different, and more stringent, criterion than that which applies to the 2009 notification ('*difficulties*').

⁷ Emphasis added.

⁸ Working Time Regulations 1998 as amended, reg. 4.

Nevertheless, the national authorities are encouraged to continue their efforts to achieve full compliance with the 48-hour week by 1 August 2011, and to encourage ongoing consultation between employers and doctors' representatives on the arrangements which should apply.

5. CONCLUSIONS

As a result of the above, the Commission is of the opinion that:

- it can be accepted that the United Kingdom needs up to two more years from 1 August 2009, in accordance with Article 17(5) of the Working Time Directive, before it can fully apply the limit to working time (not more than 48 hours per week on average) to all doctors in training. This is required in order to take account of a number of specific temporary difficulties applicable to certain posts, having regard to the United Kingdom's responsibilities for the organisation and delivery of health services and medical care,
- it should be underlined that in any event, under Article 17(5) of the Directive, Member States who avail of extended transitional arrangements shall ensure that weekly working hours do not in any case exceed 52 hours per week, averaged over a period not exceeding six months,
- the provisions of Article 17(5) do not appear to envisage extending transitional arrangements for *three* years at this point. Rather, a Member State should monitor what progress is made during the two years' extended transitional arrangements, and evaluate on that basis whether, and to what extent, it anticipates special difficulties which would necessitate a further extension. If it so anticipates, the Member State may then notify this requirement following the procedure set out in the fourth subparagraph of Article 17(5).
- the national authorities should encourage health service employers to engage or continue their engagement in consultation with representatives of doctors in training, in accordance with the sixth subparagraph of Article 17(5), with a view to reaching agreement, wherever possible, on the arrangements which will apply to the extended transitional period and on the measures to be adopted to reduce weekly working hours to an average of 48 hours generally by the end of the transitional period,
- the national authorities are requested to ensure the dissemination of this Opinion, so that it may be taken into account (where relevant) by the competent national authorities.

Done at Brussels, 28.9.2009.

For the Commission
Vladimír ŠPIDLA
Member of the Commission

CERTIFIED COPY
For the Secretary - General

Jordi AYET PUIGARNAU
Director of the Registry