The Working Time Directive

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On 12 November 1996, the European Court of Justice rejected the UK Government's challenge to the *Directive on the Organisation of Working Time* adopted on 23 November 1993. Amongst other things, the Directive requires Member States to set limits on the length of the working day and the working week and to set a minimum amount of paid annual leave. It should be implemented by 23 November 1996. The Government has announced that it will insist, at the Intergovernmental Conference, that the Directive be disapplied in the UK . In the meantime it will implement the Directive after consultation. Until the Directive is implemented, the Government will be open to legal challenge from employees who suffer loss as a result. This Research Paper describes the main provisions of the Directive and looks at the wider implications of the ECJ ruling. It updates and replaces Research Paper 94/52.

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I Introduction and Summary

- On 12 November 1996, the European Court of Justice (ECJ) rejected the UK Government's challenge to the *Working Time Directive*, adopted on 23 November 1993 and due to be implemented in all Member States by 23 November 1996. The Directive was adopted using the Qualified Majority (QMV) procedure under Article 118a of the EC Treaty (health and safety). The UK argued that working time was not a health and safety issue, and that a different article requiring unanimity should have been used. But the ECJ interpreted the scope of the Article broadly to cover all matters relating to the physical, mental and social well-being of workers in their working environment

- The Government responded that it would insist upon changes to the EC Treaty at the current Intergovernmental Conference (IGC) which would both disapply the Directive in the UK and ensure that social provisions could never again be imposed on the UK against its will. In the meantime, it had no option but to implement the Directive after a process of consultation. It regards the ruling as a breach of the spirit of our opt out from the Social Chapter and as opening the floodgates to a deluge of social legislation from the EC.

- The Directive requires Member States to ensure that no employee is compelled to work more than 48 hours a week, averaged over a 4 month period, against his will; that all employees have a minimum of 3 weeks' paid annual leave (4 from 1999); that they are entitled to rest breaks of at least 11 hours a day and 35 hours a week; and that night shifts do not exceed 8 hours on average.

- Certain sectors, notably transport, work at sea and doctors in training, are excluded completely from the Directive. Workers who determine their own hours, such as managing executives, are excluded from all the provisions except that on annual leave. National laws or collective agreements can exempt a long list of occupations requiring a continuous presence (eg security, surveillance, residential homes, media, tourism) from all the provisions except those on annual leave and the 48 hour week.

- Even though the Government will not have implemented the Directive by 23 November 1996, it will have direct effect from that date for public sector employees and private sector employees who suffer loss as a result of non-implementation will potentially be able to sue the Government in accordance with the *Francovich* ruling.

- The speediest way of implementing the Directive, once the consultations are complete, would be an Order under section 2(2) of the *European Communities Act 1972*. However, it will involve major changes to UK employment law of a type which would normally be implemented by primary legislation.

- About 26% of the UK's full-time workforce works 48 hours or more a week compared with an EU average of about 10%. About 25% of the workforce has less than three weeks' paid annual leave.

II The Directive's Provisions

The main requirements of the Directive are summarised below:

1. Exclusions

Certain sectors are excluded from the scope of the whole Directive. These are "air, rail, road, sea, inland waterway and lake transport, sea fishing, other work at sea and the activities of doctors in training" [Article 1, para 3].

2. Daily rest periods

Every worker is entitled to a minimum daily rest period of 11 consecutive hours in any 24 hour period [Article 3]. There are derogations for many groups of workers [see (8) below].

3. Daily rest breaks

Where the working day is longer than 6 hours, every worker is entitled to a rest break, the details of which can be laid down in collective agreement or national legislation [Article 4]. There are derogations for many groups [see (8) below].

4. Weekly rest periods

Every worker is entitled to a minimum weekly rest period of 24 hours plus the 11 hours' daily rest period (i.e. 35 hours in all) [Article 5].[1] The weekly rest period can be averaged over a "reference period" of 14 days [Article 16]. Again, there are derogations for many groups [see (8) below].

5. Maximum working week

The average working time, including overtime, should not exceed 48 hours in any week [Article 6]. This can be averaged over a "reference period" of 4 months. Derogations are allowed for certain groups [see (8) below].

Member States have the option of not bringing this provision into force until **23 November 2003** (when it will be reviewed), provided that they take measures to ensure that no worker can be compelled to work more than 48 hours a week against his will [Article 18, para. 1(b)(i)].

6. Annual Leave

Every worker is entitled to a minimum of 4 weeks' paid annual leave [Article 7].

Member States have the option of setting a minimum of 3 weeks' paid annual leave until **23 November 1999** [Article 18, para 1(b)(ii)].

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[1] Originally, the Directive stated that "in principle", this should include Sunday, but the European Court of Justice in its ruling on 12 November 1996, annulled this provision.

7. Night Work

Normal hours of night workers are restricted to 8 in any 24 hour period [Article 8]. "Night" is defined as any period of not less than 7 hours, as defined in national law, which must include the period between midnight and 5am. "Night workers" are those who work at least 3 hours during the night "as a normal course" [Article 2]. "Reference periods" for the calculation of the 8 hour limit can be laid down by Member States after consultation with both sides of industry, or determined by collective agreement [Article 16]. There are derogations for many groups [see (8) below].

Night workers have an entitlement to free health assessments [Article 9].

8. Derogations

Certain groups of workers can be exempted from all the provisions described above except that on annual leave. These are cases where "the duration of the working time is not measured and/or predetermined or can be determined by the workers themselves". Mentioned particularly are:

> "(a) managing executives or other persons with autonomous decision-taking powers;
>
> (b) family workers; or
>
> (c) workers officiating at religious ceremonies in churches and religious communities."
>
> [Article 17, para 1]

Other groups of workers can be exempted from all the provisions described above except those on annual leave and the maximum working week, provided equivalent periods of compensatory rest or, exceptionally, appropriate protection, are granted. These groups are those involved in:

> "(a) activities where the worker's place of work and his place of residence are distant from one another or where the worker's different places of work are distant from one another;
>
> (b) security and surveillance activities requiring a permanent presence in order to protect property and persons, particularly security guards and caretakers or security firms;
>
> (c) activities involving the need for continuity of service or production, particularly:
>
> (i) services relating to the reception, treatment and/or care provided by hospitals or similar establishments, residential institutions and prisons;
>
> (ii) dock or airport workers;

(iii) press, radio, television, cinematographic production, postal and telecommunications services, ambulance, fire and civil protection services;

(iv) gas, water and electricity production, transmission and distribution, household refuse collection and incineration plants;

(v) industries in which work cannot be interrupted on technical grounds;

(vi) research and development activities;

(vii) agriculture;

(d) where there is a foreseeable surge of activity, particularly in:

(i) agriculture;

(ii) tourism;

(iii) postal services."

[Article 17, para 2.1]

It is also possible to derogate from the provisions on daily rest periods, daily rest breaks, weekly rest periods, night work and "reference periods" by means of collective agreements [Article 17, para 3]. While there can be no derogation from the general principle of a 48 hour week by collective agreement, the reference period over which it is calculated can be extended to 6 months, or, in some circumstances, to a year. [Article 17, para 4]

III The European Court of Justice Ruling

The *Working Time Directive* was adopted under Article 118a of the Treaty of Rome, as amended by the Single European Act. The Article is reproduced below:

> "1. Member States shall pay particular attention to encouraging improvements, especially in the working environment, as regards the health and safety of workers, and shall set as their objective the harmonization of conditions in this area, while maintaining the improvements made.
>
> 2. In order to help achieve the objective laid down in the first paragraph, the Council, acting by a qualified majority on a proposal from the Commission, in co-operation with the European Parliament and after consulting the Economic and Social Committee, shall adopt, by means of directives, minimum requirements for gradual implementation, having regard to the conditions and technical rules obtaining in each of the Member States.
>
> Such directives shall avoid imposing administrative, financial and legal constraints in a way which would hold back the creation and development of

small and medium-sized undertakings.

3. The provisions adopted pursuant to this Article shall not prevent any Member State from maintaining or introducing more stringent measures for the protection of working conditions compatible with this Treaty."

The UK Government sought annulment of the Directive on four grounds, the most important of which was that Article 118a was not an appropriate legal base for the adoption of a directive on the organization of working time.[2] It argued that directives adopted under Article 118a must have "a genuine objective link between health and safety, on the one hand, and the situation to be regulated, on the other". However, neither the Advocate General nor the European Court was swayed by this argument.[3] They agreed with the Council's much broader interpretation of the scope of the Article. The ECJ ruled that:

> "There is nothing in the wording of Article 118a to indicate that the concepts of 'working environment', 'safety' and 'health' as used in that provision should, in the absence of other indications, be interpreted restrictively, and not as embracing all factors, physical or otherwise, capable of affecting the health and safety of the worker in his working environment, including in particular certain aspects of the organization of working time. On the contrary, the words 'especially in the working environment' militate in favour of a broad interpretation of the powers which Article 118a confers upon the Council for the protection of the health and safety of workers. Moreover, such an interpretation of the words 'safety' and 'health' derives support in particular from the preamble to the Constitution of the World Health Organization to which all the Member States belong. Health is there defined as a state of complete physical, mental and social well-being that does not consist only in the absence of illness or infirmity."[4]

The UK had also argued that there was no scientific evidence of a link between the organisation of working time and health and safety. Regardless of the merits of the scientific argument, the ECJ ruled that:

> "Legislative action by the Community, particularly in field of social policy, cannot be limited exclusively to circumstances where the justification for such action is scientifically demonstrated."[5]

The ECJ did support the UK on one point and annulled the second sentence of Article 5 which stated that the minimum weekly rest period (amounting to 35 hours) should "in principle include Sunday". The Court stated that:

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2 The four pleas were: lack of jurisdiction/defective legal base; breach of the principle of proportionality; misuse of powers; and infringement of essential procedural requirements

3 See, eg, Opinion of Advocate General Leger delivered on 12 March 1996, Case C-84/94, *United Kingdom v Council of the European Union* (Council Directive 93/104/EC of 23 November 1993 concerning certain aspects of the organization of working time - Action for annulment), para 37

4 Judgment of the Court, 12 November 1996, in Case C-84/94, *United Kingdom of Great Britain and Northern Ireland v Council of the European Union*, para 15

5 Ibid, para 39

> "The Council has failed to explain why Sunday, as a weekly rest day, is more closely connected with the health and safety of workers than any other day of the week."[6]

The ECJ's interpretation of Article 118a's expression "encouraging improvements, especially in the working environment, as regards the health and safety of workers", is, indeed, a broad one. It is arguable that a whole range of measures, particularly those concerned with job security, could be said to contribute to a worker's "physical, mental and social well-being". For this reason, it would appear that many proposals concerned with working conditions, for example, on parental leave or equal rights for part-time workers, possibly even on pay or dismissal, could be dealt with under Article 118a and so be subject only to qualified majority voting (QMV).

IV Implications for the Social Chapter Opt Out

A What is the Social Chapter Opt Out?

In December 1991, all Member States agreed at Maastricht that a Social Protocol should be added to the EC Treaty. This contains a Social Policy Agreement between all the Member States except the UK allowing them to use its provisions to adopt social policies which apply to them but exclude the UK. This agreement is commonly called the Social Chapter and the UK is said to have an opt out from it.

The Social Chapter does not of itself contain any legislation or impose any new laws on any of the signatories. It merely provides a new procedure for introducing social legislation which allows the EC to act in a wider range of "social" areas and to adopt more legislation by qualified majority. It allows Directives applying to all Member States except the UK to be adopted in the following fields:

By qualified majority:

- improvement in particular of the working environment to protect workers' health and safety;
- working conditions;
- the information and consultation of workers;
- equality between men and women with regard to labour market opportunities and treatment at work;
- the integration of persons excluded from the labour market, without prejudice to Article 127[7] of the Treaty establishing the European Community.

By unanimity:

- social security and social protection of workers;

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6 Ibid, para 37

7 This refers to vocational training

- protection of workers where their employment contract is terminated;
- representation and collective defence of the interests of workers and employers, including co-determination .....
- conditions of employment for third-country nationals legally residing in Community territory;
- financial contributions for promotion of employment and job-creation, without prejudice to the provisions relating to the Social Fund.

Certain areas are excluded altogether:

- pay
- the right of association
- the right to strike
- the right to impose lock-outs

The Social Chapter came into force in November 1993. So far two Directives have been adopted under its procedures: one on European works councils and one on parental leave. Measures currently under consideration include those on part-time workers and the onus of proof in sex discrimination cases. Further information on the Social Chapter and future plans for EC social legislation is contained in *Library Research Paper 96/76*, dated 25 June 1996, on "The Social Chapter".

B Impact of the ECJ Ruling: the Government's Response

The Government considers that the ECJ's verdict is a betrayal of the spirit of the Social Chapter opt out. The Prime Minister wrote immediately to Jacques Santer, President of the European Commission, saying:

> "My intention in agreeing to the Protocol on Social Policy at Maastricht was to ensure that social legislation which placed unnecessary burdens on businesses and damaged competitiveness could not be imposed on the United Kingdom. The other Heads of Government also agreed that arrangement, without which there would have been no agreement at all at Maastricht.
>
> However, in its judgement today, the European Court of Justice has ruled that the scope of Article 118a is much broader than the United Kingdom envisaged when the article was originally agreed, as part of the Single European Act. This appears to mean that legislation which the United Kingdom had expected would be dealt with under the Protocol can in fact be adopted under Article 118a.
>
> This is contrary to the clear and express wishes of the United Kingdom Government, and it goes directly counter to the spirit of what we agreed at Maastricht. It is unacceptable and must be remedied.
>
> The United Kingdom will therefore table amendments in the Intergovernmental Conference to restore the position to that which the United Kingdom Government intended following the Maastricht agreement. Those amendments

> will be aimed at both ensuring that Article 118a cannot in future be used in ways contrary to the United Kingdom's expectation, and dealing with the specific problem of the Working Time Directive.
>
> I attach the utmost importance to these amendments and I shall insist that they form part of the outcome of the Intergovernmental Conference. I do not see how new agreements can be reached if earlier agreements are being undermined.
>
> Meanwhile, I urge the Commission to refrain from making proposals under Article 118a which properly belong under the other Member States' Agreement on Social Policy"[8]

British diplomats have already lodged with the Council of Ministers' secretariat proposals for treaty changes which would make future decisions under Article 118a subject to unanimity and for a protocol which would have the effect of excluding the UK from the directive.[9]

Jacques Santer, in his reply, said that the Directive would not shackle business and urged the Prime Minister to implement it as soon as possible. He recalled that "Member States are required to do this by 23 November 1996". He also said that the Commission reserved the right to introduce other legislation under Article 118a.[10]

The Opposition is sceptical about the Government's approach. During Prime Minister's Questions on 12 November 1996, John Major said:

> "I shall tell the right hon Gentleman precisely what the position is at the intergovernmental conference: it is exactly the same as it was on the social chapter at Maastricht. I shall not accept what has been determined by the court today and, at the end of the intergovernmental conference, I shall demand that change or there will be no end to the intergovernmental conference."[11]

Tony Blair responded:

> "So it will be at the end of the intergovernmental conference - which will, conveniently, be after the election. We can hear escape routes being planned already. Is it not back to beef when, five months on, the Government have not even got the gelatine ban lifted? It is the same old pattern. They seize on an issue, they talk tough, they alienate everybody and then they cave in. May I suggest that a law that gives people the right to a minimum holiday is not the issue upon which to launch beef war mark 2?"

EU officials doubt whether the Government's threat will have any effect on current negotiations in the IGC. It will only be problematic if the Conservative government is re-elected and so involved in the "endgame" expected to be at Amsterdam in June 1997. Even

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8 Letter from 10 Downing Street, dated 12 November 1996

9 *Irish Times*, 13 November 1996, " 'Good day for social Europe' - Flynn"

10 *Reuter New Service*, 12 November 1996, "Santer defends working time directive"

11 HC Deb 12 November 1996, c 152

then, changing the Treaty to let one Member State off an already agreed upon law would be seen as setting a serious precedent.[12] Padraig Flynn, the Social Affairs Commissioner, has said that most Member States would not support such a proposal.[13]

Whilst there is something in the Government's view that the ruling could undermine our opt out, it is difficult to argue that the *Working Time Directive* itself is a breach of the opt out. It was originally proposed in September 1990, over a year before the opt out was agreed in December 1991 and over 3 years before the opt out came into force in November 1993. It could not, therefore, have been introduced under the Social Chapter. Negotiations on the Directive were substantially completed in June 1992, well before the opt out became operational. Since the Social Chapter has been an option, the European Commission has used it to progress nearly all its proposals on "social" policy, including those on parental leave, part-time and temporary workers, European works councils and the burden of proof in sex discrimination cases. Annex 1 to this paper gives a brief chronology of developments on the *Working Time Directive*.

The Government's fear is that proposals which might previously have been brought forward under the Social Chapter because they required unanimity under the main Treaty and the UK would have vetoed them, might now be brought forward under Article 118a of the main Treaty. Even some measures which require unanimity under the Social Chapter such as "protection of workers where their employment contract is terminated" might be said to contribute to a worker's "physical, mental and social well-being", as, indeed, might some topics which are outside the Social Chapter altogether - like "pay". Proposals brought forward under the Social Chapter still would not apply to the UK, but fewer proposals might follow this route.

Such an outcome has been predicted by some commentators. Writing in the *Financial Times* of 27 June 1996, some time after the Advocate General's Opinion, Lionel Barber said:

> "And here is the rub for the UK government. If its legal challenge fails, the highest court in the union will have endorsed a similarly broad interpretation of health and safety and "working conditions". The result might be to encourage the Commission to bring forward more social legislation under the same provisions - all because of a piece of legislation which many believe would have had minimal impact on working lives."[14]

On the other hand, many observers detect a change of mood in the EU about social legislation. Zygmunt Tyszkiewicz, secretary general of Unice, the EU employers' federation, has said:

> "The 48-hour week directive is a relic of the past. It came into being during a phase of great social engineering under Jacques Delors. The whole attitude has changed. It would not stand a chance today."[15]

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12 *Reuter News Service*, 12 November 1996, "EU seen (*sic*) unfazed by British threats in short term"

13 *Reuter News Service*, 12 November 1996, "EU official urges Britain on working directive"

14 *Financial Times*, 27 June 1996, "Own goal over extra time"

15 *Financial Times*, 13 November 1996, "Judgment opens door for further legislation"

C Extension of the Working Time Directive

Padraig Flynn confirmed at a press conference on the ECJ ruling that the Commission would be consulting management and labour representatives on whether the *Working Time Directive* should be extended to the excluded sectors (transport workers, doctors in training and seafarers). If new proposals were brought forward, they would be under Article 118a.[16] The proposals would probably not cover all workers in these sectors, only those, such as some office workers, where there was no justification for derogations. The Commission feels that derogations should relate to the nature of the work performed rather than being targeted at a whole sector.[17] In a statement on the ruling, Commissioner Flynn said:

> "The European Commission has always believed and argued that the legal base (Article 118A) was correct and that the number of hours people work is a health and safety issue. I am, therefore, pleased that the Court has confirmed this view.
>
> This is an important Judgement. It clarifies for the first time the scope of Article 118A of the Treaty. This will guide us when drafting future proposals. All Member States have a legal obligation to implement the Directive by 23 November 1996. I fully expect that the UK will now take immediate and urgent steps to transpose the Directive into national law so that employees in the UK can enjoy the protection which the Directive provides. The European Commission will cooperate fully with the UK to ensure that appropriate legislation can be enacted as speedily as possible.
>
> The Working Time Directive is a flexible instrument. It is pro-health and safety, pro-employment and pro-family. I am very pleased that the European Court has ruled that this piece of European legislation, which protects people from excessive demands regarding working time, is sound.
>
> This is a good day for Social Europe and a good day for those who believe that employees should have the right to say no to excessive working hours."[18]

V Consequences of Delayed Implementation

Despite its anger at the ECJ ruling, the Government has drawn back from the brink of refusing to obey it. This would certainly have led to legal challenges from individuals, trade unions and the European Commission. Press reports suggest that this course was once mooted but rejected in the face of advice from the law officers that any legal challenge would be sure to succeed and that individual ministers might even be held liable for denying public sector workers their rights.[19] Instead, the Government will legislate, but only after widespread consultation and making use of all available derogations. In his statement on the judgment,

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16 *Reuter News Service*, 12 November 1996, "EU official urges Britain on Working Time Directive"

17 *IDS Employment Europe*, 418, October 1996, p 3

18 *Rapid Reuter Textline*, 13 November 1996, "European Court of Justice Ruling on the UK challenge to the Working Time Directive: Statement by Padraig Flynn"

19 *Financial Times*, 27 June 1996, "Reluctant step back from the brink"

Ian Lang, President of the Board of Trade, said:

> "In the meantime, of course, we have no option but to obey the law until we secure the necessary treaty changes. But we shall legislate to implement the directive only after carrying out proper and necessary public consultation on the issues and options. In doing so, we shall aim to take advantage of all the valuable derogations already secured during our negotiations on the directive. We are determined to preserve the flexibility in labour matters that has been such an important element in the revival of our economy over recent years. British industry would expect us to do no less."[20]

Any protracted delay in implementation runs the risk of legal challenge and potentially large costs. The Directive will have direct effect for "emanations of the State" (eg civil service, NHS, local authorities) from 23 November 1996 and private sector employees who suffer loss as a result of non-implementation could theoretically sue the government in accordance with the *Francovich* ruling. Trade unions have already announced that they will use legal action to ensure that the Directive is implemented if necessary.[21] The *Guardian* reports that "unions are planning to launch a spate of legal actions against the Government and public sector employers after November 23 over the failure to implement the directive, while holding out to employers the carrot of negotiated agreements over hours, rest breaks and shift arrangements allowed for in the directive."[22] The Commission or another Member State could also initiate enforcement proceedings against the UK. The basis for such actions is described below.

A Challenges from Employees in the Public Sector

It has been established for some time that EC Directives can have direct effect (ie can be relied on directly by individuals before national courts) if their wording is unconditional and sufficiently precise and if the time limit for the implementation of the Directive has elapsed. Furthermore, provisions of Directives can have direct effect whether the Directive has not been implemented at all or has been implemented incorrectly.[23] The *Marshall (No 1)* case did, however, limit this doctrine by establishing that Directives could only be vertically directly effective. In other words, they could only be relied on against the State, whether acting in its capacity as employer or public authority. The justification for this was that the State should not benefit from its own failure to comply with Community law.[24]

In the *Marshall* case, substantial damages were eventually awarded. Helen Marshall worked for an area health authority whose policy was that women should retire at 60 and men at 65. She was forced to retire at 62 in 1980 and claimed that she had been discriminated against contrary to Article 5 of the *Equal Treatment Directive*.[25] Her case was referred to the ECJ

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20 HC Deb 12 November 1996, c 156

21 See, eg, advertisement in the *Financial Times*, 13 November 1996, from the MSF, "EU Working Time Directive: Important Announcement for Employers"

22 *Guardian*, 13 November 1996, "Four million get extra holiday rights"

23 Catherine Barnard, *"EC Employment Law"*, 1995, para 1.57

24 Case 152/84, *Marshall v Southampton Area Health Authority* [1986] ECR 723

25 EEC/76/207

which found that Article 5 was directly effective and could be invoked against her employer, a state authority. The case went back to an industrial tribunal which calculated that her financial loss amounted to £19,405, including interest and injury to feelings, but the statutory maximum award at that stage was £6,250.[26] She returned to the ECJ which ruled, in *Marshall (No 2)*, that, if financial compensation is the chosen sanction "it must be adequate in that it must enable the loss and damage actually sustained.....to be made good in full".[27] Therefore, setting an upper limit on the compensation was a breach of the 1976 Directive as well - in this case, of Article 6 which provides that those who "consider themselves wronged by failure to apply the principle of equal treatment.....[must be able] to pursue their claims by judicial process". The UK Government was quick to introduce legislation repealing the upper limit on compensation in sex discrimination cases.[28] The repeal has led to very much higher awards in discrimination cases. The Ministry of Defence alone have had to pay just under £55 million to around 5,000 servicewomen discharged on grounds of pregnancy between 1978 and 1990. The average payment is just over £11,000.[29]

The ECJ has given a wide interpretation of the term "state" in other cases involving direct effect. In *Foster v British Gas*, it said:

> "a body, whatever its legal form, which has been made responsible, pursuant to a measure adopted by the State, for providing a public service under the control of the State and has for that purpose special powers beyond those which result from the normal rules applicable in relations between individuals, is included in any event among the bodies against which the provisions of a directive capable of having direct effect may be relied upon."[30]

Thus, British Gas, prior to privatisation, was deemed to be a State body. The Court has already ruled that provisions of a Directive can be relied on against tax authorities, local or regional authorities, constitutionally independent bodies responsible for the maintenance of public order and safety, and public health authorities. It is still not clear from this definition whether newly privatised industries, schools or universities are considered part of the state.[31]

Following the ruling in *Foster*, British Gas has agreed to pay £8.48 million to 400 former women employees who were forced to retire at 60. The average settlement was £23,000 with individual amounts ranging from £1,000 to £59,000.[32]

B Challenges from Employees in the Private Sector (*Francovich)*

The *Francovich* case established the principle that "a State must be liable for loss and damage caused to individuals as a result of breaches of Community law for which the State can be

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26 Catherine Barnard, op cit, para 1.80

27 Case C-271/91 [1993] 3 CMLR 293

28 *Sex Discrimination and Equal Pay (Remedies) Regulations 1993* SI No 2798

29 *Equal Opportunities Review*, No 67, May/June 1996, "The rising cost of discrimination"

30 Case C-188/89 [1990] ECR I-3313

31 Catherine Barnard, op cit, para 1.61

32 *Equal Opportunities Review* No 68, July/August 1996, "£8.5m for gas women forced to retire at 60"

held responsible".[33] In the particular case, Italy failed to implement Directive 80/987 on the protection of employees in the event of the insolvency of their employer. This required the State to provide specific guarantees for the payment of unpaid wages on the insolvency of an employer. Certain employees sued the State, in the national jurisdiction, for compensation in respect of wages owed them by the insolvent employer on the ground of the State's failure to implement the Directive. The case went to the ECJ which ruled that for the State to be liable to make good the resultant damage suffered by employees, three conditions had to be satisfied:

- the Directive had to accord rights to the individuals
- the contents of their rights had to be identifiable from the Directive itself
- there had to be a causal connection between the State's breach of duty and the damage suffered by individuals.

These conditions were satisfied in the *Francovich* case.

Subsequent judgments have extended the *Francovich* principle to cover every serious breach of Community law by the State that has directly caused loss to individuals in circumstances sufficiently foreseeable by the Member State concerned. However, the ECJ has imposed strict substantive conditions for the award of damages under this heading. Member States cannot be expected to cover losses incurred every time an error is made in implementing Community obligations or when a reasonable difference of opinion exists over their scope.[34]

It is believed that the first *Francovich* action to have been settled by the UK Government was *Porter v Attorney-General for Northern Ireland*. The case related to the failure of the UK government to implement the 1976 *Equal Treatment Directive* correctly in relation to the issue of discriminatory retirement ages. Mrs Porter was dismissed by her employer, Cannon Hygiene Ltd, on reaching her 60th birthday in June 1987. Male employees were allowed to continue working till their 65th birthday. The first *Marshall* case in 1986 had established that different retirement ages for men and women were a breach of the Directive. The UK government acted to implement this ruling in Great Britain by the *Sex Discrimination Act 1986*, which came into force on 7 November 1987. It did not act to amend the law in Northern Ireland until the *Sex Discrimination (Northern Ireland) Order 1988*, which came into force on 26 January 1989. The Government reached a settlement with Mrs Porter in June 1995 and paid her a sum in excess of £34,000 (representing 5 years' loss of earnings plus interest at judgment rate) plus costs.[35]

Any awards made as a result of a failure to implement the *Working Time Directive* (whether in the public or the private sector) would depend on the actual loss suffered in the individual case. Whilst the retirement age cases mentioned above led to large awards of up to 5 years' pay, quantifying loss under the *Working Time Directive* might be harder. However, failure

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33 Cases C-6/90 and 9/90, *Francovich v Italy* [1991] ECRI-5357, [1993] 2 CMLR 66

34 Nicholas Emiliou, "State Liability under Community Law: Shedding more light on the Francovich Principle?" in *European Law Review*, October 1996

35 A full account of this case, written by Mrs Porter's solicitor, is contained in *Industrial Law Journal*, June 1996, pp 144-148

to pay for three weeks holiday would, presumably, be compensated by at least three weeks' pay, and cases where people lost their jobs in an attempt to enforce their rights under the Directive could lead to substantial awards.

C Challenges from the European Commission

The European Commission has the power, under Article 169 of the Treaty of Rome, to take enforcement action against a Member State which has failed to fulfil a Treaty obligation, including failure to implement, in whole or in part, a Directive. It can act on its own initiative or, under Article 170, at the prompting of another Member State. The first step is for the Commission to seek the views of the States concerned and to issue a reasoned opinion. If a satisfactory settlement cannot be reached, the case goes to the ECJ. If the Court agrees that there has been an infringement, it issues a declaration requiring the offending State to take the necessary measures to comply with its ruling. If the State refuses to do so, the Commission can again issue a reasoned opinion, after giving the State an opportunity to put its case. If the non-compliance continues, the Commission can ask the ECJ to impose a "lump sum or penalty payment" upon it under Article 171(2). The possibility of fining a non-complying State was introduced by the Maastricht Treaty. Lord Howe of Aberavon, writing in the *European Law Review*, has commented that the large number of infringement cases brought against Italy lay behind the amendment:

> "The reason for this Mediterranean flavour has long been a source of grievance for Her Majesty's Government. For in the years between 1982 and 1993, the number of Court of Justice enforcement proceedings commenced against Italy was 216 and against the United Kingdom just 26 (with only Denmark a little better at 16). No one denounced this discrepancy more frequently and with more vigour than Margaret Thatcher herself. As a result, Britain was one of the main sponsors at Maastricht of the modification of Article 171, which was intended to strengthen the powers of the Court of Justice to enforce the implementation of its decisions, above all by recalcitrant member states. Even this provision has since been described by Francois Froment-Meurice as "une montagne qui accouche d'une souris".[36]

Generally, countries, including the UK, do eventually comply with ECJ rulings once infringement proceedings are set in train. Catherine Barnard has commented:

> "Research has shown that 14% of all presumed infringements reach the stage of recorded infringements, that is an Article 169 letter is sent to a Member State in respect of them. Six out of every 10 such cases are resolved before a reasoned opinion is issued; seven out of every 10 cases reaching this stage are settled without the need to advance to the judicial stage. Only six out of every 100 recorded infringements reach the stage of judgment. This has prompted the conclusion that "the ultimate fate of having their failure to fulfil

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[36] *European Law Review*, June 1996, "Euro-Justice: Yes or No?" "Une montagne qui accouche d'une souris" translates literally as "a mountain which gives birth to a mouse".

an obligation under the EEC Treaty formally established by the European Court is one the Member States are evidently anxious to avoid."[37]

VI Implementation of the Directive

A Existing UK Law

At present there are no statutory controls at all on working time in the UK except in a few special areas. There used to be legislation, dating back to the nineteenth century, regulating working hours in many areas. For example, the *Shops Act 1950* consolidated previous legislation which provided that no person could be employed in a shop for more than six hours without an interval of at least 20 minutes. It also required a lunch break of at least three-quarters of an hour for anyone working between 11.30 am and 2.30 pm and a half hour tea break for someone working between 4 pm and 7 pm. The *Factories Act 1961* (another consolidation measure) restricted the hours of women and young people working in factories to 9 a day and 48 a week; and the Wages Councils used to set minimum holidays in the sectors they covered. The Conservative Government has repealed all these restrictions and the only remaining legislative controls on working time are confined to drivers' and pilots' hours. A brief history of legislative controls in this country is contained in Annex 2 to this paper.

Employers have a general duty under section 2 of the *Health and Safety at Work Act 1974* to ensure, as far as is reasonably practicable, the health, safety and welfare at work of all their employees. The reply to a PQ says that "this means they cannot normally require people to work excessive hours or unsuitable shift patterns likely to lead to ill health or accidents caused by fatigue."[38] However, any particular case of long hours without a break would need to be tested in the Courts for its health and safety implications. There are not many instances of the successful use of health and safety legislation to curb long hours. A junior doctor, Chris Johnstone, did eventually accept £5,000 in an out of court settlement from Camden and Islington health authority after a six year battle involving 10 court hearings. In March 1989, he was working on the obstetrics ward at University College Hospital where it was not unusual for a junior doctor to work between 83 and 120 hours a week. Mr Johnstone is quoted as saying: "I worked such long hours and with so little sleep that I became dangerously sleep deprived. I became depressed and reached such extremes of exhaustion that I had to stop working."[39] Generally, the health and safety legislation is enforced by inspectors appointed by the Health and Safety Executive.

Implementation of the Directive will require extensive amendment to our employment legislation. Amongst the amendments which would probably be required would be one giving employees the right not to suffer detriment for refusing to work more than 48 hours a week; another giving them a right to claim unfair dismissal with no qualifying service provision, if terms and conditions contravene the Directive; and another providing for compensation for

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37 Catherine Barnard, op cit, para 1.87

38 HC Deb 10 July 1990, c 145W, Patrick Nicholls

39 *Guardian*, 26 April 1995, "Damages for doctor on 'inhuman' hours"

unpaid annual leave.[40] The Consultation Paper which the DTI will be issuing shortly will, presumably, set out the possibilities in detail.

B Method of Implementation

EC law can be implemented in the UK either by statute or by subordinate legislation. The *European Communities Act 1972* emphasises the use of delegated legislation in Section 2(2) and 2(3), although primary legislation is not ruled out. Schedule 2 of the Act sets out limits to the application of implementation by subordinate legislation. The following extract from *The Law and Institutions of the European Union*, Lasok and Bridge, 1994, explains the provisions:

> "In the case of Community secondary legislation which is not directly applicable, such as ECSC recommendations and EC and Euratom directives, but leaves the choice of the means of their implementation to the individual Member States, there are two possible courses of action. Such Community legislation could be implemented in the United Kingdom either by statute or by subordinate legislation. Whilst the European Communities Act does not expressly rule out the use of statutes for such purposes its emphasis is on the use of delegated legislation. Thus section 2(2) of the Act confers extensive authority upon Her Majesty in Council and upon Ministers and Government Departments to make subordinate legislation:
>
> > '*(a)* for the purpose of implementing any Community obligation of the United Kingdom, or enabling any such obligation to be implemented, or of enabling any rights enjoyed or to be enjoyed by the United Kingdom under or by virtue of the Treaties to be exercised; or
> > *(b)* for the purpose of dealing with matters arising out of or related to any such obligation or rights or the coming into force, or the operation from time to time, of sub-section (1) above.'
>
> The wide extent of these delegated law-making powers is confirmed by section 2(3) which lays down that a provision made under sub-section (2) includes 'any such provision (of any such extent) as might be made by Act of Parliament'. In other words the subordinate legislation made under section 2(2) to implement Community obligations can be used to repeal or amend any past or future Act of Parliament the provisions of which are incompatible with Community law.
>
> But these powers of making subordinate legislation are not entirely without limitation and are subject to Schedule 2 to the Act. That Schedule provides that the powers conferred by section 2(2) shall not include the power:
>
> > *'(a)* to make any provision imposing or increasing taxation; or
> > *(b)* to make any provision taking effect from a date earlier than that of the making of the instrument containing the provision; or
> > *(c)* to confer any power to legislate by means of orders, rules, regulations or other subordinate instrument, other than rules of procedure for any court or tribunal; or
> > *(d)* to create any new criminal offence punishable with imprisonment for more than two years or punishable on summary conviction with imprisonment for more than three months or with a fine of more than level 5 on the standard scale (if not calculated on a daily basis) or with a fine of

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40 *Croner's Employers Briefing*, 16 April 1996, "Time, gentlemen, please", gives a brief discussion of the sort of changes which the Directive would require to UK law

more than £100 a day.'

These limitations are also given a measure of entrenchment since section 2(4) states that they shall remain in force unless and until amended or repealed by a subsequent statute. As far as the form and procedure of such subordinate legislation is concerned Schedule 2 states that the power to make regulations shall be exercisable by statutory instrument and that wherever the power is exercised without a draft having been approved by resolution of each House of Parliament, then it shall be subject to annulment in pursuance of a resolution of either House. This gives the Government a choice as to the procedure to be adopted and that choice will no doubt be exercised in the light of the subject matter of the legislation."

The *Working Time Directive* is Community secondary legislation which is not directly applicable (except to the employees of the State) so it could be implemented by an Order under section 2(2) of the *European Communities Act 1972*. Without knowing how the Government would seek to implement it in the UK, it is a little difficult to know whether it would be caught by Schedule 2. It would not impose or increase any taxes and it is doubtful whether penalties would be on the scale envisaged in paragraph (d). On the other hand, it is not impossible that the many exclusions, exemptions and derogations included in the Directive would encourage the Government to take power to legislate by means of subordinate legislation. It is also a fairly major change to UK employment law of the type that one might, in other circumstances, expect to be implemented by primary legislation.

The Directive, though, would probably be implemented by secondary legislation - an Order under section 2 (2) of the *European Communities Act 1972*. This would obviously be quicker than primary legislation. Although it would require substantial amendment to the *Employment Rights Act 1996* (the consolidation Act covering employment protection legislation), Orders under the 1972 Act can, and do, amend primary legislation.

The maternity leave changes necessitated by the *Directive on the Protection at Work of Pregnant Women or Women who have recently given Birth*,[41] were implemented by primary legislation - sections 23-25 of the *Trade Union Reform and Employment Rights Act 1993* [TURER]. In a sense, this was a convenient vehicle as TURER was a major piece of employment legislation going through the House at the time. Other changes which had to be made as a result of this Directive (on maternity pay, health and safety etc) were introduced by statutory instruments, some of which (marked with an asterisk in the list below) were made under the *European Communities Act 1972* and some of which were made under existing order-making powers. The SIs were the:

- *Maternity Allowance and Statutory Maternity Pay Regulations 1994 SI No 1230**
- *Social Security Maternity Benefits and Statutory Sick Pay (Amendment) Regulations 1994 SI No 1367*
- *Maternity (Compulsory Leave) Regulations 1994 SI No 2479**
- *Management of Health and Safety at Work (Amendment) Regulations 1994 SI No 2865*
- *Suspension from Work (on Maternity Grounds) Order 1994 SI No 2930*

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41 Dir 92/85/EEC

TURER also implemented, by section 26 and Schedule 4, the *Directive on an Employer's Obligation to Inform Employees of the Conditions Applicable to the Contract or Employment Relationship* which laid down requirements about written statements of terms and conditions of employment.[42]

By way of contrast, the Government proposes to implement the relatively minor changes to primary legislation it now has to make to implement parts of the *Directive on the Protection of Young People at Work*[43] by an Order under the 1972 Act.[44] It also amended UK law to comply with parts of the ruling by the ECJ on 8 June 1994 that UK law did not properly implement aspects of the *Acquired Rights Directive*[45] and the *Directive on Collective Redundancies*[46] by Regulations under the 1972 Act. These Regulations - *The Collective Redundancies and Transfer of Undertakings (Protection of Employment) (Amendment) Regulations 1995* SI No 2587 - amend section 188 of the *Trade Union and Labour Relations (Consolidation) Act 1992* and regulation 10 of the *Transfer of Undertakings (Protection of Employment) Regulations 1981* so that an employer is now required, at his choice, to consult either a recognised trade union or elected representatives of the affected employees before making redundancies or transferring his business.

C Costs of Implementation

Shortly after the Directive was adopted at the Social Affairs Council on 23 November 1993, the Department of Employment issued a Compliance Cost Assessment [CCA] which estimated the "total direct impact cost to employers" at around £1.7 billion, at 1992 prices, with a further £0.7 billion three years after implementation when the annual paid holiday entitlement increases from three weeks to four.[47]

No doubt a revised CCA will be published shortly as a number of the figures on which this estimate was based will have changed. For example, the CCA was based on the assumption that "approximately 3 million employees currently work hours in excess of the daily and weekly rest provisions of the Directive". In reply to a recent PQ, John Taylor, Parliamentary Under Secretary of State at the DTI with responsibility for Corporate and Consumer Affairs, said:

> "My Department estimates that some 2.1 million employees do not conform with the daily and weekly rest provisions in the working time directive; 2.7 million regularly work more than 48 hours a week; and about 0.2 million work over the directive's night work limit. Up to 3.8 million workers could be affected by the directive's paid holiday provisions. There is no information

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42 91/533/EEC

43 94/33/EC

44 Department of Health, *Consultation Document on the Employment of Children,* 30 October 1995, para 5.2.3.

45 77/187/EEC

46 75/129/EEC

47 Annex B, dated December 1993, to the *Explanatory Memorandum on the Working Time Directive*, submitted by the Department of Employment on 13 January 1994.

> about how many of those who currently work more than 48 hours a week might refuse to do so."[48]

Some commentators say that there are so many exclusions and derogations in the Directive, that, if the UK makes full use of them in implementing the Directive, the costs will, in practice, be much lower than predicted. For example, the *Financial Times* reported on 2 November 1996:

> "Engineering employers said yesterday that providing the government takes advantage of the wide degree of flexibility which the directive allows, most businesses will see 'no disruption'. Even the Institute of Directors, the employers' organisation most opposed to the change, said yesterday it did not expect 'a lot' of impact in terms of hours worked, although small businesses bitterly resent the extra bureaucracy the directive is likely to require."[49]

The extra burden of record keeping is a major concern for businesses. Article 18, para 1 (b) (i) which allows employees to work more than 48 hours a week if they wish, requires employers to keep records of workers who exercise this option and the hours they work. The CBI has said that the directive's biggest direct impact will be on smaller companies but that many other businesses would face the heavy burden of form filling and renegotiation of existing staff agreements.[50] Adair Turner, director general of the CBI, is reported as saying "even if all the available exemptions are taken up, the directive will still require many employers to participate in time-consuming negotiations in order to continue flexible working arrangements".[51] Larger companies, generally, have no permanent requirement for staff to work long hours and already give three weeks paid leave. Smaller companies, particularly in areas like hotels and catering, are concerned, though, in practice, many will be covered by the exemptions. One thing all are agreed on is the need for the Government to issue guidance as soon as possible.

VII Working Time Rules in Member States

Nearly all the other Member States of the EU already have statutory limits on the length of the working week of 48 hours or less. Similarly, they give employees the right to minimum annual leave of at least three weeks. Incomes Data Services' *Employment Europe*, November 1995, contains extremely useful comparative tables showing working time limits in the 15 EU countries and their annual leave arrangements. These are reproduced overleaf:

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48 HC Deb 24 July 1996, c 479W

49 *Financial Times*, 2/3 November 1996, "Utilities may face trouble on working hours"

50 *Financial Times*, 13 November 1996, "Industry warns of higher costs and form filling"

51 Ibid

Table 1: Regulation of working time in EU-15

Country	(Statutory) max. working week; O/T limits; typical range in CAs	Max. daily hours (including for night-work), and rest breaks	Daily rest (between periods of daily work) and weekly rest	Recent developments or debate on working time
EU Dir.	48 hours incl. O/T	8-hr night shifts in 24 hrs, reference period set by CA. Break after 6 hrs	Daily rest: 11 hrs. Weekly rest: 35 hrs in 7-day period	-
Austria	By law: 40 with flexibility options via CAs. O/T up to 10 hrs weekly by law (up to 15-20 by CA). Most CAs set 38.5-hr week	By law: 8 hrs per day (9 hrs in some circumstances). Nightwork prohibited for women, some options possible. 30 mins' break after 6 hrs	By law: 11 hrs daily (may be 10 by CA); 36 weekly including Sunday (can be 24 by CA on continuous shifts)	Compliance with EU Directive will require changes in hrs of work, rest periods, night/shift working. Social partners negotiating on hrs flexibility (extending wkg day). Seasonal work variations
Belgium	By law: 40, sometimes 50. Flexibility options under 1987 law. O/T up to 65 hours in any 3 months. Most CAs set 38-hr week	By law: 8 hrs per day (11 hrs in some cases) or 12 by CA. Nightwork prohibited in principle with exemptions by law (men) and CA (women). 1 hr break after 6 hrs	By law: 1 day usually Sunday. CAs allow up to 12 Sundays' work p.a. max 4 consecutively. On continuous shifts, min 80-hr rest period per week including 18 hrs on Sunday	Nightwork debate: early 1995 the Labour Council signed a CA stipulating that women's nightwork provisions must be included in all sectoral CAs (current state has been condemned by ECJ)
Denmark	No statutory limit. 37 per week the norm by CA. O/T regulated by CA, but no limits usually given, compensation/time off in lieu set by CA	No statutory or CA daily limit. 50% of CA's set a max of 8 hrs (averaged over 3 months) for nightwork	By law: 35 hrs (24 hrs + 11 hrs daily rest period). Can be reduced to 32 hrs (24 + 8) for shift workers. Should include Sunday	Some CA's introducing longer reference periods for calculating working week. Attempts to introduce EU Directive by CA may be insufficient
Finland	By law: 40 hours. O/T 320 hrs p.a. (+160 hrs in some circumstances) to be worked within stated limits. Most CAs set 36-hr week	By law: 8 hrs. CA's may vary working hrs by season. If working hrs >7, one hr's break mandatory	No statutory limit on daily rest. By law 30 hrs' weekly rest	Compliance with Directive implies amalgam. of existing laws & intro. of daily rest period. Hrs flexibility and P/T work on the agenda. Pilot projects on 2 x 6 hr daily shifts (ie 30-hr week) in progress
France	By law: 39 hours and O/T 130 hrs max p.a.. Flexibility options by industry/co CA up to 44 or 48 hrs, with O/T 70-130 hrs. Some CAs set 37-hr week	By law: 10 hours max., may rise to 12 by CA. Nightwork permitted except for women Breaks covered by CA	No statutory limit on daily rest. By law: 24 hrs weekly including Sunday	Social partners' agreement on voluntary early retirement. Many industry/co CAs on part-time work, hrs annualisation, compensatory time-off for O/T. Talks on working time in progress. Some co CAs have 4-day week with no loss of pay
Germany	By law: 48 hours on a 6-day week. Law & CA set reference periods for averaging. O/T set by CA. Working hrs can be 10 hrs for 60 days on top of max. annual time limits	By law: 8 hrs daily. Up to 10 if 8 hrs averaged over 6 mths (4 wks if on nights). ½ hr break after 6-9 hrs	By law: 11 hrs daily rest. One day's weekly rest - usually Sunday	Unions pursuing shorter working week. Some employers seek regular Saturday working and annualisation
Greece	By law: 48 hrs on 6-day wk. CAs set 40 hrs in private sector, 37.5 in public. Minister sets O/T for occup/industry e.g 70 hrs in manuf.	By law: 9 hrs but some flexibility options	Daily rest not specified by law. One full day per week by law	Unions demanding shorter working week, given long weekly hrs and extensive O/T working

Table 1: Regulation of working time in EU-15 (continued)

Country	(Statutory) max. working week, O/T limits, typical range in CAs	Max. daily hours (including for night work), and rest breaks	Daily rest (between periods of daily work) and weekly rest	Recent developments or debate on working time
Ireland	No general legislation: some legal limits for certain sectors e.g. 48 hrs in industry, similarly some O/T limits e.g. 2 hrs daily	No general legislation: some limits for certain sectors e.g. 9 hrs daily max. in industry	No general legislation; some patchy regulation e.g. 1 rest day in industry	In the process of extending statutory annual leave from three to four weeks by 1999. Employers resisting union attempts to advance deadline. Proposals being prepared to comply with Directive
Italy	By law: 48, 40 by CA with flexibility options. O/T limit 2 hrs daily, 8 hrs a week	8 hrs by law/CA but flexibility options. Rest breaks set by CA or custom and practice	No regulation but usually 8 hrs between work periods (or = to length of shift)	'Solidarity' contracts (work-sharing contracts) and some increase in P/T contracts. Unions attempting to bring actual hours worked closer to contractual hours
Luxem.	By law: 40 hrs, 48 hrs in some cases. O/T limit 2 hrs per day (on top of 8 hrs per day)	By law: 8 hrs, up to 10 by CA. Breaks set by CA	Daily rest set by CA. Weekly rest: by law 1 full day (normally Sunday) plus 20 hrs	Working time being debated, particularly longer hrs in retail
Nether'ds	By law: 48 hrs per 6-day week, with O/T up to 52 hrs per week. Most CAs set 38-hr week with O/T of 6-8 hrs per week	By law: in factories/ offices 8.5 hrs; in shops: 9 hrs. Nightwork by CA. No law on rest breaks but usually set by CA at 15 mins after 6 hrs	By law: daily rest 11 hrs; weekly rest 36 hrs consecutively, with at least one Sunday off in two	New working time law under debate, due to come into force 1-1-96. Will allow longer hrs for shops; more shifts & P/T work; Sat. as normal working day by CA. Some CAs already have 4-day week
Portugal	By law: 44 hrs (42 in offices), flexibility options possible via sectoral CA. By law: O/T of 200 hrs p.a. 2 hrs daily. Most CA's set 38-41 hrs	In offices 7 per day, 8 elsewhere. Women's nightwork still restricted 1-2 hrs' rest after 5 hrs	By law: min. 11 hrs daily. By law: one day (usually Sunday) weekly plus most CAs give another day	Statutory 40-hr week on union agenda. TUs reject employers' demand for flexibilisation - very few sectoral CAs on this. Little scope for P/T work
Spain	By law: 40 hrs, can be annualised by CA. O/T up to 80 hrs p.a., prohibited to under-18s. Most CAs set 38-hr week	By law: 9 hrs, or as set by CA. Nightwork limited to average 8 hrs in any 15 days. By law: 15 mins. rest after 6 hrs' work	By law: min. 12 hr daily rest (10 hrs for some occupations). Weekly rest: 1½ days continuous, which may be spread over 2 weeks. Normally includes Sunday, & Sat p.m. or Mon a.m.	1994 amendments to Workers' Statute revise working time law, to allow more flexible working by CA; set minima only for O/T or night pay; redefine P/T working; widen scope for negotiated holiday arrangements
Sweden	By law: 40 hrs, can be averaged over 4 weeks. By CA 40 hrs, but less (38-36 hrs) for shiftwork. Variations possible e.g. banking 38.5 hrs. O/T limits by law and industry CA. Any extra to be approved by union	Set by local negotiation, often with a 'fallback' position in industry CA. Nightwork limit set by CA. By law, break after 5 hrs	No daily rest period specified. Legal right (if not bargained away) to rest between 12 midnight & 5 a.m. Weekly rest of at least 36 consecutive hrs, usually at weekend	Working time laws under review. Unions want to cut time by 200 hrs p.a. by 2000 (2 hrs per wk). 1995 metal-working CA cuts weekly hrs by ½ hr over next 3 yrs. Some CAs devolve O/T dispensations to local level
UK	No statutory limits. 39-hr norm in industry, 37 in major engineering firms. 35-37½ in offices	No legislation. Working hours set by CA (sectoral or company) for c. 20% of employees, or by employment contract	No regulation. In practice, usually Sunday and ½ or full day for weekly rest	Unions to continue to press for shorter working week, management seek to use longer working days to meet customer demand. Arguments on whether weekend is part of normal working week

Source: *National sources, IDS* O/T= overtime CA=collective agreement P/T=part-time

Table 3: Working hours and holidays in western Europe

Country	Annual working time in manuf: 1994	National public holidays	Annual Leave	
			Statute	Agreement
Austria	1722	13	5 weeks	5/6 agreement
Belgium	1729	10	4 weeks	4/5 weeks
Denmark	1687	9.5	25 days	25-30 days
Finland	1732	12	5 weeks	5-6 weeks
France	1755	11	5 weeks	5-6 weeks
Germany	1620	10-13	4 weeks	6 weeks
Greece	1832	10 + 2 voluntary	22 days	5 weeks
Ireland	1794	9	3 weeks	4 weeks
Italy	1744	10	-	4-6 weeks
Netherlands	1714	8	4 x no of days worked per week	23-30 days
Portugal	1882	12 + 2 optional	22-30 days	4½-5 weeks
Spain	1772	14 (max)	4 working weeks	22-25 working days
Sweden	1824	11	25 days	22-30 days
UK	1752	8	-	4-5 weeks

Source: *IDS and BDA (German employers' confederation)*

V Hours Worked in Member States

A All Member States

Statistics collected by *Eurostat* show that the UK has a far larger proportion of its full-time workforce working 48 hours or more a week than any other EU country - 26.2% compared with an EU average of 10.1%:

Working hours[52]
1995

% of full-time employees with usual weekly hours in the range:					
	1 - 35 hours	36 - 39 hours	40 hours	41 - 47 hours	48+ hours
Austria	2.6%	33.7%	57.3%	2.9%	3.6%
Belgium	7.2%	65.3%	21.8%	1.6%	4.0%
Denmark	4.7%	75.6%	5.2%	6.8%	7.7%
Finland	8.7%	58.5%	29.4%	2.5%	2.9%
France	7.4%	65.9%	9.1%	9.4%	8.2%
Germany	3.5%	54.8%	32.4%	3.6%	5.6%
Greece	11.4%	16.5%	51.1%	5.1%	15.9%
Ireland	16.7%	34.1%	30.6%	7.4%	11.3%
Italy	11.0%	26.6%	47.7%	5.6%	9.1%
Luxembourg	7.3%	3.1%	82.3%	2.1%	5.1%
Netherlands	0.9%	34.3%	62.1%	1.2%	1.5%
Portugal	19.5%	5.2%	29.7%	34.9%	10.6%
Spain	6.2%	10.6%	69.1%	6.1%	7.9%
Sweden	2.3%	13.1%	77.5%	4.6%	2.5%
United Kingdom	9.0%	25.2%	13.1%	26.4%	26.2%
EU15	**7.0%**	**39.8%**	**33.3%**	**9.7%**	**10.1%**

Source: Eurostat

[52] Table contributed by Nicola Chedgey, Economic Policy and Statistics Section

B UK Hours and Holidays

A table in Incomes Data Services' *Employment Europe*, May 1996, identifies the occupations where employees work more than 48 hours a week on average in the UK:

Table 2: Occupations where employees work more than 48 hours a week on average (UK)

	Average weekly hours		
	Basic	**Overtime**	**Total**
Security guards and related occupations*	44.9	4.9	49.8
Furnace operatives (metal)	39.4	11.9	50.9
Road goods vehicle drivers*	41.5	8.9	50.4
Mechanical plant drivers and operatives (earth moving and civil engineering)	41.7	10.8	52.5
Crane drivers	39.1	11.4	50.5
Mine (excluding coal) and quarry workers*	41.8	9.5	51.3
Farm workers*	40.7	8.0	48.7
Agricultural machinery drivers*	39.3	12.6	51.9
Mates to metal/electrical and related fitters	38.7	9.8	48.5
Road construction and maintenance workers	40.3	8.2	48.5

Source: *New Earnings Survey 1995* * may be covered by separate regulation/exemption

The reply to a recent PQ shows the growth in the number of employees in Great Britain working over 48 hours a week since 1984:[53]

Employees usually working more than 48 hours per week[1]
Great Britain: spring of each year[2]
(thousands)

	Number
1984	2,740
1985	2,763
1986	2,968
1987	3,126
1988	3,512
1989	3,598
1990	3,606
1991	3,414
1992	3,263
1993	3,360
1994	3,518
1995	3,690
1996	3,793

Notes:
[1]Total usual hours per week including paid and unpaid overtime and excluding meal breaks.
[2]Data for 1979 to 1983 either not available or not consistent with later years.
Source: Labour Force Survey, Office for National Statistics.

53 HC Deb 12 November 1996, c174W

According to IDS, some 11% of the UK workforce currently enjoys no right to paid holiday at all and a further 14% have less than 3 weeks. The majority of these are on temporary or fixed term contracts. 55% of temporary workers have no paid holidays compared with 8% of those on permanent contracts. Lack of paid holidays is most common in small firms: 24% of workers in companies of fewer than 10 staff and 13% in firms of 10-19 staff.[54]

An indication of the spread of holiday entitlements in the UK is given in the following table:

Entitlement to paid holidays[55]
United Kingdom
Autumn 1995

thousands

	All employees (a)	Full-time employees	Part-time employees
None	2,498	707	1,791
1 - 5 days	278	67	211
6 - 10 days	795	351	444
11 - 15 days	1,731	1,129	601
16 - 20 days	4,242	3,487	755
20 days or less	9,544	5,742	3,802
More than 20 days	10,812	9,672	1,140
Total (b)	20,356	15,413	4,942

Note: totals may not equal sum of parts due to rounding
(a) includes some who did not give details of full-time/part-time status
(b) excludes those who did not give details of their holiday entitlement

Source: Quantime (LFS Database)

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54 IDS *Employment Europe* 413, May 1996, "UK to toe the line on working time limits?"

55 Table contributed by Nicola Chedgey, Economic Policy and Statistics Section

Annex 1: Chronology of Working Time Directive

1. The *Social Charter*, signed by all Heads of Government of the Member States of the EC except the UK at Strasbourg in **December 1989** said, under the heading, "Improvement of Living and Working Conditions":[56]

> "7. The completion of the internal market must lead to an improvement in the living and working conditions of workers in the European Community. This process must result from an approximation of these conditions while the improvement is being maintained, as regards in particular the duration and organization of working time and forms of employment other than open-ended contracts, such as fixed-term contracts, part-time working, temporary work and seasonal work.
>
> The improvement must cover, where necessary, the development of certain aspects of employment regulations such as procedures for collective redundancies and those regarding bankruptcies.
>
> 8. Every worker of the European Community shall have a right to a weekly rest period and to annual paid leave, the duration of which must be harmonized in accordance with national practices while the improvement is being maintained." [my underlining]

2. The Commission submitted its proposal for a *Draft Directive concerning certain aspects of the Organisation of Working Time* to the Council of Ministers in **September 1990**.[57] The UK objected to the Directive from the beginning, arguing that it would impose burdens on employers, interfere in the relations between employers and employees, reduce competitiveness and flexibility and that it was not necessary on grounds of health and safety.[58]

3. The Economic and Social Committee gave its Opinion in **December 1990**, and the European Parliament gave its Opinion at its first reading in **February 1991**.

4. The Commission submitted revised proposals, taking account of these Opinions, to the Council in **April 1991**.[59]

5. The proposals were discussed at Social Affairs Councils in **December 1991**, **April 1992** and **June 1992** without agreement being reached. However major concessions were agreed in the Council on **24 June 1992**. In her statement after this Council, Mrs Shephard, then Secretary of State for Employment, reserved the right to challenge the Directive's legal base in the European Court of Justice [ECJ]:

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56 *"Community Charter of the Fundamental Social Rights of Workers"*, European Commission Press Notice, 30 October 1989

57 COM(90) 317, 8073/90

58 See, eg, Explanatory Memorandum submitted by the Department of Employment on 24 October 1990, 8073/90, paras 9-11

59 COM(91) 130, 5950/91

> " The Council devoted most of its time to consideration of the working time directive, but the Council did not reach a common position, nor was a vote taken.
>
> I made it clear that the United Kingdom continues to have very severe doubts about the directive as a whole and about its proposed legal base and that we reserved the right to challenge it in the European Court of Justice. In the discussions of the text, the United Kingdom secured all its key objectives, namely: the right for employees to work more than 48 hours per week if they choose to do so, freedom for each member state to decide whether to allow working on a Sunday, and the right of employers and employees to make collective agreements at local level concerning working time in a manner which best suits their particular circumstances — to derogate from the terms of any eventual directive. The United Kingdom also secured other helpful points.
>
> However, other member states continued to have difficulties with the proposal, and the Council decided that further work on various aspects of the directive was necessary before the issue could return to Ministers.....
>
> The outcome on the working time directive was a very good one for the United Kingdom."[60]

The Council failed to reach a final agreement because of "a few technical problems concerning the derogations to the maximum work week (problems which arise from differences between the various national legislations for the reference period) and the possibility to receive derogations through collective bargaining agreements".[61] "Broad agreement" on the "Directive as a whole", was, however, reached.

6. The Council reached political agreement on a common position on the proposal in **June 1993**. In his statement on the Social Affairs Council Meeting of **1 June 1993**, Michael Forsyth, then Minister of State for Employment, made it clear that the Government would abstain on the Directive and challenge its legal base in the ECJ:

> "A number of important issues were discussed. The main debate related to the draft Working Time Directive on which the Council reached political agreement on a common position. We made clear the United Kingdom's continued objections to the Directive, and our intention to challenge the legal base of the directive, when it is adopted, before the European Court of Justice, on the grounds that it represents a misuse of the health and safety provisions introduced by the Single European Act. In consequence, my right hon. Friend registered his intention to

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60 HC Deb 30 June 1992, c 548W

61 *Europe*, 26 June 1992

> abstain on the Directive.
>
> Three major concessions were secured which would allow the United Kingdom to maintain flexibility and freedom of choice for employers and employees, namely:
>
> - the right for individual workers to work more than 48 hours a week if they wish;
>
> - that Sunday working should remain a matter for national law;
>
> - provision to allow company and plant agreements to derogate from the main provisions of the directive.
>
> Exemptions from the scope of the Directive were made for work at sea and doctors in training, to add to those previously agreed."[62]

David Hunt, Secretary of State for Employment, told journalists that the UK had drawn most of the Directive's teeth:

> "Mr Hunt told journalists that Britain had won important concessions, including an indefinite exemption from any mandatory regulation of overtime working. But the appeal would go ahead because the directive would impose other mandatory controls, including new minimum rest periods and holidays.
>
> 'I believe we have drawn most of its teeth,' Mr Hunt said. 'Even so I refused to accept the directive because we believe that it is an abuse of the treaty for the commission to have used health and safety as a legal base.' "[63]

7. The European Parliament proposed 19 amendments to the common position at its second reading in **October 1993**.

8. The Commission accepted, wholly or partly, 9 of these amendments and resubmitted the proposal to the Council on **23 November 1993**, where it was adopted.[64] The UK abstained.

9. The UK made its application for the annulment of the Directive to the ECJ in **March 1994**.

10. The Advocate General gave his Opinion, which went against the UK, on **12 March**

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62 HC Deb 7 June 1993, c 95W

63 *Guardian*, 2 June 1993, "UK to appeal against EC overtime limits"

64 93/104/EC

1996.[65]

11. The ECJ confirmed this Opinion in all but one small particular, on **12 November 1996**.[66]

12. In a statement on the ECJ's decision on **12 November 1996**, Ian Lang, President of the Board of Trade, said that the Government would insist that the present Intergovernmental Conference [IGC] ensures that the Directive no longer affects the UK, but that:

> "In the meantime, of course, we have no option but to obey the law until we secure the necessary treaty changes. But we shall legislate to implement the directive only after carrying out proper and necessary public consultation on the issues and options. In doing so, we shall aim to take advantage of the valuable derogations already secured during our negotiations on the directive."[67]

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65 Opinion of Advocate General Leger delivered on 12 March 1996, Case C-84/94, *United Kingdom v Council of the European Union* (Council Directive 93/104/EC of 23 November 1993 concerning certain aspects of the organization of working time - Action for annulment)

66 Judgment of the Court, 12 November 1996, in Case C-84/94, *United Kingdom of Great Britain and Northern Ireland v Council of the European Union*

67 HC Deb 12 November 1996, c 156

Annex 2: History of Controls on Working Time in the UK

Protective legislation on young people's and children's (and, later, women's) hours began to be introduced at the beginning of the nineteenth century in response to the appalling conditions then prevailing in factories and mines and the extremely long hours worked in factories, mines and shops. Lord Shaftesbury was closely associated with much of the early legislation, particularly the campaign for a ten hour day. The *Factory Act 1833* prohibited the employment in textile factories of children under nine and limited the hours which could be worked by older children. The *Factory Act 1844* extended the limitations on the hours of young people to cover women. The *Factory Act 1847* reduced the maximum daily working hours in textile factories for both women and young people to ten a day. There followed a series of pieces of often contradictory legislation which were eventually rationalised in the *Factory and Workshop Act 1878*. This extended the 1833 Act to all factories, raised the minimum age for employment to ten and limited the hours of work for children under 14 to half the normal day. The *Education Act 1880* made school attendance for children under ten compulsory for the first time. Children with poor attendance records were not allowed to leave until the age of 13. The *Shop Hours Regulation Act 1886* provided that shopworkers under the age of 18 should not work more than 74 hours a week.

The twentieth century opened with the *Factory and Workshop Act 1901* which restricted the hours of work of women and young people to a ten hour day (and 55½ hour week) in textile factories and to a 10½ hour day (and 60 hour week) in other factories. The *Employment of Women, Young Persons and Children Act 1920* prohibited the employment of women and young persons at night in industrial undertakings. It also laid down 14 (then the compulsory school leaving age) as the minimum age for all full-time employment. The *Shops Act 1934* limited the hours of work of young people in shops to 48 a week. The *Factories Act 1937* abolished the distinction between textile and non-textile factories and further restricted the hours of work of women and young people to 9 a day and 48 a week. The *Wages Councils Act 1945* converted the Wages Boards, established in 1909, to Wages Councils which set minimum holidays and premium rates for overtime and shift working in the industries they covered. The *Agricultural Wages Act 1948* established the Agricultural Wages Board which sets minimum holiday entitlements for agricultural workers. The *Shops Act 1950* consolidated previous legislation on shopworkers' hours. Amongst other things, it provided that no person could be employed in a shop for more than six hours without an interval of at least 20 minutes. It also required a lunch break of at least three-quarters of an hour for anyone working between 11.30 am and 2.30 pm and a half hour tea break for someone working between 4pm and 7pm. The *Mines and Quarries Act 1954* consolidated previous legislation and banned women from working underground. It also restricted the hours of women and young people above ground to a 9 hour day and a 48 hour week. The *Factories Act 1961* consolidated earlier Factories Acts.

There have been very few legislative restrictions on the hours of work of adult males. The *Coal Mines Regulation Act 1908* restricted the hours a man could work underground to 8 (later, 7½) a day. The *Hours of Employment (Conventions) Act 1936* restricted the hours of sheet glass workers so that the UK could ratify ILO Convention No 43. The *Shops Act 1950* limited the hours shop assistants could work without a break, as described above. The *Baking Industry (Hours of Work) Act 1954* imposed a general ban on baking work between 10pm and

5am. The *Transport Act 1968* controlled the hours of public service vehicle drivers. These are now largely controlled by *EC Regulation 3820/85* which limits drivers' hours to nine a day. The *Air Navigation Order* 1989 and the Civil Aviation Authority's *CAP 371* effectively limit the hours of flight crew to 55 a week.[68]

Nearly all these restrictions except those affecting children under school leaving age and those on drivers' and pilots' hours have now been repealed. The Agricultural Wages Board also still sets minimum holidays for the workers it covers. The Conservative Government has argued that such controls are outdated and reduce the flexibility and competitiveness of UK business. The *Sex Discrimination Act 1986* repealed controls over women's hours of work contained in the *Mines and Quarries Act 1954*, the *Factories Act 1961* and the *Hours of Employment (Conventions) Act 1936* (which, by that time contained the legislation banning night work by women in industrial undertakings.) The 1986 Act also repealed the *Baking Industry (Hours of Work) Act 1954*. The *Wages Act 1986* withdrew the right of Wages Councils to set holiday entitlements. The *Employment Act 1989* repealed the restrictions on the hours of work of young people contained in the *Factories Act 1961*, the *Shops Act 1950* and the *Employment of Women, Young Persons and Children Act 1920*. The *Coal Industry Act 1992* and a Commencement Order made under it repealed the *Coal Mines Regulation Act 1908*.[69] The *Deregulation and Contracting Out Act 1994* repealed the remaining provisions of the *Shops Act 1950* which required shop assistants to take regular breaks. The *Health and Safety (Repeals and Revocations) Regulations 1995* repealed the *Hours of Employment (Conventions) Act 1936*.

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68 Civil Aviation Authority CAP 371, "*The Avoidance of Fatigue in Aircrews*", May 1990

69 HC Deb 20 October 1993, c 277, Statement by Tim Eggar on the Coal Industry

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