



Maritime & Coastguard Agency

Consultation on proposed Merchant Shipping (Working Time: Inland Waterways) (Amendment) Regulations 2016

PURPOSE OF THIS CONSULTATION

This consultation seeks views on proposals to implement Directive 2014/112/EU implementing the European Agreement concerning certain aspects of the organisation of working time in inland waterway transport, concluded by the European Barge Union (EBU), the European Skippers Organisation (ESO) and the European Transport Workers' Federation (ETF).

On 23 June, the EU referendum took place and the people of the United Kingdom voted to leave the European Union. Until exit negotiations are concluded, the UK remains a full member of the European Union and all the rights and obligations of EU membership remain in force. During this period the Government will continue to negotiate, implement and apply EU legislation. The outcome of these negotiations will determine what arrangements apply in relation to EU legislation in future once the UK has left the EU.

The documents attached are:

- Appendix 1 to this document, showing the changes to offences and penalties compared to the 2003 Regulations;
- The proposed Merchant Shipping (Working Time: Inland Waterways) (Amendment) Regulations 2016
- An unofficial text of the Merchant Shipping (Working Time: Inland Waterways) Regulations 2003 (the 2003 Regulations) with the proposed amendments incorporated
- Draft Merchant Shipping Notice supporting the Regulations
- Draft Regulatory Triage Assessment, explaining the impact of the proposed Regulations on UK operators. This is based on informal discussions with UK operators and unions.

This formal public consultation follows engagement with representatives of UK inland waterway transport operators (passenger and cargo) and unions over the last three years, while the Directive was being negotiated and during preparation of these proposals.

NOTES ON THE DRAFT REGULATIONS

Application

Mobile workers

Directive 2014/112/EU applies to “mobile workers”, defined as “travelling personnel”.

The proposed Regulations amend regulation 2(1) of the 2003 Regulations to (r2(1)) define workers by the following criteria:

- Employed by an undertaking which operates services for passengers or goods
- On a vessel to which the Regulations apply (see regulation 3)
- as a member of travelling personnel

“travelling personnel”

There are large number of operations in the UK, catering primarily for leisure travellers and tourists, which operate from and return to a fixed point with the same passengers. Such operations may return to that point several times during the day, and those working on the vessel have the opportunity to go ashore during the day, and will always be able to return home at the end of the day.

The MCA is considering whether such personnel should in fact be deemed “travelling personnel”. If not, they would be subject to the Working Time Regulations 1998 instead of to these Regulations. This would mean, for example, that their weekly working time was limited to 48 hours averaged over 17 weeks instead of over one year, but the record keeping requirements for such workers would be less prescriptive, and health surveillance would only apply to those engaged in night work, or to workers for whom there was evidence of a risk to their health from their work. The MCA believes this would be more in keeping with the level of risk attaching to their work.

Question 1: Should vessel crew who return to the same departure point at the end of each voyage with the same passengers be considered as workers for the purposes of the Regulations (i.e. are they travelling personnel)? If not, should there be a time limit on the length of an individual voyage to which this provision applies?

Vessels to which the Regulations apply (regulation 3):

The Regulations apply to any ship which:

- (a) does not ordinarily go beyond the limits of waters of category A, B, C or D (as categorised in Merchant Shipping Notice 1837(M)); and
- (b) is not a pleasure vessel.

The Regulations therefore apply only in the United Kingdom and applies regardless of the flag of the vessel. If a UK ship were operating on inland waterways in other

countries in Europe, the local administration would enforce the Directive for the workers on the ship under local regulations.

It is intended that these Regulations, along with Working Time Regulations 1998, the Merchant Shipping (Hours of Work) Regulations 2002 as amended, and the Merchant Shipping (Sea Fishing: Working Time) Regulations 2004 should between them provide seamless coverage for every worker (or seafarer) in the maritime sector in the UK maritime sector or on a UK ship, and so ensure that every worker is protected by appropriate legislation governing their working time. In principle, duplication should be avoided so that where one set of regulations applies, the others do not.

However, it is recognised that in practice there are workers and vessels which work at the margins of each regime and/or cross boundaries between different regimes. The MCA believes that there are safety implications, as well as administrative burdens, if workers have to chop and change between different regimes. Indeed, one of the objectives of Directive 2014/112/EU was to provide a harmonised regime on inland waterways (across national borders) so that vessels were not moving between different working time rules. In cases where more than one regime could apply, therefore, the MCA will be satisfied if the employer and workers have agreed to apply one regime which applies to them and comply with that set of requirements.

This is the arrangement which has been applied under the 2003 Regulations up to now, and the MCA intends to continue. In case of a challenge by workers, it would be for the courts to decide on the appropriate regime for the particular operation in the light of the circumstances of the case.

Question 2: Are you content with this pragmatic arrangement as regards selection of a working time regime?

The Directive applies to those working on vessels in the commercial inland transport sector. This means any vessel operating transport services for passengers or goods by inland waterway.

Where the provisions of the Directive are considered more favourable to workers on other inland waterway vessels, and where collective agreements are in place governing working conditions, the Directive may be applied to those workers.

Maximum working time and minimum rest

The 2003 Regulations set a maximum average working week of 48 hours per week, calculated over a reference period of 17 weeks, which can be extended to up to six months if certain criteria apply. In addition, there is a requirement for “adequate rest” and at least 77 hours rest in any seven day period.

Under the proposed Regulations, there is considerably more prescription:

a. Maximum daily working time: no more than 14 hours work in any 24 period.

b. Maximum weekly working time: no more than 84 hours work in any 7 day period – but this only applies if workers have at least as many rest days as working days (e.g. working a pattern of two weeks on, two weeks off) For other workers, see **e.** below.

c. Maximum annual working time: this is based on a 48 hour week, calculated over the maximum number of worker weeks, taking out annual leave entitlement. For those working for a period of less than a year, the maximum working time for their period of employment must be pro-rated.

d. Maximum average weekly working time: in addition to the maximum working time for any one week, the requirement for an average working week of no more than 48 hours remains, but the reference period would be extended to one year, allowing for seasonal peaks and troughs. Where the period of employment is less than one year, the average weekly hours are calculated over the total number of weeks of employment.

e. Maximum average weekly working time where there are more working days than rest days: no more than 72 working hours in any 7 day period (instead of b. above).

Health assessment /safety and health protection for night workers and shift workers

Annual health assessment

The Agreement entitles workers to a free annual health assessment. Guidance is included in the draft MSN.

Question 3: Is the guidance helpful?

Question 3.1: Does it make clear that a health assessment is not the same as a medical fitness examination?

Question 3.2: Would a suggested proforma for health assessment, which operators could adapt as necessary, be useful?

Health assessment for night workers/Transfer of workers from night work to day work

This makes little change to the requirement in the 2003 Regulations for health assessment for night workers, which is in line with health surveillance provisions under other working time regimes.

Length of night work

Night work (working between the hours of 11pm and 6am) is limited to 42 hours per week.

Safety and health protection for night workers etc.

Regulation 7D makes provision for the MSN to specify protections to be provided to these workers. HSE publishes a straightforward, practical booklet of advice for those working or managing those working at night or on shifts. This is available to purchase, or to download free of charge from <http://www.hse.gov.uk/pubns/priced/hsg256.pdf>

This is non-prescriptive and provides a range of possible measures to consider.

Question 4: Are there any particular measures which should be prescribed for workers on inland waterways?

Young persons

This provision comes from Directive 94/33/EC. Employers must not allow those under the age of 18 years to work at night, except as part of a recognised course of training.

Question 5: The draft MSN lists at section 6.6.2 those training courses which MCA recognises in the context of inland waterway vessels. Are there others that should be listed?

Directive 94/33/EC defines night as between 11p.m. and 7a.m. or between 10p.m. and 6a.m. The draft Regulations specify between 10p.m. and 6a.m, for clarity.

Question 6: Do you have a preference between the two options for “night” in this context?

Adequate rest breaks

The provision of adequate rest breaks where made necessary by a pattern of work is work is carried forward from the 2003 regulations. In order to fully implement the Agreement, the conditions where these are required are expanded to include work at a predetermined rate.

Storage of records (MSN para 8.3)

The Directive says records must be kept on the vessel for one year. However, it is recognised that many inland waterway vessels in the UK have minimal storage capacity. MCA will therefore accept records being kept ashore, provided that workers are aware that this is the case, and have ready access to the records if required. MCA must also be able access the records easily for inspection (by arrangement). Guidance on this point has been included in the MSN.

Question 7:

Q7.1 Do you agree this guidance is needed?

Q7.2 Do you agree with the proposed arrangements for the storage of records?

Rest periods

Adequate rest (MSN para 9.1)

The Social Partners' Agreement does not explicitly require “adequate rest”. This is carried forward from the 2003 Regulations. The Directive states that implementation must not be used to justify a reduction in the protection of workers (article 2.2).

Question 8: Do you agree that removing the provision for “adequate rest” would result in a reduction in the protection of workers, in view of the prescriptive requirements in the proposed Regulations governing rest?

Under the 2003 Regulations, “adequate rest” cannot be less than 77 hours rest in any 7 day period. The Agreement extends this to include:

Minimum daily rest: 10 hours in any 24 hour period, including at least 6 hours of uninterrupted rest. This is the same as the provisions for seafarers.

Minimum weekly rest: 84 hours rest in any 7 day period.

Rest breaks:

The Directive requires any worker working continuously for more than 6 hours to have a rest break. The Regulations define this in accordance with working time regulations for workers ashore.

Working Days and Rest Days

No worker may work continuously for more than 31 days without a rest day (a period of at least 24 hours with no working time).

The Regulations set out how to calculate the number of rest days to follow each period of consecutive working days.

Entitlement to annual leave/payment for annual leave

The draft Regulations are unchanged from the 2003 Regulations, allowing 4 weeks of annual paid leave.

The Regulations governing annual leave for workers ashore were amended between 2009 and 2014 to ensure that all workers were entitled to leave in respect of public holidays.

Question 9: Do you agree that the paid leave entitlements for workers on inland waterways should be extended, in line with the entitlement of other workers in the UK, to 5.6 weeks per annum or pro-rata for periods of less than one year? If not, please give reasons.

Exceptions

Exceptions are made for those who can determine their own working time (carried forward from the 2003 Regulations) and for emergencies. If a worker has to work during scheduled rest time because of an emergency they are entitled to compensatory rest.

The 2003 Regulations provided a number of exceptions for particular types of work (old regulation 14) and a provision for collective or workforce agreements to modify the application of certain provisions of the Regulations (old regulation 15). These are no longer required because the Social Partners Agreement which the Regulations

implement specifically takes account of the characteristics of the sector. The Agreement therefore supersedes the generic exemptions and the provision for collective agreements.

In addition, regulation 15 provides an alternative regime which employers may (but are not obliged) to apply on a passenger vessel during the peak season.

Power to require information

Regulation 16 - this provision is unchanged.

Offences/Remedies

The same principle has been applied as under the 2003 Regulations (and the Working Time Regulations for shore-based workers) that employer duties should be enforced by the MCA, and worker entitlements should be enforced through the right to take a case to an employment tribunal.

Regulation 17 (offences) has been amended to provide for the enforcement of a number of the new rights contained in the Regulations:

The offences, some of which are carried forward from previous legislation (see Appendix 1 - in separate document) are:

- Failure to ensure that the worker does not exceed daily, weekly or annual maximum working time (*regulation 6, 6A, 6B*)
- Failure to ensure that the worker does not exceed weekly average maximum working time (*regulation 6C(2), 6D*)
- Failure to provide opportunity for health assessment before being assigned night work (*regulation 7A(1)*)
- Failure to transfer worker from night work to day work if appropriate (*regulation 7B(1)*)
- Failure to ensure worker does not exceed maximum hours of night work (*regulation 7C*)
- Allowing worker under 18 years of age to work at night, other than as permitted by regulations 7E(2) (*regulation 7E(1)*)
- Failure to ensure a worker is given adequate rest breaks where their pattern of work puts their health and safety at risk (*regulation 8*)
- Failure to ensure that workers under 18 years are provided with suitable compensatory rest if working at night (*regulation 7E(3)*)
- Failure to keep records of hours of work and rest, and retain on board until at least the end of the reference period (*regulation 9(1)*)
- Requiring a worker to work more than 31 days consecutively (*regulation 10B(1)*)
- Failure to provide MCA with requested information on night workers (*regulation 16*)

In all merchant shipping legislation, prosecution is a “last resort” if other sanctions (detention, or prohibition or improvement notices) cannot be used (because the offence is no longer continuing) or have been ineffective.

Employers who fail to comply will be guilty of a summary offence punishable in England and Wales by a fine or in Scotland or Northern Ireland by a fine not exceeding the statutory maximum.

Regulation 18 (remedies) has been updated to include a number of new rights for workers to bring a complaint before an employment tribunal (industrial tribunals in Northern Ireland). Workers have the right to take a case to an employment tribunal if they do not receive their entitlements to : -

- Adequate rest (*regulation 10(1)*)
- Suitable compensatory rest for workers under 18 years if working at night (*regulation 7E(3)*)
- Minimum periods of daily and weekly rest (*regulation 10(3)(a) and (b)*)
- Rest breaks (*regulation 10A(1)*)
- Failure to provide appropriate number of rest days (*regulation 10B(2)*)
- Paid annual leave (*regulation 11(1)*)
- Annual free health assessment (*regulation 7(1)*)

These rights are broadly consistent with (but not exactly the same as) those of shore-based workers and include the right to bring a complaint for lack of: rest breaks, compensatory rest for young workers, consecutive rest days after consecutive working days and failure to provide for health assessments. The Department for Business, Enterprise and Innovation Strategy in England, Scotland and Wales, and the Department for the Economy in Northern Ireland, have policy responsibility for employment legislation and, accordingly, the proposals will be discussed with them before the amendments contained in the Regulations are made.

Question 10: Please let us have your views on the proposed offences and remedies.

Q10.1 Do you think we have the right balance between offences and remedies?

Q10.2 Do you think the penalties are at an appropriate level?

Q10.3 Do you think that the offences/ remedies are consistent with shore-based workers under the Working Time Regulations 1998?

Schedule 2 has been amended to omit references to legislation which have been revoked.

Review

All UK legislation implementing international or European standards is subject to a 5-yearly review. Draft regulation 19A applies the standard provision for such a review to these Regulations.

SUMMARY SHEET: QUESTIONS

“Travelling personnel” (page 2)

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Application(page 3)

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Offences and penalties (page 8)

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