

**TIME FOR A CHANGE? THE EUROPEAN UNION AND THE
REGULATION OF WORKING TIME**

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DRAFT PAPER: COMMENTS WELCOME

Compared with the early period of European construction, in the 1990s it became less clear how the European Union's could define a new collective 'modernisation project' (Wallace 1996a: 7). In the area of socio-economic adjustment, new challenges and pressures appeared, under the general heading of 'globalisation', to offer the potential for a new modernisation project. But important tensions remained between the desire to conserve and protect (seen notably in the concern expressed about the future of the 'European social model') and the desire to embrace change in a way which did not simply mean abdication of responsibility to market forces. Several such ambiguities may be seen today in the various 'third way' projects marking the renewal of social-democratic parties in Western Europe. Policy redirections in member states, or 'policy reappraisal' (Wallace 1996a: 8), helped to change the EU agenda, towards the search for 'competitiveness' and greater labour market flexibility. At the same time, the Economic and Monetary Union project, with its more or less explicit subtext of labour market reform,¹ ensured a role for specifically European institutions and policies. In addition, the need to ensure greater labour market participation for both men and women - spurred by double-digit unemployment rates - led to the creation of a new base, via soft law,² for employment-related policies. Thus, although social policy measures in the field of work remained in the shadow of market-building and geopolitical considerations, they became more central to the EU's search for a collective modernisation project in the 1990s. The question is: did this change of context mark a new departure for the European Union in its regulatory capacity, style and methods?

Regulation appears to be a particular feature of the EU polity, mainly due to the tension between national and supranational actors. The dominance of national government means that the EU budget is quite small, so the scope for distributive or redistributive policies is very limited. In institutional terms, the Commission can only strengthen its role by expanding the scope of regulatory activities, and this is what has happened in several areas (Majone 1998: 18-19). The rationale for supranational regulation is regulatory failure at national level, rather than simply market failure (which can be managed by cooperation rather than the delegation of regulatory powers). In the economic and social sphere, there is a positive advantage for governments to delegate regulatory powers because of the difficulties of enforcing regulation. The transfer of regulatory tasks to a supranational authority may improve the behaviour of regulated business companies and thus has the advantage of delegating difficult decisions (Majone 1998: 20-21). Seen in this way, supranational regulation may be an instrument of national modernisation projects, helping governments in their bargaining with business. It should also be noted here, following Majone, that studies of supranational regulation need to take into account not only the relationship between national governments and supranational institutions (especially

¹ The United Kingdom, not currently a member of the Euro-zone, has been particularly insistent on this theme. Thus, for example, Labour MP Alan Donnelly, arguing on Radio Four ('Continental Drift', 19 May 1999) that the euro made it imperative from France to learn from the UK, lower wage costs and reform the welfare system, particularly pensions.

² Jacques Delors' 1993 White Paper on 'Growth, Competitiveness, Employment', leading to the Essen summit in December 1994. The guidelines agreed at Essen for combatting unemployment and mainstreaming anti-unemployment measures into EU economic policy served as a reference point for subsequent measures.

DOMESTIC POLICIES ON WORKING TIME

In most EU member states as generally in industrialised countries, the long-term trend over the twentieth century has been a significant drop in working time per employee (which includes holidays as well as weekly or monthly reductions in working hours, although not early retirement which has also been a feature of the late twentieth century). A long-standing trade union demand particularly in heavy industry, the reduction in working hours shows a redistribution in favour of workers, sometimes through legislation, but more normally through collective bargaining or a combination of both. However, since the mid-1970s (a time when trade unions started a new campaign for reduced working hours), the decline in actual time worked per employee has slowed down considerably. In addition, what appears to be reduced working time per employee is the effect of an increase part-time work alongside long full-time hours (Lehndorff 1998: 601). In the UK, working time for those in full-time employment has actually increased since the early 1980s. Overall, the figures indicate that collectively agreed reductions in working time waned in the 1980s and 1990s. Nevertheless, where bargaining on WTR took place, such as Germany, working hours have been spread more evenly than the traditional pattern which shows a distinct bump at 38-40 hours per week.

For several reasons, the bargaining agenda regarding working time has been radically transformed, since 'changing temporal flexibility is considered to be a vehicle for changes in the way labour markets operate' (Bastian 1998: 103). One factor which lies outside the traditional sphere of collective bargaining is the increased labour market participation of women, who continue to form the majority of part-time workers. Women working part-time accounted for 42.7% of employment growth between 1983 and 1992 (Rubery et al 1998: 34). Female labour market participation and the relative importance of part-time work vary across countries; generally speaking, where female participation rates are high, part-time working by women is also relatively high (this is true particularly of Britain, the Netherlands and Sweden, and to some extent Germany).³ The need to encourage greater employment rates for women and to enable them to 'reconcile work and family life' (often in the absence of adequate childcare provision) has constituted one of the main reasons for state efforts to promote part-time work and flexible forms of work in the 1980s and 1990s.

A further reason for renewed interest in working time issues has been businesses' desire to cut costs in the face of ever-keener competition. Part-time work in particular has traditionally been seen as a cheap means of providing flexibility, especially as part-timers often did not enjoy the same rights as full-timers in respect of bonuses, social security and pension contributions and benefits, sick pay, overtime pay, fringe benefits, statutory protection against dismissal and so on. In the 'open all hours' culture of the contemporary market-place, part-time work can be used to fill in the gaps, involving unsociable hours or flexible rostering. In the UK, for example, part-timers have been used to staff retail outlets open on Sundays, with no or reduced

³ France is close to the average, with a slightly higher than average employment rate for women and a slightly lower rate of part-time work by women. Finland presents an atypical case of high female labour market participation and very low rates of part-time work by women. Italy and Spain have lower rates of female employment and very low part-time work by women.

the Commission), but also wider relationships with economic and social actors, particularly business firms.

Regulatory growth in the may be charted along different dimensions: quantitative growth, technical complexity, task expansion and policy innovation (Majone 1998: 15). Given the narrow constitutional base of EU social policy, quantitative growth has been limited. But some task expansion has taken place, with the broadening of definitions (for example, education and citizenship). Most strikingly, the narrow constitutional base of EU social policy offers greater scope for innovation than is the case for traditional policy areas. As Giandomenico Majone notes, social regulatory measures require the efforts of a policy entrepreneur (normally the Commission), but also the opening of a window of opportunity which occurs when problems, politics and policy ideas come together: 'Most important policy innovations in the EC have been achieved after many years during which the Commission persisted in its attempts to "soften up" the opposition of the Member States, while waiting for a window of opportunity to open' (Majone 1998: 25). The Single European Market appears to have provided a crucial breakthrough by defining social policy in terms of standards rather than its economic function, thus allowing policy innovation particularly in the use of health and safety legislation which substantially improved on and expanded the scope of national provision in the powerful bigger member states (in particular, by introducing the concept of the working environment).

However, as Kenneth Armstrong and Simon Bulmer note, the Single European Market represented both regulatory and deregulatory trends. The SEM appeared at a time when regulation in the economics-derived sense of regulating market access and competitive behaviour came onto the agenda in member states, just as regulation in the sense of system-steering and rule-making seemed necessary because of the logjam in the Rome Treaty process (Armstrong & Bulmer 1998: 8-9). As indicated above, if anything this tension increased in the 1990s and found expression, rather than resolution, in the Treaty of Maastricht.

As with many policy areas within EU social policy, European-level regulation of working time comes up against markedly different regulatory frameworks and traditions in member states: broadly speaking, contractual versus legal, although it is also possible to see them in terms of individual versus collective regulation. Several questions arise: to what extent can EU regulation provide a minimum floor allowing different national regulatory frameworks to coexist? Or does EU regulation push member states along a certain path, towards greater legal regulation or towards contractualisation or individualisation of labour relations? Do the implementation problems posed by the existence of several competing frameworks squeeze out any scope for supranational regulation?

This paper discusses two pieces of legislation within the context of regulatory trends in the EU and in EU member states: the Working Time Directive and the Directive on Part-Time Work. These pieces of legislation represent different regulatory approaches corresponding to the SEA and the Maastricht Treaty. They will be examined with particular reference to current changes in the regulatory framework of the United Kingdom, the EU member state which has seen the biggest shift in its approach to supranational social regulation.

overtime payment (Rubery 1998). Part-time work has generally not been prioritised by trade unions and is therefore largely invisible in collective agreements. Given the cost-cutting rationale behind use of part-time work, hours tend to be decided on an individual basis with little scope for collective regulation, whether formal or informal. In a country which dismantled most of the statutory protective mechanisms regulating work in the 1980s, this trend shifts the power further towards employers, especially as employment relations become more individualised and trade unions weakened.

In the Netherlands, on the other hand, the development of part-time work has been promoted by national-level agreements between the social partners, backed up by legislation. Part-time work has been the principal, but not the only instrument of an overall decrease in working hours and increase in flexible forms of working. In November 1982, the Wassenaar Accord recommended across-the-board working-time reductions, to be calculated by year rather than by day or week (based on the use of 'roster-free days'), with pay increases phased over several years. Since many workers took their time off in the form of increased leave, the traditional model of 5 x 8 hours remained the norm in the 1980s, however. Legislation passed in 1993 and 1996 took a different tack; it sought to encourage part-time work (defined as less than 35 hours per week) by ensuring equal rights for part-timers (to holiday pay, bonuses and training etc.). By the mid-1990s, 10% of the male and 58% of the female labour force was working part-time (Plantenga & Dur 1998: 681-2). This approach represented a change of bargaining strategy especially on the part of trade unions, who saw it as their mission not just to protect their members in the core workforce but also to help women into the labour market, to share jobs and to encourage economic growth. Thus, the male 'breadwinner model' is retained but modified to integrate women, giving them equal rights if not equal earning power. The consensual nature of the change, together with its economic benefits, led many in other EU countries to advocate the 'Dutch model', characterised as negotiated 'flexicurity'. 'Flexicurity' entails that 'greater flexibility in contracts may not lead to a disproportionate deterioration of worker protection as far as their legal status is concerned' (Dutch Ministry for Social Affairs and Employment, quoted in O'Reilly & Spee 1998: 267).

'Flexicurity' potentially offers a new policy direction for the EU, following the social-democratic ethos of much proposed workers' rights legislation in the 1970s and 1980s, and is evident in the rhetoric of DGV in the 1990s, with its emphasis on reconciling social protection and economic competitiveness. However, it is not uniquely European: the International Labour Organisation embraced a similar approach in the early 1990s, notably in relation to the abandonment of rules prohibiting night work for women and also on part-time and flexible forms of work. In the EU, two sets of constraints apply: first, as already mentioned, different regulatory traditions exist in member states; secondly, member states have traditionally been reluctant to transfer regulatory powers to the supranational level, whether through fear of a dilution of existing regulation or fear of regulation. But the possibility of convergence arises, as the highly regulated states find fixed rules an obstacle to competitiveness, and political and economic pressures limit the scope of cost-cutting in the least regulated states. According to Guy Standing, 'any system of social relations of production and distribution evolves through a phase of flexibility into one of inflexibility and rigidity, which contains the seeds of its own demise, and which unwinds through an era of "flexibilization"' (Standing 1997: 7).

The UK and the Netherlands stand out as markedly different approaches to the regulation of work, although both have resulted in high levels of part-time work. In general, Western European countries have been less active in promoting part-time work. Other means of rendering working time more flexible include calculation of working hours over a period of several months (usually three or four) or even on an annual basis, instead of by the week, and shift work to include weekend or evening/night work with compensation by time off instead of full overtime payment. In those countries characterised by legal regulation of work (that is, all member states except the UK and Ireland), a common trend has been the 'flexibilisation' of labour legislation through state encouragement of collective bargaining on working time, with the specific purpose of allowing derogations from legislative floors or ceilings. This entails a modification of the societal bargain without abandoning it altogether. But the practical impact of such change can be extremely far-reaching. Thus, a country like Spain which has been severely criticised for its rigid labour market rules has seen a marked decentralisation of bargaining of temporal flexibility to sectoral, and increasingly to company level in the case of large enterprises. In the UK, the main actors have been businesses seeking either to modify collective agreements to make them more flexible (particularly through annualisation of hours or flexible rostering) or to introduce new, variable forms of individual contract (temporary work or 'zero hours' contracts where employers are free to decide and change hours worked). Nearly 1.5 million people in the UK work under an annualised working hours system, for which there are no legal requirements. Thus, the form of regulation depends on the existing regulatory framework but it is important to note that there is always some form of regulation, whether collective or individual, legal or contractual, formal or informal.⁴ In general terms, we see a move away from blanket protective regulations towards decentralised regulation and promotional and facilitating regulations.

If increased female labour force participation and business cost-cutting have increased pressure for more flexible forms of working, a third concern has been unemployment. As Jens Bastian notes, 'The "black cloud" of unemployment has been a familiar characteristic of EU summits for over a decade' (Bastian 1998: 91). Here, too, approaches vary. The view espoused by the OECD is that unemployment in the EU is caused mainly by labour market rigidities, hence the remedy prescribed focuses on supply-side adaptation. As modified and repackaged by British New Labour, this remedy was adopted at the Luxembourg employment summit in November 1997 under the heading of 'adaptability' and 'employability'. The major change in relation to Thatcherite supply-side economics is that the 'employability' strategy does not leave everything to the market: individuals have a responsibility to equip themselves for the necessary training to find and move between jobs, but the state also has a role in providing the infrastructure to enable them to do that. For this reason, the idea has been ambiguous enough to win support across all member states, and its precise relationship with older approaches based on worksharing is glossed over. In France, for example, 'employability' was cautiously welcomed as an alternative to the bogey-word 'flexibility', and the government proclaims no incompatibility between

⁴ Guy Standing comments that 'There is no such thing as "deregulation" of labour markets. No society could exist without modes of regulation, and one of the stupidest terms that was to come into popularity in the 1980s and 1990s was deregulation.' (Standing 1997: 10).

'employability' and the law on the 35-hour week, which adopts a worksharing approach but is significant above all as a French variant of the trend towards the use of collective bargaining to promote new forms of work regulation. The French case has undoubtedly reinvigorated the debate on working time reduction in order to reduce unemployment and even been emulated by some countries, although it has been severely criticised by the OECD and by the European Commission. Elsewhere, active labour market policies such as the Scandinavian examples held up as a model by the European Commission, including innovative use of worksharing in the public sector, paid leave arrangements and training sabbaticals for employed and unemployed people represent a very different approach to the British one, but fit broadly into the heading of 'employability' whilst reflecting a different societal bargain.

Such common pressures are global in the sense that they affect all industrialised countries, but can be regarded as specifically European in their impact on the post-war societal bargains and the regulatory frameworks they created. Convergence at a very general level could provide a window of opportunity for EU regulation. This may be seen in the way the Commission has used the Essen guidelines as a reference-point for further action, paving the way for common actions through the employment provisions of the Amsterdam Treaty. Furthermore, decentralisation of decision-making and the shift towards collective bargaining or employer-led contractualisation of employment relations indicates a weakening of nation-centred policy-making and a move towards governance which could, it is argued by some, be more conducive to EU-style regulation (see Armstrong & Bulmer 1998: 256-260). Yet the diversity of policy responses (shown, for example, in the still very different rates of part-time work), to the extent that competing models may be identified, suggests the difficulty of agreeing on any pan-European strategy. And although supranational regulation based on fragmented and diffuse governance might emerge to compensate for the weakness of national regulation, the difficulties of implementation and enforcement might well lead to regulatory failure at this level too.

TABLE: Part-Time Work in Europe (percentage of total employment), 1997

Country	Men & women	Men	Women
EU-15	17.7	5.5	33.1
Belgium	16.8	3.6	35.2
Denmark	23.6	13.0	35.5
Germany	17.6	3.7	35.2
Greece	3.4	1.8	5.8
Spain	8.1	2.9	17.1
France	17.6	5.6	31.6
Ireland	13.7	6.1	23.2
Italy	7.0	2.9	13.4
Luxembourg	8.5	1.0	20.9
Netherlands	38.4	16.7	68.1
Austria	14.8	3.2	29.5
Portugal	5.3	1.8	9.5
Finland	10.9	6.1	15.6
Sweden	25.2	8.7	41.8
UK	25.3	8.3	44.8

(source: UK House of Commons Select Committee on Education and Employment: Second Report on Part-Time Working: drawn from Eurostat compilation of Labour Force Survey data, based on respondents' self-classification as part-time or full-time)

THE EU AND THE REGULATION OF WORKING TIME

According to Bastian, the new employment approach of the 1990s is characterised by a 'mixture of pragmatism and effort in cross-national consensus', in contrast to the 'overly ambitious approach taken in the mid-1980s' (Bastian 1998: 96). In particular, it has lost much of the redistributive character of earlier attempts at EU regulation of work. This, together with the UK's continued refusal to opt in until the change of government in 1997, explains the fate of plans to regulate 'atypical' work in the late 1980s and 1990s, in particular the weakness of the 1997 (?) Directive on Part-Time Work and the numerous derogations allowed in the Directive on Working Time first adopted in 1993, considered here. These Directives bridge the the Single European Act and the Maastricht Treaty and are therefore particularly useful as case studies in the move from the 'cooption' method of policy-making to a more cooperative mode of policy-making drawing on competing policy methods (Wallace 1996b: 54). According to Armstrong & Bulmer, the post-Maastricht era was one of increased flexibility, shown in the new Protocol and Agreement on Social Policy which 'enhances EU social competence but in a manner which increased regulatory flexibility both in respect of instruments (the social dialogue) and obligated states (the UK's opt-out)' (Armstrong & Bulmer 1998: 282).

1. The European Directive on Working Time

The European Working Time Directive (no.93/104) was adopted on 23 November 1993 under the health and safety provisions contained in Article 118a of the Treaty of Rome. As mentioned earlier, the Single European Act gave the Commission a new window of opportunity for employment legislation. Although the Act did not substantially expand EU policy scope or competence in the field of labour legislation, it did provide for qualified majority voting on health and safety legislation, in line with the technical standards and norms which formed the backbone of the Cockfield White Paper. Since the UK maintained its refusal even to contemplate supranational decision-making in this field, regulatory growth rested on the Commission's ability to act opportunistically as a policy entrepreneur by presenting employment legislation as health and safety, widening the latter's definition to include the broad working environment and the effects of working time on employees' physical and mental health. The UK challenged the legal base of the Directive, but when the European Court of Justice upheld the Directive's status on 12 November 1996 it had no choice but to comply and implement the regulations. (The legal basis of the Directive, as well as its content, ensure that today the Working Time Directive remains one of the major bones of contention for British - Conservative -Eurosceptics). Although the Conservative government had negotiated a lengthy adjustment period for the UK, the change of government meant a complete change of approach and despite pleas from business to wait before implementing the legislation, the Labour government published a consultative document on 8 April 1998 and the Working Time Regulations 1998 (SI 1998/1833) were laid before Parliament, to come into effect on 1 October 1998.

Thus, the implementation of the Working Time Directive, conceived in its specific form to bypass UK opposition to EU social policy, effectively closes this period of regulation by integrating the UK. The Maastricht Treaty consolidated the policy entrepreneurship stemming from the SEA by including 'working conditions' alongside health and safety legislation as matters for qualified majority voting. However, in practice the Council works to ensure maximum compliance with legislation, working by unanimity where possible, so that the ceiling for junior doctors' working hours was later set in accordance with the UK government's wish not to tie its own hands. Interestingly, the new treaty provision also means co-decision with the European Parliament, which in the case of junior doctors raises the possibility of the Parliament intervening to prevent a 'lowest common denominator' position. It is noteworthy, however, that the PASP procedure introduced by the Maastricht Treaty did not work in this case because the social partners failed to reach agreement in the transport sector.

The Directive covers weekly limits on working time, rest periods during the working day and in the working week, annual leave, and protection of night workers. It covers both private and public sectors, with the exception of mobile workers in transport, workers working at sea and doctors in training (the subject of legislation agreed by the Council in May 1999). The main provisions are:

- a maximum working week of 48 hours, to be calculated over a reference period not exceeding four months;
- entitlement to a rest break, the details of which to be agreed by collective bargaining or determined by law;
- entitlement to a minimum uninterrupted rest period of at least 11 hours in any 24-hours period;
- entitlement to at least 24 consecutive hours in each seven-day period, in principle Sunday unless otherwise agreed, to be calculated over a period not exceeding 14 days;
- entitlement to four weeks' annual paid leave;
- the right to free health checks for night workers;
- the possibility that member states may offer particular guarantees to workers who incur risks to their own safety or health linked to night-time working.

Several basic issues arise from the Directive, relating to its scope: how is working time defined and measured, and which workers are covered by the rules? The Directive defines working time as any period during which a worker is working, at his/her employer's disposal and carrying out his/her activity or duties, although the term 'worker' is not defined. For the purposes of EU legislation, a worker is defined as 'any person employed by an employer, including trainees and apprentices but excluding domestic servants'. The scope of the Directive is very broad, then, but a further feature is provision for a series of opt-outs and derogations. The Directive's preamble states a general principle that derogations must be possible, whether via legislation or collective bargaining, with the proviso that any hours worked in excess of the ceiling must be compensated with equivalent rest periods. The Directive also lists a series of possible derogations to provisions on breaks and rest periods and annual leave for certain categories (workers who travel great distances to work, security and surveillance activities, and a large range of activities involving the need

for continuity of service or production such as energy provision, or activities with seasonal surges such as postal services or tourism; also in some circumstances for shift workers). In such cases, derogations may be made by law or by means of collective agreements 'between the two sides of industry at the appropriate level' and in accordance with national legislation and/or practice. Further, the Directive permits member states to allow opt-outs of the maximum weekly working time provision, provided that this is agreed in writing with the workers concerned, and that the employer keeps up-to-date records of such arrangements and the hours worked in practice. According to some, the opt-outs and derogations which form a major part of the Directive undermine its whole basis, particularly as a piece of health and safety legislation. David Stopford, director of employment affairs at the UK Construction Confederation, claimed that the opt-outs and derogations allowed in the regulations undermined the Directive's basis as health and safety legislation: 'Have you ever heard anything more stupid: a health and safety measure that somebody can opt out of? This is back-door employment law' (Thatcher 1998: 41). In addition, the Directive also allows member states the option of a three-year transitional period, during which time the annual leave provision should be a minimum of three years. Finally, it is worth noting that the provision for night workers is vague and leaves precise details to the member states.

The implementation of the Working Time Directive in the UK has raised many questions about its scope and effectiveness. In some respects, the Regulations improve on the EU legislation (for example, in relation to night workers, although here there is imprecision on what constitutes 'heavy physical or mental strain'). But the Directive's lack of clarity in many areas 'has been compounded by the government's general policy of copying out the wording of the Directive without offering any clarification, so as to keep, in the words of the Better Regulation Task Force, the Regulations "goal-based"' (Barnard 1999: 62). In line with the Directive, the UK Regulations define working time in a broad fashion as; any period during which s/he is receiving relevant training; and any additional period which is to be treated as working time for the purpose of the Regulations under a relevant agreement. The term 'worker' is defined widely so as to include all those carrying out work for an employer, with the exception of those individuals whose work amounts to a business activity on their own account (in other words, including sub-contracted employment and agency employment). This means that the majority of casual workers, including those employed under zero-hours contracts, are covered.

The main requirements of the Regulations are:

- a maximum average 48-hour week, over a reference period of (usually) 17 weeks;
- entitlement to a rest break of 20 minutes minimum after six consecutive hours of work;
- entitlement to a rest period of 11 hours in any 24-hour period, and of at least 24 consecutive hours in each seven-day period;
- entitlement to three weeks' paid holiday each year, rising to four weeks from November 1999;
- a maximum working period of 8 hours in any 24 hours (usually averaged over 17 weeks) for night workers;

- a maximum working period of 8 hours in any 24 hours for night workers whose jobs involve special hazards or heavy physical and mental strain;
- the right to free health checks for night workers.

In practice, the lack of clarity may make it difficult for workers to enforce their rights in the workplace or through the courts. The evidence to date suggests that British employers, too, are not well informed about the law, so a significant advertising and information campaign, as well as enforcement on the ground (by health and safety inspectors), would be needed. Moreover, as Catherine Barnard points out, provisions on paid leave and rest breaks are entitlements, and workers may decide (or be persuaded) to forego their entitlements (Barnard 1999: 64). But the important and complex derogations may well affect the way the Regulations work in practice. These opt-outs and derogations essentially reproduce those of the Directive and fall into three broad categories. First, workers whose working time is unmeasured and who exercise a large degree of autonomy over their working time may decide to opt out of all the provisions except those on annual leave entitlement and free health checks. Second, the 'special' activities involving travel to and from work and a broad range activities dependent on continuous service, permanent presence or seasonal demand are exempt from the limit on night work and entitlements to rest breaks and daily and weekly rest. This set of exemptions and derogations is potentially very important because it concerns sectors where hours are notoriously long and rest periods and paid holidays few and far between: tourism and associated industries, security and surveillance work. Third, shift workers are exempted from entitlements to daily and weekly rest periods if this is made impossible through a change of shift, or when work is split up over the day. In the latter two cases, compensatory rest time should be made available. In addition, individual workers can choose to contract out from the 48-hour maximum working week, provided that the terms of the opt-out are laid down in writing and that the employer keeps full records.

The Regulations also reproduce the possibility of derogation from the provisions on averaging periods for calculating weekly hours, night work and rest breaks (subject compensatory time off) through collective agreements, in a form which is new to the UK regulatory system. The idea of an articulation between legislation and collective bargaining in order to derogate from statutory protection, which as we have seen has become commonplace in the rest of the EU, introduces a new element and one which will probably prove crucial to the practical operation of the Regulations. Furthermore, the form of such collective agreements may prove a challenge to the British system. As well as the traditional agreements based on bargaining between employers and trade unions, the Regulations also allow for workforce agreements concluded between employers and elected workforce representatives. In addition, the Regulations provide for 'relevant agreements', a catch-all category defined as 'a workforce agreement which applies to [the worker], any provision of a collective agreement which forms part of a contract between him and his employer, or any other agreement in writing which is legally enforceable as between the worker and his employer' (quoted in *IDS Brief* 1998: 11).

The UK is a country characterised by the 'long hours culture'. The average working week is 43.9 hours, the longest in the EU. According to David Coats, senior policy officer at the Trades Union Congress, 2.5 million people (10% of employees) in

Britain currently have no entitlement to paid holiday (quoted in Thatcher 1998: 38). Limits on the working week and improvements on paid leave entitlements, together with implementation of the 1994 Young Workers Directive, therefore have potentially a major impact on British working practices. Businesses expressed great concern about the financial costs of implementing the measures (which the government has estimated at 1.9 billion pounds, or 0.5% of the wage bill).

Derogations should be interpreted narrowly. But competition between companies within the same sector, particularly small companies, may lead to widespread use of derogations. Word has got around among employers that the Regulations allow for derogations: 'Even when confronted with [...] aspects of the Regulations, such as the limits on night work and the need for regular rest breaks, they smile enigmatically and utter the "D" word: derogations' (Thatcher 1998: 34). Nevertheless, employers in general are cautious about the Regulations, wishing to avoid not only costly litigation but also damage to their reputation as responsible employers (Kodz et al 1998: 56). There are signs that the individual opt-out on the working week will prove to be a popular option: Catherine Barnard cites anecdotal evidence to suggest that 'most employers are relying on it to avoid the requirements laid down by Regulation 4 [limiting the working week to 48 hours]', and surveys to date suggest that this is certainly the case (Morley 1999). Without adequate information and policing, the individual opt-out is more subject to abuse than derogations through collective bargaining, which require a bigger investment on the part of employers. Newspapers report cases of coercion or underhand methods to obtain individual opt-outs. Early signs are that firms which bargain on implementation of the Regulations will generally do so in the spirit of the law rather than simply to avoid it.

In this regard, much will depend on the strength of decentralised bargaining in particular sectors and companies. Bargaining coverage in the UK has dropped in recent years with the decentralisation of bargaining to workplace or company level. The 1990 Workplace Industrial Relations Survey showed that the share of employees in establishments with more than 25 employees covered by collective agreements on pay fell from 71% in 1984 to 54% in 1990. Although the results of the 1998 Workplace Employee Relations Survey have not yet been published, they are expected to reveal a further sharp decline, particularly since union presence and recognition has fallen in the 1990s. The proportion of workplaces with no union members at all fell from 36% in 1990 to 47% in 1998 (Cully et al 1998: 15). Meanwhile, union recognition arrangements were found in only 45% of workplaces, showing a decline from 66% in 1984 and 53% in 1990 (Cully et al 1998: 16). The Working Time Directive must therefore be seen in conjunction with the Fairness at Work proposals introducing mechanisms for union recognition, which are likely to boost union presence, since employer hostility to unions is found to be a major factor explaining non-unionisation. On the other hand, the lack of awareness of and interest in gender issues among employers and trade unions alike has led some observers to conclude that the impact of the Regulations will be limited.

There is no doubt that the approach and scope of the Working Time Directive represent a major change in the way governments deal with employment relations. The Working Time Directive has been seen by some observers as a 'blessing in disguise' in that it has encouraged employers to take management of time and the

problem of long hours in the UK seriously (Mark Hall and Keith Sisson, quoted in Kodz et al 1998: 54). It must be seen as part of a wider package involving the Minimum Wage Regulations and the Fairness at Work proposals, representing a desire to modernise employment relations by creating a regulatory floor whilst retaining a substantial degree of flexibility in implementation. To date employers have been cautious rather than pro-active, but the change in attitudes towards management of time may take years rather than months to show. According to newspaper reports, Citizens' Advice Bureaux report a greater number of queries relating to working time than to the minimum wage. The relative lack of awareness on working time on the part of employees may therefore simply be a matter of time.

However, it is noteworthy that the Working Time Regulations have made less impact on employers and the public consciousness than the Minimum Wage rules, which have already seen their first test case. Employers are reported to show little awareness of the Regulations and their likely effect, whether through complacency or lack of information due to the speed of the legislative process. The relative lack of information and interest in relation to the minimum wage may be because traditionally the British long hours culture depends on the compliance of workers, who prefer overtime pay to time off (Kodz et al 1998: 57). But the knock-on effect of minimum wage regulation, together with widespread discontent over the individual and societal damage of long hours, may lead to a cultural change. A national poll conducted for the TUC in 1998 found that 61% of employees who responded said they were unhappy with their working hours (Rubery 1998: 674).

The priority given to the minimum wage over working time regulation may also reflect the government's priorities, since the minimum wage was more closely identified with the New Labour campaign. The official publicity budget for the Working Time Directive was £1m, compared with the £4 million spent on publicising the National Minimum Wage legislation (Morley 1999). Although both policies stemmed from EU regulation, the link with the EU was direct and binding in the case of the Working Time Directive, as opposed to exhortatory in the case of the minimum wage. This has to some extent allowed the UK government to hide behind the EU in what is a classic case of social regulation where benefits apply generally but are perceived as small by those affected, whilst costs are borne by a small but highly vocal and politically important segment of society (see Majone 1998: 30).

In short, it can be seen from the above observations that compliance will be problematic, raising fundamental questions about the nature and function of regulation, particularly in relation to deep-rooted national labour market cultures.

2. The European Directive on Part-Time Work

In a general sense, the Directive on Part-Time Work dates from the early 1980s, when DGV was frequently at odds with national governments and employers over its protective approach to workers' rights. The Commission pursued its interest in regulation of 'atypical' work following the Single European Act and the period of the Social Charter and the Social Action Programme based upon it. The Directive refers in its preamble to Article 100 relating to the common market. But its legal base rests on the Protocol and Agreement on Social Policy introduced in the Maastricht Treaty, which at that time excluded the UK. The Commission invited the social partners

(UNICE, CEEP and the ETUC) to discuss and come to an agreement on 'atypical' work. On 6 June 1997 they concluded a Framework Agreement on Part-Time Work, which then formed the basis of a Directive adopted on 15 December 1997. On 7 April 1998, following the UK government's agreement at the Amsterdam summit in June 1997 to end the UK opt-out of social policy, the Directive (98/23/EC) was extended to cover the UK on 7 April 1998.

Thus, what started out as intended regulation on all forms of 'atypical' or non-standard work (that is, work which differs from standard full-time work including temporary work and other non-standard contracts) resulted in legislation relating to one aspect of this, part-time work. During the course of the 1980s and 1990s, when no fewer than nine draft directives on 'atypical' work were put forward by the Commission (Jeffery 1998: 193), the thrust of the proposals changed significantly. According to Jens Bastian, the inclusion of draft directive on part-time work in the Social Action Programme of March 1995 reflected the Commission's new pragmatic approach, because it supported existing national trends promoting part-time work rather than prompting member states to take action (Bastian 1998: 97). Member states (still excluding the UK) were prepared to countenance EU regulation because it corresponded to their domestic labour market agendas of promoting part-time work. In this general sense, then, the Commission's policy entrepreneurship was largely frustrated by member states' opposition and no significant policy innovation occurred.

The Directive on Part-Time Work is very brief and merely adopts the Framework Agreement, which itself is short and consists of a general principle rather than detailed provisions. The general principle is that 'In respect of employment conditions, part-time workers shall not be treated in a less favourable manner than comparable full-time workers solely because they work part time unless different treatment is justified on objective grounds.' Where appropriate, the principle of *pro rata temporis* shall apply. The method of implementation is left open: the principle of non-discrimination is to be applied according to arrangements defined by member states and/or social partners. Furthermore, as has been pointed out by Mark Jeffery, the principle is subject to a number of qualifications which limit its effectiveness. The principle covers employment conditions only, and not pay. The exception 'on objective grounds' is extremely general and is not defined by the agreement. Member states may (by law or by collective bargaining, according to national practice) make access to employment conditions subject to a period of service, which in practical terms will exclude part-time workers from such rights. In addition, the term 'worker' is narrowly defined to exclude self-employed workers, and part-time workers 'who work on a casual basis' are also excluded, although there is no definition of 'casual'. Finally, comparisons between full-time and part-time workers may take account of 'other considerations which may include seniority and qualification/skills', which may also prove a barrier to enforcement of part-time workers' rights (Jeffery 1998: 195-196). Given such broad exceptions to the general principle, Jeffery concludes that 'there is at the very least substantial grounds for doubt that the Directive is strong enough or clear enough to achieve its aim of the removal of discrimination against part-time workers (Jeffery 1998: 196).

The purpose of the Directive is two-fold: to remove discrimination against part-time workers and improve the quality of part-time work, and to encourage part-time work

and flexible organisation of work 'in a manner which takes into account the needs of employers and workers'. The quality of part-time work is dealt with in terms facilitating access to part-time work for workers already working full time or vice versa, and the provision of training to part-time workers; here, the agreement merely exhorts employers to consider how they can best facilitate such access, with no recommendations on the best means of doing so, let alone binding obligations. According to Jeffery, 'it is not clear whether [such weak provisions] can really be said to constitute legal regulation at all (Jeffery 1998: 197). Regarding measures to facilitate the development of part-time work, the Directive says that member states should 'identify and review' legal or administrative obstacles to part-time working and eliminate them by law or collective bargaining. This may be said to constitute 'deregulation' in the sense of dismantling existing legislation, although there is no indication of what form such obstacles might take or how they might be eliminated. The Directive therefore offers no guidance on matters related to social security contributions and its link with pay, one of the major areas of concern in the UK. Finally, the Directive insists that part-time work should be voluntary, and stipulates that a worker's refusal to transfer from full- to part-time work should not constitute a valid reason for termination of employment, but then qualifies this adding 'without prejudice to termination in accordance with national law, collective agreements and practice, for other reasons such as may arise from the operational requirements of the establishment concerned.' A similar, blanket qualification is contained in the final clause on implementation, which states that 'This Agreement does not prejudice the right of the social partners to conclude, at the appropriate level, including European level, agreements adapting and/or complementing the provisions of this Agreement in a manner which will take account of the specific needs of the social partners concerned.'

Given such extensive qualifications and the predicative and general nature of the recommendations, the Directive is undoubtedly weak. This weakness reflects the structural imbalance in the Social Dialogue between the employers, famously hostile to binding agreements and to any hint of redistributive measures, and the trade unions, committed to the policy process along with the Commission and therefore ready to accept general provisions as the most they are likely to get. The PASP is thus structurally weak. Since related Directives tend to reproduce the social partners' agreement without adding to it, this means that the Parliament or other institutions can only agree or reject the content without improving on it. This means that the Maastricht expansion in terms of methods of regulation - which in themselves constituted an innovation in respect of practice in the UK - did not provide for policy innovation, in fact the reverse.

For this reason, the Directive is unlikely to have a direct impact on member states' policy or practice. In addition, the narrow basis of the Directive and its emphasis on part-time work as 'atypical', that is, considered only in relation to the 'norm' of full-time work, together with its neglect of pay and social security issues mean that the comprehensive approach necessary to deal with protection of part-time workers is lacking. However, considered from a UK viewpoint in a wider context of EU and national legislation and case law, the Directive has at least the potential to contribute to an awareness of the issues surrounding part-time work and the desirability of specific measures. In its report on part-time working, the House of Commons Select

Committee on Education and Employment emphasised the need to consider any measures as part of a package including the National Minimum Wage, the Working Time Regulations, the Parental Leave Directive, the Fairness at Work White Paper and the National Childcare Strategy, as well as changes to the National Insurance System. In particular, the Select Committee urged government to changes to the operation of occupational pensions schemes, as well as partial retirement schemes and measures to encourage access to training for part-time workers. Unless government is willing to implement the Directive in a way which interprets obstacles to part-time working broadly, it will have little effect.

As regards protection of part-time workers, the Directive does not add significantly to existing law which was already moving in the direction of equal rights for part-time workers, at least partly in response to EU equal opportunities laws. The Employment Protection (Part-Time Employees) Regulations 1995 extended certain statutory employment rights (e.g. on unfair dismissal and statutory redundancy payment) to all employees with two years' service. The Pensions Act 1995 and the Occupational Pensions (Equal Treatment) Regulations 1995 include provisions on equal access for part-time workers to occupational pensions schemes. Indeed, the Select Committee expressed a concern that, 'if the Directive on Part-Time Work is transferred in its basic form it will be no more effective, and in some areas less effective than existing legislation' (<http://www.parliament.the-stationery-office.co.uk.pa.cm199899/cmselect/cmeduemp/346/34609.htm>).

Aside from the administrative obstacles to the development of part-time work, regulation of part-time work raises yet more questions about the relationship between legal regulation and compliance. According to some experts who gave evidence before the House of Commons Select Committee, it is possible to modify employer behaviour through legislation, and therefore attention to the rights of part-time workers will help to raise awareness of broader working time issues and break down the 'long hours culture' prevalent in the UK. Such an analysis sees different regulatory frameworks as a major determinant, alongside structural differences in the sectoral composition of the economy, of different working hours models. It is also the basis for the UK government's strategy for moving from a low-skill, low-productivity economy. However, others such as Jill Rubery see the general 'culture of the labour market', as expressed in the attitudes of trade unions and other actors, and the 'whole complex set of societal institutions' including the work-gender contract as determining the management of working time and work organisation.

CONCLUSION

This brief review confirms the thesis that regulatory powers are delegated to the EU where member states see advantages in doing so, where it adds to the credibility of legislation or draws fire from national regulators. However, it is doubtful that problems of regulatory failure at national level can be solved by delegating powers to supranational level.

Bargained flexicurity forms the ideological basis for EU action in the field of work and employment, but as a regulatory strategy it appears implausible because of the lack of articulation between legislation and collective bargaining at the necessary levels. Such a strategy is also undermined by the absence of any link between labour

relations and welfare policies (because of the weakness of supranational competence in the latter area). The 'lowest common denominator' approach may be more likely in this case. But in the case of working time, in the UK at least, the prospect of the floor being raised exists at least potentially, assuming political will on the part of the national government. This does not constitute policy innovation as such, since its practical implementation will depend on national circumstances

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