

CTP/B100175/DVI

Brussels, 21 April 2010

UPDATED IRU POSITION ON THE REVISION OF THE EU WORKING TIME DIRECTIVE

As adopted by the IRU EU Goods Transport Liaison Committee (CLTM) in Brussels on 3 March 2010 and by the IRU Passenger Transport Council (CTP) in Geneva on 15 April 2010

Updated IRU Position on the revision of the EU Working Time Directive with regard to fake and genuine self-employed drivers, night work and enforcement.

I. ANALYSIS

1. Background and Objectives of the current Revision Process

The EU Road Transport Working Time Directive (2002/15/EC) entered into force on 23 March 2005. Its stated aim is to improve the health and safety of mobile workers in road transport, increase road safety and remove competitive distortions between road transport undertakings established in different EU Member States.

The centerpiece of the legislation is the limit of an average 48 hour working week calculated over a 4 month reference period, alongside a 10 hours night work limit in each 24 hour period and an obligatory break after 6 hours of work. Today, the Directive covers all mobile workers who are also subject to the EU Driving and Rest Time Rules Regulation 561/2006/EC, but not to self-employed drivers.

On 15 October 2008, the European Commission adopted a legislative proposal to modify the Road Transport Working Time Directive¹. If adopted as proposed, this would: permanently exclude self-employed drivers from its scope; attempt to bring 'false' self-employed drivers unambiguously within the Directive's scope; improve enforcement overall and finally; modify provisions on night work so as not to include those who work very short periods at night.

Since the adoption of the IRU Position Paper on this subject in March 2009, new developments in the EU co-decision process require that this position be updated.

2. Exclusion of Self-Employed Drivers

Via the current legislation, the European Parliament and Member States granted self-employed drivers a temporary exclusion from the Directive which officially expired on 23 March 2009. The objective of the current EC proposal is to make it permanent via a modification of the Directive. However, but the proposal's late publication carried with it unacceptable legal uncertainty for self-employed drivers since it was impossible for Parliament and Council to complete their legislative decision-making process by 23 March

¹ <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:DKEY=481116:EN:NOT>

2009. Regardless of the eventual policy outcome of the EU co-decision process, the legal obligations of self-employed drivers since 23 March 2009 should be made clear. This requires an unambiguous statement from the EU Institutions that **at least until** the conclusion of the co-decision process, the status quo ante 23 March 2009 must be maintained for self-employed drivers.

3. EU Definition of Fake Self-Employed Drivers

Currently, fake self-employed drivers are considered to be those who do not fall within the definition of 'self-employed' given in article 3 e). of Directive 2002/15/EC. According to the Commission, this negative definition makes fake self-employed drivers difficult to identify. To remedy this, the Commission proposal uses the same criteria to create a positive definition (article 3 d) of false self-employed drivers, one that groups them together with regularly employed mobile workers (who have always been covered by the Directive (article 2.1)).

“[A] mobile worker’ shall also include any person who is not tied to an employer by an employment contract or by any other type of working hierarchical relationship, but:

- i. who does not have the freedom to organise the relevant working activities;*
- ii. whose income does not depend directly on the profits made;*
- iii. who does not have the freedom, individually or through a cooperation between self-employed drivers, to have relations with several customers.”*

The Commission proposal sets out the framework principles on which national criteria can be established. For the IRU, this is the limit of what can be achieved at EU level without breaching the subsidiarity principle or creating conflicts with employment status definitions created at the national level for tax purposes. Nevertheless, it is necessary that Member States develop more detailed definitions and better methods for the effective identification and sanctioning of fake self-employed drivers. This must include bringing about effective cooperation between national ministries of labour, transport and taxation.

4. Night work

The Directive’s current rules require Member States or national social partners to define a period of at least 4 hours between 00:00hrs and 07:00hrs that is to be regarded as ‘night time’ for the purposes of the Directive. It states that any time worked during these 4 hours must be considered ‘night work’. By contrast the Commission’s new text proposes that *‘night work’ shall mean work during a period of work which includes at least two hours work performed during night time.* That is, at least 2 of the 4 hours defined nationally as ‘night time’, must have been worked for the period to qualify as ‘night work’.

The motivation for this change is essentially to bring the Directive into line with other working time legislation in respect of night work. It would also ensure that drivers whose shifts accidentally extend for an insignificant duration into a period defined as ‘night time’ are not immediately required to comply with other obligations arising from night work.

5. Enforcement

Currently in terms of enforcement, Member States are only required to lay down a system of penalties for breaches of the Directive. This contrasts strongly to the EU Driving and Rest Time Rules Regulation which is accompanied by a dedicated Enforcement Directive (2006/22/EC) specifying minimum control levels. The Commission argues that, without a quantum leap forward in terms of enforcement, the Working Time Directive risks becoming ‘dead legislation’. Subsequently the Commission’s draft proposal prescribes the following compulsory measures to be inserted into article 11:

- Member States should organise a system of appropriate and regular monitoring and controls for the Directive and ensure competent enforcement bodies have adequate resources to fulfill this task
- Member States should provide transport undertakings and mobile workers with information, assistance and advice on working time rules and work organisation.
- The Commission should facilitate information exchange, best practices and cooperation between Member States, promoting a common approach to implementation.

Because of the multiplicity of ways in which the Directive has been transposed nationally, cross border controls are impossible. Another implication of the Commission's proposed changes to article 11 is that existing national systems for enforcing working time – such as Denmark's - which rely on the reporting of abuses rather than their active detection by authorities, might become prohibited (see first bullet point above).

6. Recent Developments in the Co-decision process

In March 2009, a 'general approach' was adopted by Member States broadly supporting the EC proposal but emphasising that individual countries are fully empowered to apply the Directive to self-employed drivers via national legislation, if they so wish.

In the European Parliament a new first reading has begun on the basis of a report drafted by the Employment and Social Affairs Committee (EMPL) rapporteur, Mrs. Edit Bauer EPP (Slovakia). An opinion from the Transport Committee (TRAN) has also been drafted by Mr El Kadraoui PES (Belgium).

Mrs Bauer has largely followed the Council's 'general approach', in particular regarding her emphasis on Member State autonomy, to decide whether or not to include the genuine self-employed. By contrast, Mr El Khadraoui has tabled an opinion containing a number of controversial proposals. These include a fixed EU night time definition which is already contested in the IRU Position. Another proposal in Mr El Khadraoui's draft opinion is the suggestion that the Directive's scope should, in the future, be extended to drivers of vehicles less than 3.5 tonnes. However, the IRU agrees with Mr El Khadraoui that this should not form part of the current revision process. It goes far beyond the scope and impact assessment of the original Commission proposal and would be premature since the Commission is planning a comprehensive review of the 3.5 tonnes threshold for the application of commercial road transport legislation, a process which should be concluded before any precedent is created by applying the Working Time Directive to such drivers.

All these issues will be important elements and considerations in the development of a compromise solution on this dossier and will have a serious impact on the road transport industry.

II. IRU POSITION

- **Legal Certainty:** For reasons of legal certainty, the IRU calls for the temporary exclusion of self-employed drivers from the Sectoral Working Time Directive to be maintained, at least until the conclusion of a co-decision procedure on Commission Proposal COM 2008/650.
- **Application of the Directive to Genuine Self-Employed Drivers:** The IRU supports an outcome which would entail a general exclusion for genuine self-employed drivers at EU level but emphasises the right of each Member State to introduce national rules to include them, if they so wish. In the interest of legal clarity and practical enforcement, it should be specified that national rules extending the scope of the Directive to the self-employed should only apply to drivers registered in that country.

- **Fake Self-Employed Drivers:** The IRU maintains that drivers who: are tied to an employer by an employment contract or by any other type of working hierarchical relationship **and** who do not have the freedom to organise their relevant working activities and whose income does not depend directly on the profits made **and** who do not have the freedom, individually or through a cooperation between self-employed drivers, to have relations with several customers, is not a self-employed person and therefore must be rigorously subjected to the Working Time Directive as well as the relevant social and fiscal legislation in force in their Member State of registration.

- The IRU maintains that the Commission's legislative proposal identifies the right basic principles to define fake self-employed workers. The IRU asserts that this is the limit of what can be realistically achieved currently at European level.

The IRU calls for Member States in cooperation with the IRU and its members to develop more detailed definitions and better methods for the effective identification and sanctioning of fake self-employed drivers. This would include bringing about effective cooperation between national ministries of labour, transport and taxation.

- **Night work:** The IRU supports the European Commission's proposed definition of 'night work' as being at least two hours worked (during the nationally defined 4 hour 'night time' period) since it brings consistency between this Directive and other working time legislation.

The IRU cannot support a concession on night work or night time as part of a compromise deal on the status of the self employed, above all if it would remove a Member State's ability to set their own definition of the night time period or extend 'night time' to a period greater than 4 hours.

- **Drivers of vehicles less than 3.5 tones:** In view of the pending EU review of the 3.5t threshold for commercial road transport legislation, an extension - during the current revision process - of the scope of the Working Time Directive to drivers of vehicles below this weight is extremely premature and should be opposed by the IRU.

- **Enforcement:** The IRU maintains that the onus is on Member States to ensure a proper application and enforcement of the Directive, exclusively to drivers registered on their territory.

Member States should be allowed to maintain enforcement systems which encourage the reporting of abuses rather than insist on their active detection by regular monitoring.

Enforcement measures should be adopted at national level only after consultation with national social partners. Dialogue at European level must involve the EU social partners.

* * * * *