



COMMISSION OF THE EUROPEAN COMMUNITIES

013974/EU XXIII.GP
Eingelangt am 23/05/07

Brussels, 23.5.2007
COM(2007) 266 final

**REPORT FROM THE COMMISSION TO THE COUNCIL AND THE EUROPEAN
PARLIAMENT**

**on the consequences of the exclusion of self employed drivers from the scope of the
Directive 2002/15/EC of the European Parliament and of the Council of 11 March 2002
on the organisation of the working time of persons performing mobile road transport
activities**

REPORT FROM THE COMMISSION TO THE COUNCIL AND THE EUROPEAN PARLIAMENT

on the consequences of the exclusion of self employed drivers from the scope of the Directive 2002/15/EC of the European Parliament and of the Council of 11 March 2002 on the organisation of the working time of persons performing mobile road transport activities

1. INTRODUCTION

Directive 2002/15/EC¹ establishes minimum requirements in relation to the organisation of working time in order to improve the health and safety protection of persons performing mobile road transport activities, to improve road safety and to align conditions of competition. The Directive came into force on 23 March 2002 and Member States have had three years until 23 March 2005 to implement the Directive's provisions in relation to mobile workers. Article 2(1) of the Directive indicates that the Directive's provisions shall apply from 23 March 2009 to self employed drivers once the Commission presents a report to the Council and the European Parliament and a consequent legislative proposal based on the report.

As part of the final conciliation agreement reached between the European Parliament and the Council on this Directive, it was concluded that at the latest, two years before this date, namely 23 March 2007, the Commission should present a report to the European Parliament and the Council, which would analyse the consequences of the exclusion of the self employed drivers from the scope of the Directive in respect of road safety, conditions of competition, the structure of the profession as well as social aspects. The report should take into account the circumstances in each Member State relating to the structure of the transport industry and to the working environment of the road transport profession. On the basis of the report, the Commission should submit a proposal either (a) to set out the modalities for inclusion of self-employed drivers which undertake purely national transport activities and for whom particular situations pertain; or (b) not to include self employed drivers within the scope of the Directive.

Article 7(2) of the Directive also required the Commission to assess the consequences of the Directive's night work provisions and report on them by the 23 March 2007 in the context of the ongoing biennial report which it is obliged to provide on the implementation of the Directive.

This report therefore fulfils several objectives: it serves to provide an overview of the current state of implementation of the Directive by the Member States; it addresses the potential consequences of the exclusion of self-employed drivers from the scope of the Directive; and it assesses the consequences of the Directive's night time provisions.

The Commission retained consultants in December 2005 to consider the above three objectives, drawing up reports on each Member State and through a thorough examination of relevant studies and data, face-to-face interviews with representatives of both sides of

¹ OJEU L 80 of 23.3.2002, p. 35

industry, national administrations and Commission Directorates General concerned, as well as feedback from several meetings with industry on the preliminary results obtained, to come forward with their considered conclusions on the exclusion of the self-employed driver and the consequences of night time provision. The final report is available at http://ec.europa.eu/transport/road/studies/index_en.htm

2. IMPLEMENTATION OF THE DIRECTIVE BY MEMBER STATES

A majority of Member States did not manage to transpose the Directive within the three year transitional period provided. The Commission was obliged to open infringements proceedings against eleven Member States in May 2005. Since then, the number of Member States not communicating all their transposing measures has reduced to four. This has meant that the impact of the Directive in certain Member States can only be estimated. In terms of those Member States that have forwarded their national transposing measures, the Commission has since opened correspondence with them to ensure the definitions and limits accurately reflect the Directive's provisions. Therefore the Commission is not yet in a position to issue its first biennial report, due in March 2007.

3. CONSEQUENCES OF THE EXCLUSION OF SELF-EMPLOYED DRIVERS

3.1. Introduction

The final text of the Directive is a delicate compromise, testifying to the difficult conciliation agreement between the European Parliament and Council. The inclusion of self-employed drivers by 23 March 2009 following the fulfilment of the above mentioned conditionalities represented a shift from the Council common position² of temporary exclusion pending a further possible proposal for inclusion at a later stage from the Commission. Two Member States, Spain and Finland, subsequently sought unsuccessfully before the Court of Justice to annul the Directive³, primarily to permanently exclude self-employed drivers from the scope of the Directive. In its original proposal⁴ and throughout the debate on the proposed Directive, the Commission advocated inclusion of the self employed, for several reasons:

- (a) to be consistent with the scope of the Regulation⁵ on driving time and rest period rules, which makes no such distinction between drivers;
- (b) to avoid the potential fragmentation of a highly competitive industry through the re-designation of employees as self-employed drivers (so called 'false self employed')
- (c) to ensure that the aims of fair competition, improved road safety and better working conditions were applied through the Directive to the whole road transport sector.

² OJEU C 142 of 15.5.2001, p. 24

³ C-184/02, Kingdom of Spain & C-223/02, Republic of Finland, (joined cases) 24.9.2004 rec. p. I-7789

⁴ OJEU C 43, 17.2.1999, p. 4

⁵ OJEU L 370, 31.12.1985, p. 1

However the original proposal of the Commission was built on a less extensive definition of working time in the case of self-employed drivers.

In the light of the conclusions set out in the consultants' report, the Commission is bound to reflect on the impact of the inclusion of the self-employed within the Directive and how its original objectives can best be met.

3.2. Road Safety

At first sight, the link between fatigue from working excessive hours and an increased danger to road safety from professional drivers appears self-evident. Nevertheless, as a large number of Member States have only recently implemented the Directive, it is too early to obtain data on the impact of the new rules on road safety. Moreover the Commission's database, which relies on the statistics transmitted from national administrations, cannot distinguish between self-employed drivers and mobile workers. It is also often difficult to ascertain the reason for a particular accident, as fatigue can result not only from excessive working hours but from other factors.

This said, the extensive research literature on the subject, as well as the comprehensive report produced for the Commission⁶, shows that excessive working hours, which for goods transport drivers encompasses a significant element of physical work (loading and unloading), is a major contributory factor to fatigue and hence to falling asleep at the wheel. Fatigue and its consequences for road safety can affect a driver, whether he be self-employed or a mobile worker.

The consultants' report confirmed that self-employed drivers work longer than mobile road transport workers and that both categories worked more than workers in other sectors. Should the self-employed driver be excluded from the working time rules, only his driving time, breaks and rest periods would be regulated at Community level under Regulation (EEC) 3820/85, soon to be superseded on 11 April 2007 by Regulation (EC) 561/2006. There will no longer be a limit on 'other work', which he will still have to record on the tachograph under Regulation (EEC) 3821/85. Various studies⁷ have identified that for professional drivers, driving represents on average 66% of their entire work, availability 12%, leaving 21% of their time devoted to 'other work', such as loading/unloading. Exclusion of the self-employed would therefore entail not applying a global weekly time limit on such activities. However for self-employed drivers, this time limit would only encompass part of their working routine, as neither 'availability' nor any general administrative work is included unless it is linked to the specific transport operation (see Article 3(a)(2) of Directive 2002/15/EC). This absence however will be mitigated in the future by several new rules brought in by the new Regulation (EC) 561/2006. It will introduce a new weekly driving time limit of 56 hours – up until now, theoretically, drivers could legally drive up to 74 hours in one week - as well as require all drivers to take at least a full 45-hour weekly rest every two weeks.

⁶ Le lien entre la durée de travail des conducteurs routiers et la sécurité routière au sein de l'Union européenne, Universität-Gesamthochschule Kassel, Institut für Arbeitswissenschaft, June 1997

⁷ Ibid, p. 170, Table 8.21

Other factors contributing to fatigue – stress, health problems and a lack of support - were more prevalent amongst the self-employed. A reduction in working time could undoubtedly help reduce fatigue. However, this could lead to higher levels of stress, as the self employed driver tries to achieve more in less time in order to maintain his profitability, which in turn could lead to greater fatigue and accidents. The consultants point out that attention to other factors, such as better enforcement of driving time rules and aspects concerning the working environment could prove to be more effective road safety measures than reducing working time for the self-employed.

Unlike other road safety measures, where active enforcement is considered necessary and undertaken either at national level or within a Community regulatory framework, it appears that Member States do not accord working time rules the same level of priority as the enforcement of Community driving time and rest period rules. Despite pressure from the Commission and the European Parliament when discussing what is now Directive 2006/22/EC on minimum conditions for the implementation of Council Regulations (EEC) 3820/85 and (EEC) 3821/85 concerning social legislation relating to road transport activities and repealing Council Directive 88/599/EEC⁸ the Council did not agree to any minimum systematic inspection requirement for working time rules. For driving times and rest period rules they did agree to a whole series of measures to ensure compliance, progressively trebling minimum inspection levels, concentrating on premises inspections (at least 50% of all inspections each year), developing and implementing a national enforcement strategy. For working time, enforcement is therefore mainly bound to rely on complaints from drivers or on investigation following an accident, only the latter presumably applying to the self-employed. A low level of compliance would reduce any effect on road safety.

This said, the Commission continues to consider that in terms of road safety a reduction in working time for the sector could have a positive effect. The research literature tends to corroborate this view. Indeed 50% of the employee and 25% of government stakeholders interviewed by the consultants mentioned that they shared this perception (see consultants' report, Table 5.3). In terms specifically of the impact of inclusion a slightly higher percentage in each category of stakeholder (government, employer and employee) admitted it would have a positive impact on road safety.

The inclusion of the self-employed may have a positive effect on road safety, but it is hard to quantify. The Commission is conscious that other factors, such as age, and in particular stress, may play an equally important role in promoting fatigue particularly amongst the self-employed drivers and recognises that the new driving and rest time rules and stricter enforcement of such rules may play an equally valid role in minimising fatigue and stress.

3.3. Conditions of competition and structure of the profession

The second aim of the Directive and an important reason for the Commission initially proposing the inclusion of self-employed drivers within the scope of the Directive is to prevent distortion of competition and ensure a level playing field for

⁸ OJEU L 102, 11.4.2006, p. 35

all road transport operators. The Commission feared that exclusion of the self-employed driver would promote fragmentation of the industry, given that it operated in a highly competitive environment. The phenomenon of an operator encouraging his drivers to become nominally self-employed but working exclusively for him, known as 'false' self-employed drivers, might become more attractive and more prevalent. As a result, such operators and their in-house sub-contractors would compete on an unfair basis.

In terms of the structure of the profession, one of the distinguishing features of the road transport sector is the fragmentation present in the industry. Within the Union, 95% of the road haulage companies are micro-enterprises with less than 10 employees (small firms or one-man operations). Only 1% comprises companies with more than 50 employees.

In the absence of concrete data on the effect of the application of the Directive's provisions to mobile workers, the consultants have looked at trends within 'clusters' of Member States, namely those groups of Member States where the structure of the road transport sector appears to be similar. Four Member State clusters were designated: South/Mediterranean (ES, FR, GR, IT, PT) – many self-employed, few large companies, growth in consolidation noted; Middle/Western (AT, BE, DE, IE, LU, NL, UK) – few self-employed, many large companies, growth in consolidation observed; Northern (DK, SE, FI) – few self-employed, few large companies, increasing fragmentation detected; and New Member States (BU, CY, CZ, EE, LT, LV, HU, MT, PL, RO, SL, SK) – many self-employed, few large companies, increasing fragmentation noted. The consultants considered that exclusion of the self-employed would encourage a continuation of the current trend towards fragmentation in the latter two clusters while provoking a small increase in self-employed drivers in the former two clusters. Moreover no significant impact on competition within the industry was expected from a continued exclusion of the self-employed. They would retain their current role as low-cost subcontractors in the Member State cluster where large companies predominate, or compete on an equal basis with other self-employed drivers in those Member State clusters where they make up the majority of the road transport sector.

The circumstances of individual Member States concerning the structure of the transport industry are set out in full in chapter 6.2 as well as in annex 3 of the consultants' report.

By contrast, inclusion will result in an increase in the cost burden and a reduction in working time, so the competitive advantage of the self-employed within the road freight industry will be substantially reduced. The larger firms would then be in a more competitive position as they could cope with reduced hours through efficiency measures. This could then strengthen the consolidation process within the industry.

The lack of any significant change in the conditions of competition, were exclusion of the self-employed to remain in place, however still leaves the issue of the 'false' self-employed. It is this issue that could also lead to an artificial fragmentation within the structure of the profession, should the Directive not be applied to self-employed drivers.

The Commission considers that working time rules should be applied to 'false' self-employed drivers. It notes that many Member States have not correctly transposed the particular distinction made between "mobile worker" and "self-employed driver", which the Directive introduces in Articles 3(d) and (e) respectively. A self-employed driver is closely defined: he has a Community licence/professional transport authorisation, is entitled to work for himself, is not tied to an employer by a contract or any other type of working hierarchical relationship, is free to organise his working activities, generates income from the profits made, may cooperate with other self-employed drivers and has commercial relations with several customers. Otherwise, the driver is considered a mobile worker. The Commission intends to focus efforts on the correct application of the definition of mobile workers in the Directive.

The Commission also considers that addressing this issue will minimise artificial fragmentation within the industry. It also notes that other constraints, such as stricter criteria for admission to the occupation of road transport operator may provide a counterbalance to any potential fragmentation pressure that exclusion of this category of driver could produce⁹.

3.4. Social Aspects

The Commission recognises by the term 'social aspects' not only health and safety and working conditions of mobile workers and self-employed drivers, but also remuneration and the work-life balance. Taken together, all these aspects contribute to an image of the profession, one which to date has proved insufficiently attractive to counteract the continuing shortage of professional drivers throughout the Union.

The circumstances in each Member State relating to the working environment of the road transport profession are set out in full in paragraphs 2.4.3 and 2.4.4 of the consultants' report as well as in its annex 4.

In terms of income, the consultants have noted that for those clusters of Member States where small companies or self-employed drivers form a large proportion of the sector, income is considered to be in the high bracket – this reflects the long hours that such drivers normally are expected to work. For the Middle/Western cluster of Member States, where a relatively small percentage of self-employed drivers serve mainly larger transport companies as subcontractors, a lower income bracket is the norm. Exclusion of the self-employed allows them to maintain their income level, as well as their competitive position within the sector. While the Directive does not address the issue of profitability it is evident that this is a key aspect for the future viability of the self-employed driver. Applying the Directive's provisions will have an inevitable impact in this area, rendering the profession less financially attractive.

The consultants confirmed that inclusion would reduce the physical workload to be undertaken by self-employed drivers. For the psycho-social work profile in the sector, they considered the impact of inclusion mixed, noting that work demands would have to be managed within a shorter timeframe, leading to a loss in job

⁹ See Summary of contributions received by the Commission in response to the consultation paper "Revision of the Community legislation on access to the road transport market and admission to the occupation of road transport operator". Web site: <http://ec.europa.eu/transport/road/consultations>

control. From their survey it is also clear that in comparison with other workers, self-employed drivers currently report more work-related health problems, wish to work less extra hours and are less satisfied with the fit between work and family life. Yet a reduction in working time would also lead to a reduction in income.

The Commission notes that from the consultants' survey the profile of the self-employed driver is a young entrepreneur. Given the continuing chronic shortage of drivers within the sector, such drivers have the choice of becoming a mobile worker or a self-employed driver. The latter offers them the possibility of increased job control and higher income, with the need to invest more time and energy to make it profitable.

Thus, while continued exclusion may be preferable for economic reasons, the possible social impacts of exclusion or inclusion are less obvious. Exclusion may not help to mitigate health and safety problems; on the other hand inclusion may generate additional stress and administrative workload for the self-employed while reducing their income.

3.5. Conclusions

The Commission has taken note of the results of the consultants' extensive survey and study as well as the views expressed in subsequent meetings with Member States, and the social partners during September 2006 when the initial findings of the survey were presented.

While the Commission recognises that limiting working time for the self-employed may bring a certain improvement in road safety, this improvement is difficult to quantify in relation to other factors contributing to fatigue. Difficulties with inspections cited by governments in the consultants' survey and the consistent line of a majority of Member States during the three year debate on enforcement through Directive 2006/22/EC to exclude a systematic enforcement of the working time rules from its scope may in practice render the Directive's provisions ineffective, particularly concerning self-employed drivers.

In a largely fragmented sector, it appears that exclusion of the self-employed will tend to reinforce the current trends within the structure of the profession and allow self-employed drivers to maintain their competitive position within the industry. Addressing the issue of 'false' self-employed drivers should counteract any artificial fragmentation.

In terms of social impact, the Commission acknowledges that the balance of overall disadvantages and advantages of exclusion or inclusion is mixed. An increase of working hours for self-employed drivers, made possible by exclusion from the Directive might be considered not desirable in itself in terms of improving the health and safety of drivers. But inclusion might impose greater emotional stress and financial difficulty for the self-employed, be difficult to enforce and therefore ineffective.

Further impact assessment prior to the legislative proposal referred to in Article 2.1 of the Directive would be required. The impact assessment should also take into account several new elements arising since the adoption of Directive 2002/15/EC:

- the new Regulation on driving times and rest periods, the new enforcement Directive and the introduction of the digital tachograph have redressed the balance in terms of minimum daily and weekly rest periods to which all drivers are entitled, the strengthened quality and quantity of enforcement activity for driver's hours, and the introduction of a more accurate, tamperproof recording device for driver activity.
- the Commission envisages encouraging active enforcement of enhanced operator conditions through a new proposal on admission to the occupation to be adopted in 2007. This will help address the phenomenon of the 'false' self-employed.
- the Commission intends to focus on a correct and enforceable application by Member States of the Directive's definition of mobile workers which encompasses false self-employed drivers. This will initially be through dialogue with Member State authorities and the social partners, ensuring a correct alignment, but also by identifying and promoting best practice in terms of enforcement, and ultimately by making use of the legal instruments available under the Treaty if it considers this to be appropriate.

The Commission will also consider in this impact assessment the continued exclusion of the genuine self-employed from the sectoral working time rules while at the same time ensuring a rigorous interpretation and implementation of the definition of "self-employed drivers" contained in the Directive so that the working time rules apply to the "false self-employed".

4. NIGHT WORK RULES

4.1. Introduction

The introduction of common limitations on working time for night workers has been contentious in some Member States, as goods transport often happens at night when there is less traffic on major roads. The advantage of travelling further during the night due to a lack of traffic congestion is rendered less favourable by a specific limitation on night workers' working hours. Nevertheless it has to be acknowledged that during this time the level of traffic accidents is twice that during other periods¹⁰ and that fatigue is a relevant factor.

4.2. Consequences of the Directive's night work rules

Those mobile workers, whose working hours fall within the night time period determined by the Member State or agreed between the social partners, may work up to 10 hours in any 24-hour period. The consultants note that in many Member States such rules on night time limits already exist and that therefore the impact of the stipulations of the Directive is limited. However, they also note that from their data it is evident that night workers already work long hours and suggest therefore rather the promotion of a fatigue management programme. The issue of enforcement of the

¹⁰ European Commission CARE database

current limits, like enforcement of working time rules in general, remains to be studied more closely.

While it appears that there is no demand to change or further harmonise the current night time provisions, the element of enforcement of the rules deserves more detailed examination.

4.3. Conclusions

While there appears to be no demand to adjust the current provisions, the issue of enforcement is pertinent. The Commission will examine further in consultation with the relevant Member State enforcement authorities and with the social partners meeting at European level how they ensure respect for the night time rules and in what ways compliance can best be achieved.

OVERALL SUMMARY

The Commission will now carry out a formal impact assessment in view of a legislative proposal modifying the Directive 2002/15/EC as requested in its Article 2(1).

The Commission will consult Member States and the social partners meeting at European level to examine further arrangements for ensuring respect of working time rules.