The Working Time Regulations were laid before the House on 30 July 1998 and come into force on 1 October 1998. They implement the EC Working Time Directive which requires Member States to set limits on the length of the working week and working day and to introduce a right to a minimum amount of paid annual leave. This paper summarises the main provisions of the Directive and the Regulations, their potential cost and benefits, and some of the criticisms which have been made of their provisions. Research Paper 96/106 contains a more detailed account of the background to the Working Time Directive and the arguments of principle surrounding it.

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Summary of main points

The EC Working Time Directive, which requires Member States to set limits on the length of the working day and working week and to set a minimum amount of paid annual leave, should have been implemented in the UK by 23 November 1996. The Conservative Government delayed implementation while it awaited the outcome of an (unsuccessful) challenge in the European Court of Justice. The Labour Government issued draft implementing Regulations for consultation on 8 April 1998, and the final version - the Working Time Regulations 1998 SI No 1833 - were laid before Parliament on 30 July 1998. They come into force on 1 October 1998. The Government has promised to issue further guidance during the summer. The Regulations will also implement aspects of the Young Workers' Directive which should have been implemented by 22 June 1996.

Workers employed in “air, rail, road, sea, inland waterway and lake transport; sea fishing; and other work at sea” are excluded from the scope of the Directive (and Regulations), as, in some respects, are doctors in training, the armed forces, the police and other civil protection services. The European Commission has initiated proposals which would extend the Directive to some of the excluded sectors.

Very briefly, the Regulations confer on adult workers the rights to:

- A daily rest period of at least 11 consecutive hours in each 24 hour period
- A daily rest break of 20 minutes (or length determined by collective or workforce agreement) for those working more than six hours a day
- A weekly rest period of 24 hours in each seven day period (or 48 hours in 14 days)
- Three weeks' paid leave each year, rising to four weeks in November 1999.

The Regulations place a general limit of 48 hours on the working week, which can be averaged over 17 weeks. Individual workers can agree in writing with their employers voluntarily to disapply the 48 hour limit. They also place a general limit of eight hours on night work, though this, too, can be averaged over 17 weeks.

There are many "derogations" or special cases. For example, the limits on the working week and night work and the rights to daily rest periods and breaks and weekly rest periods do not apply to people whose working time is not measured. The limit on the length of night work and the rights to daily rest periods and breaks and weekly rest periods do not apply to a whole range of activities such as security and surveillance and those requiring continuity of service or production, although compensatory rest should be provided. These provisions can also be modified by collective or workforce agreements.

The Regulations represent a major change in employment law of a kind which would normally merit primary legislation. However, as they implement an EC Directive, it is possible to make the changes by Order under section 2(2) of the European Communities Act 1972. There has been some concern about the lack of Parliamentary debate and the short notice employers have been given of potentially major changes they will have to make to terms of employment.
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I Background

On 30 July 1998, the Government laid the Working Time Regulations 1998, SI 1833, before Parliament. They implement the EC Working Time Directive. They come into force on 1 October 1998 but as Parliament rose for the summer recess on 31 July 1998, they will not be debated in Parliament before they come into operation. The Regulations have been made under section 2(2) of the European Communities Act 1972 and are subject to the negative procedure. They may be debated after the recess if they are prayed against within forty sitting days.

The EC Working Time Directive requires Member States to set limits on the length of the working day and working week and to set a minimum amount of paid leave. Library Research Paper 96/106, dated 19 November 1996, contains a full discussion of the Directive and its implications. The Directive should have been implemented in the UK by 23 November 1996, but the Conservative Government delayed while the European Court of Justice deliberated upon the UK challenge to the legal basis of the Directive. In the event, this challenge was unsuccessful. On 6 December 1996, the DTI published a Consultation Document on Measures to Implement Provisions of the EC Directive on the Organisation of Working Time. This took the line that the Government should make as much use of the options for exemption and variation offered by the Directive as it possibly could to minimise its impact. Responses were requested by 6 March 1997. However, no steps had been taken to implement the Directive before the General Election of 1 May 1997, and the Labour Government, although committed to implementation, spent some time deciding how it would actually do this.

In reply to a PQ on 5 February 1998, Ian McCartney, Minister of State at the Department of Trade and Industry (DTI), announced that the Government would publish draft regulations for consultation around the end of March and complete the consultation in time to have the regulations in force by 1 October. In the event, the draft Regulations were published on 8 April 1998. Comments were requested by 5 June 1998. The final version of the Regulations, laid before Parliament on 30 July 1998, made a number of relatively small changes which took account of some points made during the consultation period, but major changes were precluded by the need to stick closely to the Working Time Directive. The Government has, theoretically, been open to legal action based on its failure to implement

2 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
3 HC Deb 5 February 1998, c 1222
the Directive in time since November 1996, but only one or two cases have been brought.\(^5\)

The Regulations will also implement those provisions of the *Young Workers’ Directive* which deal with the hours of work of adolescents (i.e. young people aged over minimum school leaving age but under 18).\(^6\) This Directive should have been implemented by 22 June 1996.

This paper first summarises the provisions of the *Working Time Directive* and then, under the same headings, those of the *Working Time Regulations*. It then briefly looks at the expected costs and benefits of the changes, and some of the points raised during the consultation period. The Regulations are complex and Members wanting to know exactly how they will affect a particular individual should consult the Regulations themselves and the Guidance the Government is due to publish before they come into force. This should be available on the DTI's website towards the end of August.\(^7\)

## II The Directive’s Provisions

The main requirements of the *Working Time Directive* are summarised below:

### A. 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]. In addition, it does not apply “where characteristics peculiar to certain specific activities, such as the armed forces or the police, or to certain specific activities in the civil protection services inevitably conflict with it” [Article 2 of Directive 89/391/EEC].\(^8\)

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\(^7\) [http://www.dti.gov.uk](http://www.dti.gov.uk)

\(^8\) Article 1, para 3 of the *Working Time Directive* states that it applies to “all sectors of activity, both public and private, within the meaning of Article 2 of Directive 89/391/EEC”. This is the so-called "Framework” Directive on Health and Safety at Work. Article 2 defines its scope: “(1) This Directive shall apply to all sectors of activity, both public and private (industrial, agricultural, commercial, administrative, service, educational, cultural, leisure, etc ). (2) This Directive shall not be applicable where characteristics peculiar to certain specific public service activities, such as the armed forces or the police, or to certain specific activities in the civil protection services inevitably conflict with it. In that event, the safety and health of workers must be ensured as far as possible in the light of the objectives of this Directive.”
B. 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 H below].

C. 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 agreements, agreements between the two sides of industry or national legislation [Article 4]. There are derogations for many groups [see H below].

D. 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]. The weekly rest period can be averaged over a "reference period" of up to 14 days [Article 16]. Again, there are derogations for many groups [see H below].

E. 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 up to 4 months [Article 16]. Derogations are allowed for certain groups [see H 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 and that records are kept of all those agreeing to work more than 48 hours a week [Article 18, para. 1(b)(i)].

F. 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)].
G. Night Work

Normal hours of night workers are restricted to 8 hours in any 24 hour period [Article 8]. The 8 hour limit must always apply to night workers whose work involves “special hazards or heavy physical or mental strain”. “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 or agreements concluded between the two sides of industry [Article 16]. There are derogations for many groups [see H below].

Night workers have an entitlement to free health assessments both before they start night work and at regular intervals thereafter [Article 9]. NB The provision on free health assessments is not covered by the derogations described in H below.

H. Derogations

Certain groups of workers can be exempted from all the provisions described above except the provision 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. Derogation may be by means of “laws, regulations or administrative provisions or by means of collective agreements or agreements between the two sides of industry”. [Article 17, para 2]. 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;

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9 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.
(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]

All workers can be exempted from the provisions on daily rest, rest breaks, weekly rest, the length of night work and reference periods “where occurrences are due to unusual or unforeseeable circumstances, beyond the employers’ control, or to exceptional events, the consequences of which could not have been avoided despite the exercise of all due care”. Exemptions from these provisions are also allowed “in cases of accident or imminent risk of accident” [Article 17, para 2.2].

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10 Article 17, para 2.2 (a) refers to Article 5(4) of the Framework Directive on Health and Safety at Work, and it is this which is quoted here.
Shift workers can be exempted from the provisions on daily and weekly rest “each time the worker changes shift and cannot take daily and/or weekly rest periods between the end of one shift and the start of the next one”. Derogations are also permitted “in the case of activities involving periods of work split up over the day, particularly those of cleaning staff” [Article 17, para 2.3].

It is also possible to derogate from the provisions on daily rest periods, daily rest breaks, weekly rest periods, length of night work and "reference periods" by means of collective agreements or agreements between the two sides of industry [Article 17, para 3].

While there can be no derogation from the general principle of a 48 hour week (except for those whose working time cannot be measured or predetermined), 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]. This provision is to be reviewed by the Commission and Council by 23 November 2003.

I. Definition of "Working Time"

The limits in the Directive apply to "working time" which is defined as:

Any period during which the worker is working, at the employer's disposal and carrying out his activities or duties, in accordance with national laws and/or practice.

[Article 2, para 1]

III The Regulations

The Labour Government, like the Conservative Government before it, has decided to make use of most of the derogations permitted by the Directive, but there are a number of respects in which the Labour proposals differ from those of the Conservatives. For example, the Conservatives had proposed that the rest break allowed after six hours' work need be no longer than five minutes, whereas, the Labour Government proposes that it should be at least 20 minutes and should count as part of working time. The Conservatives had proposed that workers should qualify for the three weeks' paid annual leave after 49 weeks’ service, whereas Labour provides for a three month qualifying period with notional accrual. The Conservatives implied that the rights conferred by the Directive should apply only to those employed under a contract of employment, whereas Labour intend that all workers who are not genuinely self-employed should be covered. The Conservatives proposed that enforcement should be by individual application to employment tribunals, whereas Labour will involve the health and safety enforcing authorities as well.

The main provisions of the Regulations are summarised below:
A. **Exclusions**

Workers employed in the following sectors of activity are excluded from the scope of the Regulations: “air, rail, road, sea, inland waterway and lake transport; sea fishing; and other work at sea”. Also excluded are workers engaged in “the activities of doctors in training” and cases “where characteristics peculiar to certain specified services such as the armed forces or the police, or to certain specific activities in the civil protection services, inevitably conflict with the provisions of these Regulations” [Regulation 18].

The April 1998 Consultation document suggested that the mere location of a work activity (e.g. in an airport shop) is not sufficient to make workers carrying it out subject to exclusion. It also points out that the European Commission published a White Paper in July 1997 which proposed extending the *Working Time Directive* to non-mobile workers in the excluded sectors.\(^{11}\) This would suggest that non-mobile workers in the excluded sectors (people selling tickets at railway stations, perhaps) are excluded at present. Proposals based on this White Paper are being discussed by the European social partners under second stage consultations at present.\(^{12}\)

The genuinely self-employed are also excluded. The Regulations apply to all “workers”. A “worker” is defined as:

an individual who has entered into or works under (or where the employment has ceased, worked under) -

(a) a contract of employment; or

(b) any other contract, whether express or implied and (if it is express) whether oral or in writing, whereby the individual undertakes to do or perform personally any work or services for another party to the contract whose status is not by virtue of the contract that of a client or customer of any profession or business undertaking carried on by the individual

[Regulation 2]

The purpose of this definition is to ensure that workers such as agency workers or homeworkers who may not strictly work under a “contract of employment” are covered. The April 1998 Consultation Document explained:

Those whose work amounts to carrying out business activity on their own account - i.e. likely to be paid on the basis of an invoice or similar demand for payment, rather

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\(^{12}\) *European Industrial Relations Review* 292, May 1998, p. 3
than receiving “wages” from a party whose relationship to them is that of an employer as opposed to a client or customer - are excluded.

Part V of the Regulations deals with “special classes of person”. Essentially, it ensures that agency workers, Crown employees (civil servants), the armed forces, House of Lords and House of Commons staff, the police service, non-employed trainees and agricultural workers can be covered by the Regulations. There are modifications, for example to take account of the armed force’s own service redress procedures and the Agricultural Wages Board. Of course, members of the police service and armed forces may be excluded because of their “peculiar characteristics” or “specific activities” under Regulation 18, but it must be envisaged that there are circumstances in which members of these groups would be covered. Ultimately, of course, decisions on precisely who is and who is not covered will be for the Courts.

B. **Daily rest periods**

Adult workers are entitled to a rest period of at least 11 consecutive hours in each 24 hour period. Young workers are entitled to 12 hours rest\(^{13}\) [Regulation 10]. There are many “special cases” in which this provision need not apply (see H below).

C. **Daily rest breaks**

Adult workers are entitled to a rest break if their daily working time is more than six hours, and young workers are entitled to a rest break of 30 minutes if their daily working time is more than four and a half hours. The length of the adults’ rest break can be determined by a collective agreement or a workforce agreement (see K below). If there is no workforce or collective agreement, the adults’ rest break must be at least 20 minutes [Regulation 12]. Again, there are many “special cases” in which this provision need not apply (see H below).

D. **Weekly rest periods**

Adult workers are entitled to a weekly rest period of 24 hours in each seven day period. This can be spread over 14 days (so that workers could, for example have one weekend off every fortnight). The daily rest period (11 hours) is additional to this. Young workers are, generally, entitled to two days' rest every seven days [Regulation 11]. Again, there are many “special cases” in which this provision need not apply (see H below).

\(^{13}\) Young workers are those who have passed the minimum school leaving age but not yet reached the age of 18
E. Maximum working week

There is a general limit of 48 hours on the working week. However this can be averaged over 17 weeks [Regulation 4]. In the “special cases” described in H below, the 48 hour limit can be averaged over 26 weeks. Individual workers can agree in writing with their employer to disapply the 48 hour limit [Regulation 5]. Such an agreement is only valid if the employer maintains up-to-date records of all workers who have agreed not to be bound by the 48 hour limit and the hours they actually work, and makes such records available to the “enforcing authority” (i.e. the Health and Safety Executive or the local authority). There are more limited exemptions from this provision (see H below).

F. Annual leave

All workers are entitled to three weeks paid leave in each leave year. This entitlement will rise to four weeks on 23 November 1999. The entitlement arises after 13 weeks’ employment with a particular employer. The leave may be taken in instalments but must be taken during the leave year in question and cannot be replaced by pay in lieu unless the worker leaves his job with leave owing. Where a worker leaves his job having taken more of his leave than he is entitled to pro rata, a relevant agreement can stipulate that he should compensate his employer in some way14 [Regulations 13-16]. There are no exceptions to this provision.

G. Night work

There is a general limit of eight hours work in any 24 hour period for night workers [Regulation 6]. However, this can be averaged over 17 weeks, except in cases where the “work involves special hazards or heavy physical or mental strain”. A “night worker” is defined as someone who, “as a normal course, works at least three hours of his daily working time during night time”. Collective or workforce agreements can substitute a definition based on a proportion of annual working time likely to be worked at night. “Night time” is defined as a period of at least seven hours including the period between midnight and 5 a.m. The period can be set by a relevant agreement. If there is no such agreement, it is 11 p.m. to 6 a.m. [Regulation 2]. There are many “special cases” in which this provision need not apply (see H below).

Adult night workers are entitled to free health assessments before taking up night work and at regular intervals thereafter. Young workers assigned to work between 10 p.m. and 6 a.m. are entitled to a free health assessment before taking up such work and at regular intervals

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14 A “relevant agreement” is either a workforce agreement or a collective agreement or “any other agreement in writing which is legally enforceable as between the worker and his employer”.

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thereafter. Employers should, where possible, transfer night workers who have been assessed by a registered medical practitioner as suffering from health problems associated with night work, to suitable work during the day [Regulation 7].

H. Derogations or special cases

The limits on the maximum working week and the length of night work do not apply to workers employed as domestic servants in private households. Neither does the right to a free health assessment for night workers [Regulation 19]. Domestic service in private households is generally excluded from health and safety legislation.15 For this reason, the limits, which will be enforced by Health and Safety officers, will not apply to domestic servants.

The limits on the maximum working week and the length of night work, and the rights to daily rest periods, daily rest breaks and weekly rest periods do not apply where it is characteristic that working time is “not measured or predetermined or can be determined by the worker himself”. This may be the case for:

(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.

[Regulation 20]

The limit on the length of night work and the rights to daily rest periods, daily rest breaks and weekly rest periods do not apply:

(a) where the worker’s activities are such that his place of work and place of residence are distant from one another or his different places of work are distant from one another;

(b) where the worker is engaged in security and surveillance activities requiring a permanent presence in order to protect property and persons, as may be the case for security guards and caretakers or security firms;

(c) where the worker’s activities involve the need for continuity of service or production, as may be the case in relation to:

15 Article 3 of the EC “Framework” Directive on Health and Safety at Work, Dir 89/391, defines a “worker” as “any person employed by an employer, including trainees and apprentices but excluding domestic servants”
(i) services relating to the reception, treatment or care provided by hospitals or similar establishments, residential institutions and prisons;

(ii) work at docks or airports;

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

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

(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, as may be the case in relation to:

(i) agriculture;

(ii) tourism; and

(iii) postal services.

(e) where the worker’s activities are affected by:

(i) an occurrence due to unusual and unforeseeable circumstances, beyond the control of the worker’s employer; or

(ii) exceptional events, the consequences of which could not have been avoided despite the exercise of all due care by the employer; or

(iii) an accident or the imminent risk of an accident

[Regulation 21]

Shiftworkers are exempted from the rules on daily and weekly rest periods when they change shifts and the change makes it impossible for them to take the 11 or 24 hour break. Workers whose work is split up over the day (for example cleaning staff) are also exempt from the daily and weekly rest periods [Regulation 22].

The provisions on the length of night work, daily rest periods, weekly rest periods and daily rest breaks can be modified by collective or workforce agreements. Such agreements can also introduce a different averaging period of up to 52 weeks for calculating the 48 hour maximum week if this is needed for “objective or technical reasons or reasons concerning the organization of work” [Regulation 23].
Where any limits are disapplied or modified under Regulations 21, 22 or 23, employers must “wherever possible” allow an equivalent period of compensatory rest, or, in exceptional cases, if this proves impossible, such protection as may be appropriate to safeguard health and safety [Regulation 24].

I. Definition of "working time"

One of the difficult issues of interpretation of the Directive is what should count as "working time" and particularly whether "on call" time should count.

The April 1998 Consultation Document recognised this:

26. Whether time is "working time" will depend upon all the elements of the definition being satisfied in a given situation. However, given the general nature of the definition there is scope for difference of views as to whether it is satisfied or not. For example, there may be uncertainty whether a worker's mere presence at a workplace, or being "on call", and available for work but not actually carrying out a work-related activity constituted working time. It would appear that under the definition if a worker is not working then it is not working time, but it is hard to definitively say what constitutes "work". Many service sector jobs require workers to be at their place of work waiting until required to serve a customer (e.g. shop assistant or a waiter): this is often an inevitable aspect of their job and they are likely to consider themselves to be working during such time. However, if a worker is "on call" but otherwise free to pursue their time as their own, it would appear that they are less likely to be working until "called" to work. Similarly, it is not clear whether a lunch break, which was part of a worker's contractual hours, was working time or not. One might argue that if the worker was obliged to attend a lunch with colleagues it would be working time, whereas one would suggest otherwise if they were free to go to lunch with a friend. In cases of dispute, it would ultimately be for the courts to decide. However, workers (or their representatives) and employers may well conclude that they want to take steps to avoid such uncertainties.

27. The Regulations therefore allow for workers and employers to make a "relevant agreement" (see [footnote]) which could clarify what constitute "rest periods" and what constitutes "working time" at a particular place of work. Such an agreement might, for example, confirm that a worker's presence at their workplace was sufficient to establish such time was "working time" for the purpose of the Regulations. Similarly, the employer and worker(s) might agree

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16 The formulation in the Regulations would allow an effective agreement to be made by whatever means would create terms binding a particular worker and employer. This could be an agreement between an individual worker and employer, a collective or 'workforce' agreement" whose terms were imported (either explicitly, or by custom and practice) into an individual's work contract.
that all "contractual" time would count as working time, even if it included rest breaks or periods or was spent away from the worker's place of work.

Regulation 2 repeats the Directive's definition and allows for agreements between employer and employee to clarify precisely what is counted. It defines "working time" in relation to a worker as:

(a) any period during which he is working, at his employer's disposal and carrying out his activity or duties,

(b) any period during which he is receiving relevant training, and

(c) any additional period which is to be treated as working time for the purpose of these Regulations under a relevant agreement.

Time spent on “relevant training” was included following the consultation on the draft regulations. The draft regulations had only mentioned training in relation to young workers. The definition of “relevant training” excludes training courses provided by educational institutions or training businesses. The aim is to cover non-employed trainees (for example, those on Government training schemes) while at their place of work.

J. Enforcement

The Directive does not specify how its provisions should be enforced, but EC case law has established that proper implementation requires that enforcement arrangements are "effective, proportionate and dissuasive". Infringements must be "penalised under conditions, both procedural and substantive, which are analogous to those applicable to infringements of national law of similar nature and importance". The Conservative Government did not accept that working time was a health and safety matter, so their consultative document proposed that rights under the Directive should be enforced entirely by individual application to employment tribunals. However, the Labour Government agrees that long hours of work can be detrimental to health and safety and has involved the health and safety authorities in enforcement.

Part IV of the Regulations deals with enforcement. Briefly, it provides that entitlements (to daily rest periods, daily rest breaks, weekly rest periods and paid annual leave) should be enforced by individual application to employment tribunals. Limits (on the length of the working week and night work) should be enforced in the same way as current health and safety legislation, by Health and Safety Executive inspectors or local authority Environmental Health Officers.

17 April 1998 Consultation Document, para 159
18 Ibid
If an employment tribunal finds that a worker has been denied an entitlement, it must make a declaration to that effect and may order the employer to pay compensation to the worker. The amount of compensation “shall be such as the tribunal considers just and equitable in all the circumstances” [Regulation 30]. Workers are also given the right not to suffer detriment for refusing to forego an entitlement conferred by the Regulations or to comply with a requirement imposed in contravention of the Regulations [Regulation 31]. Dismissal for such a refusal would be automatically unfair [Regulation 32].

The Health and Safety authorities have their normal range of remedies for enforcing health and safety legislation by way of inspection, prohibition and improvement notices and, ultimately, criminal prosecution by the appropriate officers of the enforcing authority. [Regulations 28 and 29].

K. Workforce Agreements

The Directive offers much scope for varying its provisions by "collective agreements or agreements between the two sides of industry". Whilst the concept of a "collective agreement", negotiated between an independent trade union and an employer, has a long history in the UK, other forms of "agreement between the two sides of industry" are of much more recent origin and owe their existence primarily to EC law. In 1994, the European Court of Justice found that the UK had failed to implement correctly two Directives (concerning consultation with workers on collective redundancies and transfers of undertakings), because consultation was restricted to workplaces with recognised trade unions. The Conservative Government introduced Regulations under the European Communities Act 1972 which amended the Trade Union and Labour Relations (Consolidation) Act 1992 and the Transfer of Undertakings (Protection of Employment) Regulations 1981 so that employers are now required, at their choice, to consult either a recognised trade union or elected representatives. The Labour Government is currently consulting on changes to these provisions which it considers "do not provide a clear and satisfactory framework for the necessary information and consultation".

Schedule 1 of the Regulations defines “workforce agreements”. They must be in writing, last for a maximum of five years, and apply either to all the “relevant members of the workforce” or to all the relevant members who belong to a particular group (such as a particular workplace or those performing a particular function). "Relevant members of the

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19 Commission of the European Communities v United Kingdom of Great Britain and Northern Ireland, 8 June 1994
20 The Collective Redundancies and Transfer of Undertakings (Protection of Employment) (Amendment) Regulations 1995, SI No 2587
21 DTI Employment Relations Directorate, February 1998, Employees' Consultation Rights on Transfers of Undertakings and Collective Redundancies: Public Consultation, URN 97/988
"workforce" are all workers employed by the employer, excluding any whose terms and conditions are provided for, wholly or in part, in a collective agreement. This means that an employer cannot bypass a recognised trade union. The Draft Regulations identified two forms of "workforce agreement": one which had been signed by a majority of "relevant members of the workforce", and one which had been signed by representatives of the "relevant members of the workforce" elected in accordance with procedures set out in the schedule. The final version of the Regulations has been amended to take account of the argument that a collection of individual signatures from a majority of the workforce is unlikely to constitute a "side of industry" as required by the Directive. However, the collection of individual signatures will still be allowed where the employer employs 20 or fewer workers.

L. Implementation

The Regulations are being made under section 2 (2) of the European Communities Act 1972. Schedule 2 of the 1972 Act permits EC Directives to be implemented by subordinate legislation provided that they do not include 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 more than £100 a day.

Subordinate legislation under section 2 is, effectively, subject to the negative procedure. Schedule 2 provides that a statutory instrument "if made without a draft having been approved by resolution of each House of Parliament, shall be subject to annulment in pursuance of a resolution of either House."

As the Regulations were only laid on 30 July 1998 - the day before the House rose for the summer recess - they will not be debated before they come into force on 1 October 1998. The absence of debate has caused some comment.22 They will only be debated after they have come into force if they are prayed against within 40 sitting days. Parliament will not be able to amend the Regulations. In the unlikely event that they were to vote against the Regulations, they would be annulled.

22 See, eg, EDMs 1601 1997/98 in the name of David Chidgey, and 1637 1997/98 in the name of Christopher Gill
Clarifying guidance on the Regulations will be published "in the summer". The Government hope to make it available on the DTI website during August if possible.

IV Costs and Benefits

A Regulatory Appraisal of the Regulations was published as Annex E of the April 1998 Consultation Document. This states that the measures to be introduced "form an important part of the Government's aim to create a flexible labour market underpinned by minimum standards". The benefits identified are:

- Promotion of individual choice - there is evidence that some people working long hours would be happier working fewer hours for less pay but are not given the choice by their employer.

- A better balance between work and family life - 8% of employees have no holiday but among working women with dependant children the proportion is 15%. 54% of male employees working over 78 hours and 45% of those working over 48 hours are fathers, compared with 37% of all male employees.

- Improvements in health and safety - reductions in stress and fatigue caused by long hours can lead to better performance at work with fewer accidents.

- A more committed workforce - there is some evidence that reductions of excessive hours can increase productivity and cut absenteeism. Minimum standards across industry discourage competition that relies on poor conditions for workers which sometimes amounts to exploitation.

The Regulatory Appraisal describes the many difficulties in making estimates about the cost of introducing these limits on working time, but suggests that the immediate cost of implementing the Directive in the UK would be about £1.9 billion per year - less than 0.5% of the annual labour bill. The industrial sectors likely to be most affected are agriculture, mining and hotels and restaurants.

Estimates are made of the numbers likely to be directly affected by each provision and the costs of compliance:

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23 HC Deb 23 July 1998, c 640W
24 http://www.dti.gov.uk
### Table: Workers directly benefiting from the Regulations and Cost (per annum) of complying with the Regulations

<table>
<thead>
<tr>
<th>Regulations</th>
<th>Workers directly benefiting from the Regulations</th>
<th>Cost (per annum) of complying with the Regulations</th>
</tr>
</thead>
<tbody>
<tr>
<td>Minimum daily and weekly rest periods*</td>
<td>2.1 m</td>
<td>£1.16 bn</td>
</tr>
<tr>
<td>Working time limits for night workers of 8 hours per day*</td>
<td>0.3 m</td>
<td>£0.18 bn</td>
</tr>
<tr>
<td>Minimum annual paid leave</td>
<td>2.5 m</td>
<td>£0.47 bn</td>
</tr>
<tr>
<td>Working time limits of 48 hours per week</td>
<td>2.7 m</td>
<td>£0.06 bn</td>
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<tr>
<td>Health assessments for night workers</td>
<td>3.5 m</td>
<td>£0.05 bn</td>
</tr>
<tr>
<td>TOTAL*</td>
<td></td>
<td>£1.9 bn</td>
</tr>
</tbody>
</table>

*Costs relating to provisions for adolescents are included in the totals. The requirement for daily and weekly rest periods for young workers is estimated to affect about 18,000 people at a cost of £5 million.

After November 1999, the additional week's paid leave would raise the cost by £0.4 billion per annum.

### V Response to Consultation

Generally, organisations representing large employers, such as the CBI, have welcomed the fact that the Government has decided to make use of all the available flexibilities. Representatives of small firms remain strongly opposed to what the Federation of Small Businesses (FSB) calls the "increased amounts of red tape resulting from the implementation of these directives". Trade unions are pleased with the introduction of statutory minimum rights on working time and with the improvements on the Conservative Government's proposals, but concerned about the implications for collective bargaining of some of the methods of implementation adopted.

A large number of detailed points were made by organisations responding to the Consultation Document. Some of the recurring themes are outlined below:

#### A. Lead Time

Many employers' organisations are concerned at the speed with which such a major change in working practices will have to be introduced. The FSB, in their response to the Consultation document, say:

> It is our opinion that the Government's determination to bring the regulations into force in October 1998 is unrealistic as businesses are not aware that these regulations are to be enforced so quickly. It is impractical to expect most firms,
particularly for owner manager small businesses without the facilities of human resource professionals, to gear up to these regulations in such a short lead time. Businesses need a longer lead time to change their working practices, which obviously involves time and effort.

The CBI, in their draft response, suggest that implementation be delayed until at least 1 January 1999. This is also the view of the Better Regulation Task Force who point out that local authorities will not have budgeted to appoint the additional enforcement officers they will need in the middle of the financial year.

B. Uncertainty

There is much concern that the Regulations still leave a great deal to be determined by legal interpretation. Despite the explanatory notes in the Consultation Document, many companies (e.g. in distribution) are not clear whether they count as an "excluded sector" or not. There are wildly conflicting views about who might class as a "managing executive or other person with autonomous decision-taking powers". BECTU, for example, says that many broadcasting workers:

may not have specifically measured hours of work but are nonetheless subject to overall deadlines i.e. production companies or broadcasters will require that a certain amount of work (e.g. production of a television programme) is to be undertaken by a stated deadline - even though precise hours worked are not specified. We would argue that these are clearly examples of working time which is predetermined by the employer and not by the workers themselves.

The Institute of Personnel and Development (IPD), on the other hand, considers that most "managers" (who are subject to similar deadlines) will be excluded from the Directive. It is still not clear exactly what will count as "working time" and who will count as a "worker". The Better Regulation Task Force, while accepting that the broad definition of "worker" adopted in the Regulations is a matter of policy, argues that a great deal of uncertainty (and cost) would be removed if the definition were limited to those who worked under a contract of employment. The GMB point out that it is not clear how the definition of "night worker" will apply to those on rotating shifts. The FSB fear that "the regulations, as drafted, will not allow employers to understand their obligations and, similarly, employees to be aware of their rights". The CBI argue that it will be particularly difficult to keep track of time worked and holidays due to temporary and contract workers who work for a number of different employers. The TUC hope that the promised Guidance will cover questions such as the treatment of travel to work time where the employee keeps the employer's vehicle at home and travels direct to his first appointment. The TUC accepts that, ultimately, such questions can only be decided by the courts, but argues that "clear guidance could avoid much unnecessary litigation".

There is a general view that the Government, in its anxiety to implement the Directive correctly (and so avoid possible costly legal proceedings and compensation claims in the
European Court), has merely "copied out" its wording. In so doing, the Government is thought to have "copped out" of laying down precise rules on how it should be interpreted in the UK. On the other hand, some commentators, such as the Better Regulation Task Force, advocate the use of “copy-out” as it keeps the Regulations “goal-based”.

C. Annual Leave

Some employers do not grant annual leave until people have worked for them for a year. The regulations confer a right after three months and employers' organisations like the CBI fear that this will be very disruptive in sectors such as construction and textiles. On the other hand, trade unions believe there should be no qualifying period for annual leave. They fear that temporary and contract workers may never qualify. Another area of uncertainty is bank holidays. The TUC argues that the statutory right to paid annual leave should be in addition to bank holidays and that a new statutory right to paid time off on public holidays should be created.

The IPD points to a potential difficulty where an employee agrees not to take up his entitlement to paid annual leave. What is now Regulation 13(9) - in accordance with the Directive - prevents him being paid in lieu.

D. Workforce Agreements

The TUC is highly critical of the proposals for workforce agreements. It is perfectly happy with the inclusion of collective agreements within the definition and glad that the Government has said that where a collective agreement exists this must be the method used. It accepts that EC law requires that there should be a mechanism for worker representation in all organisations, even where no trade union is recognised. However, it does not consider that the proposals for electing employee representatives in the draft Regulations comply with EC law as employers will have too much power in deciding how these representatives are to be elected and as there are no controls on ballot-rigging. It is also completely opposed to workforce agreements signed by a majority of individual employees, arguing that they are:

entirely inconsistent with the letter and the spirit of Article 17.3 of the Working Time Directive and the other provisions which permit derogations by agreements between the 'two sides of industry'.............

The Consultation Document seems to have misunderstood the underlying rationale for the provisions that permit derogations by agreement. Art 17.3 of the Directive allows derogations in all circumstances by means of "collective agreements or agreements concluded between the two sides of industry at national or regional level.....or agreements concluded between the two sides of industry at lower level." In essence this means that there must be a representative institution on both "sides". This is nothing more than a statement of the principle that there is an inequality of bargaining power between employers and individual
employees in a workplace and workers must act collectively if they are jointly to manage working time questions with the employer. It is virtually impossible to interpret the latter part of this clause in Art 17 as permitting agreements between an employer and a majority of individual workers. The TUC cannot understand how the Government has reached the conclusion that this is the correct interpretation. Indeed, short of making a general argument about the need for a flexible approach in small firms, the Government has advanced no justification for this approach.

In a separate but related point the TUC argue that, where a trade union is recognised for collective bargaining purposes, an employer should not be able to make use of any of the derogations without negotiating them with the union. In the absence of such a provision, working time might be swept off the collective bargaining agenda:

This is inconsistent with other aspects of Government policy, including the proposal that trade unions should be able to negotiate on 'hours' if they have secured recognition through the statutory procedure.

The final Regulations go a little way to meeting the TUC's objections. Employers no longer have the right to determine the length of service of elected representatives, and workforce agreements signed by a majority of individual employees will now only be allowed where there are 20 or fewer employees.

The CBI, on the other hand, is strongly supportive of the proposals on workforce agreements.

E. Individual Opt Out

Trade unions are generally opposed to the provision which allows individuals to opt out of the 48 hour week limit. The TUC, in its response, says:

It is well established TUC policy to oppose the so-called 'individual opt-out' contained in Article 18.1(b)(i) of the Directive. The ceiling on the average 48 hour week is perhaps the most important provision of the Regulations in seeking to halt and reverse the trend towards excessive working hours. There is a substantial body of evidence which shows that long working hours and shift work are associated with higher levels of cardiovascular disease...........It cannot be right for the Government to accept that 48 hours is a reasonable limit in line with the requirements of health and safety at work and then suggest that individuals should be free to work more than 48 hours without limit. Indeed, it is contrary to the general principles of health and safety law to allow people to "volunteer" to adopt an unsafe system of work. No other EU Member State has sought to implement Art 18.1(b)(i) in the terms specified in the Directive.

The TUC goes on to argue that employees and prospective employees will feel they have to sign waiver forms if they want to demonstrate commitment to the job. Moreover, employers themselves might regret the individual opt out because it is accompanied by a
great deal of extra record-keeping and may be repealed in 2003 when the EC is due to review Article 18.1(b)(i). The TUC proposes, instead, that the 48 hour limit should be phased in. The Irish Working Time Act sets a limit of 60 hours this year, 55 next and 48 in 2000.

Employers’ organisations are much less convinced of the health and safety dangers of long hours. The IPD, for example, says:

There is no doubt that work intensity and long hours are currently real issues in the UK. Unfortunately there seems little evidence that the Directive will in itself do anything substantial to deal with the issue. Surveys show that long hours are a particular problem for managers, most of whom are likely to be excluded from the application of the Directive. Research by Birkbeck College for IPD shows that more than a third of all employees feel they have some choice about how hard they work. The relationship between long hours and stress is in any case at best indirect: employees who feel they have some control over their working lives are less likely to suffer from stress. Those people in badly paid and unrewarding jobs are least likely to be able to afford to reduce their hours of work, however much they might wish to be able to do so. This suggests that the regulations may be more important in terms of symbolism and agenda-setting (e.g. by encouraging annual hours agreements), rather than in doing anything directly to reduce long hours.

Employers generally welcome the decision to take up the individual opt out option contained in Article 18.

F. Enforcement

A number of trade unions point out that the Regulations will only be enforced properly if many more Health and Safety inspectors are appointed. According to the GMB, the Health and Safety Executive (HSE) has estimated that enforcing the Directive could increase their workload by 25% with 5,000 extra complaints a year.

The Better Regulation Task Force believes that the use of health and safety legislation will leave some employers open to criminal sanctions which may be disproportionate to the offence:

It has been suggested by some that a lax enforcement regime could be the answer to ambiguities in the legislation. But it will not help business because of the uncertainty for employers, and the fact that they will still be vulnerable to having committed an offence depending on the attitudes of the local enforcer. That level of uncertainty cannot constitute good regulation.