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The potential end of the UK's opt-out from the EU Working Time Directive

The European Parliament will tomorrow vote on a proposal which could remove the UK's opt-out from the Working Time Directive. The Directive caps working time at 48 hours a week. The British Government has consistently defended the UK's partial exemption from these rules, in fear of increased costs to businesses and the public sector.

The vote on working time comes just weeks after MEPs voted in favour of the Agency Workers' Directive, another measure which will raise costs significantly for UK businesses.

If MEPs vote against extending the opt-out it would not only be a blow for British businesses fighting recession, but will create a very awkward situation for the Government, which had previously claimed that the right for UK workers to choose to work longer than 48 hours a week had been permanently secured as part of a 'package' deal on Agency Workers in June.

What will an end to the opt-out cost the UK economy?

Despite the huge implications, the Government says that it has not published any impact assessment on the cost to the UK economy of losing the opt-out. An official in the Department for Business, Enterprise and Regulatory Reform told Open Europe that there was no assessment of the cost published because "no one expected the opt-out to come up for negotiation".

However, assuming that between 2.3 and 3.2 million employees work¹ more than 48 hours a week, Open Europe has estimated that ending the opt-out could cost the UK economy between £47.74 billion and £66.45 billion by 2020, with a middle estimate of £57 billion. The calculations are based on the opt-out elapsing in 2011.

To put this in to context:

¹ Estimates on the number workers making use of the working time directive opt-out vary. The CBI quotes the ONS Labour Force Survey data putting the figure at over 3 million (10% of the workers) (see: <http://www.cbi.org.uk/ndbs/press.nsf/0363c1f07c6ca12a8025671c00381cc7/c6e0fac05410f0ba80257520005d5996?OpenDocument>). The *TUC* suggests a similar figure of 12.7% (http://www.tuc.org.uk/work_life/tuc-15747-f0.cfm); (<http://www.timesonline.co.uk/tol/news/politics/article5342396.ece>). Other report suggests the lower figure of 2.3 million (<http://www.guardian.co.uk/world/2008/dec/15/eu-working-time-directive>). A range estimate seems appropriate, also given uncertainties surrounding the actual number of workers that will work more than 48 hours a week over a longer time period.

- This is more than £2,300 per household.
- It is more than five times the UK's annual contribution to the EU budget.
- For the same amount we could cut income tax by almost 2% (a move that would cost the Government £4.2 billion a year).
- The amount represents the entire GDP of several smaller European countries.
- It is more than this year's defence and transport budget combined.

How we reached the figures

In order to estimate a cost of the loss of the opt-out, we used the 2005 Regulatory Impact Assessment for the Road Transport Directive.² The legislation requires a mandatory limit on working time for mobile workers involved in transport and distribution services (of an average of 48 hours per week), along with other constraints such as no more than 10 hours of night work in a 24 hours period and one-off maximum of 60 hours per week. The costs included in the report assess only those resulting from enacting a 48 hour average working week limit.

To derive an approximation for the Working Time Directive, we calculated the average cost per impacted worker (465,000). Given that this figure is for an assessment compiled in 2005, we need to re-inflate quoted costs to provide present value figures for 2008. This figure was then scaled by a range estimate for the number of workers effected by the Working Time Directive to create the annual cost associated with the Directive. The flow of annual cost for 2011-2020 (still in 2008 prices) was then discounted for future inflation (using the Treasury's deflator estimates³), to arrive at an estimate of the total cost of the directive over the 2011-2020 period in today's prices.

Background:

The 1993 EU Working Time Directive stipulates that workers must not work more than an average of 48 hours a week, calculated over any four-month period. However, provisions were made for member states to opt out from these rules under certain conditions. Initially only the UK made use of this provision, but now approximately 15 member states employ the opt-out in one form or another.

Following two highly controversial rulings from the European Court of Justice, several member states pushed hard for the text to be revised. In the Simap and Jaeger cases, in 2000 and 2003 respectively, the Court ruled that all time spent on call should be classified as working time, even where the employee is not actively engaged in his or her duties.⁴ The rulings imposed huge costs on member states' public sectors, particularly for the health sectors.

On-call time and compensatory rest were the key issues addressed in a deal agreed amongst EU ministers in June this year.

² <http://www.dft.gov.uk/consultations/archive/2004/rtfguid/regulatoryimpactassessment>

³ http://www.hm-treasury.gov.uk/data_gdp_fig.htm

⁴ "One of these European Court rulings (SiMAP) holds that hospital doctors may count hours spent asleep on call as working time. The other (Jaeger) says that they are entitled to immediate compensatory rest for any resident on-call duties, even if they have been able to rest. The first might be a basis for improvements over time. The second just doesn't make sense.", see http://www.parliament.uk/parliamentary_committees/lords_press_notices/pn080404bg.cfm

The UK Government had insisted that the UK's opt-out was safe in this compromise deal, following a package agreement in which Britain accepted less flexible rules for temporary agency workers – under the so-called Agency Workers Directive – in return for retaining the opt-out on working time. For years, the UK Government had opposed the directive on agency workers, amid fear of job losses and increased costs for businesses. The CBI estimated that the directive would cost the UK 250,000 jobs.⁵ However, the failure to secure the right for flexible working hours for agency workers was justified on basis of securing the opt-out, according to the Government.

Then Business Secretary John Hutton insisted that:

"This is a very good deal for the UK... Flexibility has been critical to our ability to create an extra three million jobs over the past decade. That flexibility has been preserved by ensuring workers can continue to have choice over their working hours in future years. This agreement means that people remain free to earn overtime and businesses can cope during busy times."⁶

However, Employment Minister Pat McFadden told a Lords' committee: "we never particularly wanted these two Directives to be taken as a package... but most Member States wanted it and decided that way."⁷ Following the June agreement, McFadden played down fears that the British working time opt-out was under threat. "I don't think it will reappear," he told journalists.⁸

European Parliament's employment committee votes to scrap the opt-out

Nonetheless, on 5 November this year, the European Parliament's employment committee took a position "diametrically opposed" to that of the council – to use the Committee's own words.⁹ In a report outlining amendments for the full Parliament to vote on, the committee proposed:

End of the UK's opt-out by 2011: the committee proposed an amendment stipulating that the "non-participation clause" (opt-out) should lapse three years after the reformed directive enters into force.¹⁰

On-call time to be considered working time: Amazingly, the committee voted against the proposed changes to the definition of on-call time – the very reason the Commission revised the proposal in the first place. In their vote, the committee insisted that the full period of on-call time, including the inactive period, should be counted as working time.

⁵ CBI press release, 10 September, 2008,

<http://www.cbi.org.uk/ndbs/Press.nsf/38e2a44440c22db6802567300067301b/d6d6e007b3649b13802573f40037b617?OpenDocument>

⁶ BERR, 10 June, 2008,

<http://nds.coi.gov.uk/environment/fullDetail.asp?ReleaseID=370054&NewsAreaID=2&NavigatedFromDepartment=True>

⁷ House of Lords EU Committee, 21 October 2008,

<http://www.publications.parliament.uk/pa/ld200708/ldselect/ldcom/170/170.pdf>

⁸ http://blogs.telegraph.co.uk/richard_tyler/blog/2008/06/11/britains_victory_in_48_hour_week_optout

⁹ *Agence Europe*, 7 November, 2008.

¹⁰ Press release from the European Parliament, 5 November, 2008,

http://www.europarl.europa.eu/news/expert/infopress_page/048-41251-308-11-45-908-20081103IPR41250-03-11-2008-2008-false/default_en.htm

Compensatory rest periods: The committee also resisted the Council's common position that it is for the member states to determine what constitutes a "reasonable period" within which such compensatory rest should be granted. The ECJ had required the compensatory rest period to be at the end of the working period – something which had caused near chaos in public sectors across Europe. The EP committee decided that such compensatory rest periods should be granted at the end of the working period.¹¹

Indeed, the position agreed by the June council was not ideal from a British perspective, not least in respect to higher administrative costs to business and new caps on the number of hours employees are allowed to work each week when using the opt-out.

However, this fades in comparison to the proposals by the EP Committee.

The Council had agreed that:

- The working week in the EU should continue to be limited to a maximum of 48 hours, except where an individual worker chooses to opt-out. In other words, the UK's opt out should remain.
- A new cap for workers who opt out. No more than 60 hours on average a week when calculated over a period of three months or 65 hours where there is no collective agreement and "when the inactive period of on-call time is considered as working time." This should be compared to the present limit of 78 hours in the UK.
- Tougher conditions for using the opt-out, including employers not being allowed to have an employee sign an opt-out for the first month of employment (workers on short-term contracts would be excluded from this). New requirement for employers for keeping records on working hours of opted-out workers.
- Member States would be given the possibility to extend the reference period for calculating the 48-hour maximum working week from 4 months to a year in some circumstances.
- On-call time to be split into active and inactive on-call time. Active on-call time to be counted as working time. However, inactive on-call time can be counted as working time if national laws or social partners agree. Compensatory rest periods to take place within a reasonable time period following the end of the shift. This was seen as a way to solve the controversial ECJ-rulings.

What happens next?

The issue of the opt-out will be voted on by all MEPs on 17 December (in the European Parliament plenary session). The end of the UK opt-out could well be approved. The issue will then be debated by the Council of Ministers where the UK would be under "severe pressure" to give way, according David Yeandle of the manufacturers body EEF.¹²

¹¹ *Euractiv*, 6 November, 2008. <http://www.euractiv.com/en/socialeurope/business-furious-meps-scrap-working-time-optouts/article-176998?Ref=RSS>

¹² *Financial Times*, 3 November, 2008.

Business Secretary Peter Mandelson said that the UK will continue to "stand firm" on the issue and argues that the opt-out "is essential to Britain's labour market flexibility that has helped to create an extra three million jobs". However, the issue will be subject to a qualified majority vote, meaning the UK could be outvoted and forced to cap working hours.¹³

¹³ *Financial Times*, 3 November, 2008.