

**OPTING OUT OF THE 48-HOUR WEEK – EMPLOYER NECESSITY  
OR INDIVIDUAL CHOICE?  
AN EMPIRICAL STUDY OF THE OPERATION OF  
ARTICLE 18(1)(b) OF THE WORKING TIME DIRECTIVE IN THE UK**

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**Abstract**

The EU Working Time Directive has so far had little impact on an ingrained culture of long-hours working in the UK. Case studies suggest that the use of individual opt-outs from the 48-hour limit on weekly working time is a principal reason for this. However, removal of the individual opt-out (currently under consideration at EU level) is unlikely to make much difference to UK practice in the absence of a wider review of working time policy. In particular, the UK's individualised system of workplace bargaining is currently ill-placed to adapt to a continental European model of working time regulation.

**Key words:** working time, labour standards, collective bargaining, European Union

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## 1. Introduction

The United Kingdom has not had a history of centralized, legislative regulation of working time. Working hours have traditionally been set by collective agreements negotiated at sector or plant level. With the adoption in 1998 of Regulations implementing the EC Working Time Directive, a significant cultural change seemed in prospect. Working time legislation, according to the *Fairness at Work* White Paper, would lead both to a better work-life balance and to ‘more efficient working practices and innovation’.<sup>1</sup> At the same time, the Working Time Regulations 1998, reflecting the content of the Directive, made it possible for individual workers to make agreements with their employers to opt out of the 48 hour limit to weekly working hours. This provision – Article 18(1)(b) of the Directive – potentially has a limited life span: it must be reconsidered by the Council seven years after the date on which the Directive came into force. That seven-year period was due to expire on 23 November 2003.<sup>2</sup>

The aim of this paper is to consider how Article 18(1)(b) has operated in practice in the United Kingdom. We present findings from a more extensive analysis that was carried out for the European Commission during 2002-3, as part of the process leading to the Council’s review of Article 18(1)(b) in 2003. Our evidence takes the form of enterprise level case studies that were chosen to illustrate the range of possible responses to the individual opt-out across different sectors and types of organisation (public and private sector; manufacturing and services; larger and smaller sized enterprises).

We find that the individual opt-out is in widespread use and is regarded, in preference to other derogations, as the most convenient and effective mechanism for avoiding the 48-hour limit on weekly working time. In part because of the ease with which this limit can be avoided, the Directive has so far done little to change a long-hours culture, driven by employers’ perceived needs for flexibility and workers’ desire to supplement their earnings or status. While we also find evidence of innovation in working time in some workplaces, in the form of a move towards the annualisation of hours coupled with an overall reduction in hours worked, this cannot be solely or even principally attributed to the Directive.

The presentation is as follows. Section 2 lays out the relevant legal background, section 3 describes the industrial relations context, and section 4 presents the empirical findings. Section 5 offers an assessment of the evidence that discusses arguments for and against retaining the opt-out. Section 6 concludes.

## 2. The Legal Background

Regulation 4(1) of the 1998 Working Time Regulations (henceforth 'WTR') replicated Article 6 of the Directive, and provided that a worker's working time, including overtime, should not exceed an average of 48 hours for each seven days over a basic reference period of 17 weeks.<sup>3</sup> In addition, the UK took advantage of the individual opt-out permitted by Article 18(1)(b), which allowed workers to agree with their employers that the 48-hour ceiling did not apply to them. The 1998 Regulations laid down detailed record keeping rules but business complained that this 'gold-plated' the Directive. As a result of amendments made to the Working Time Regulations in 1999<sup>4</sup> the record keeping requirements were significantly watered down. Regulation 4(1) now provides that '[u]nless his employer has first obtained the worker's agreement in writing to perform such work a worker's working time, including overtime, in any reference period which is applicable in his case shall not exceed an average of 48 hours for each seven days'. Regulation 4(2) simply requires the employer to 'keep up-to-date records of all workers who carry out work to which it does not apply by reason of the fact that the employer has obtained the worker's agreement as mentioned in paragraph (1)'.

A number of other derogations are provided for in both the Directive and the Regulations. The most important of these relates to what the Regulations call 'unmeasured working time'. Regulation 20 of the 1998 legislation stated that the 48-hour weekly limit (among other things) did not apply to 'a worker where, on account of the specific characteristics of the activity in which he is engaged, the duration of his working time is not measured or predetermined or can be determined by the worker himself, as 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'.

The scope of this provision was highly uncertain.<sup>5</sup> In particular, it was unclear whether the derogation applied to many categories of individuals, especially junior professionals who might have certain tasks to fulfil but who combined this with a high degree of autonomy.<sup>6</sup> To help address this question, the 1999 Regulations added a new paragraph (2) to regulation 20 which had the effect of

broadening the range of workers (and work) to which the derogation applied. Regulation 20(2) now provides:

Where part of the working time of a worker is measured or predetermined or cannot be determined by the worker himself but the specific characteristics of the activity are such that, without being required to do so by the employer, the worker may also do work the duration of which is not measured or predetermined or can be determined by the worker himself, regulations 4(1) and (2) and 6(1), (2) and (7) shall apply only to so much of his work as is measured or predetermined or cannot be determined by the worker himself (emphasis added).

Regulation 20(2) is therefore intended to deal with workers whose working time is partly measured, predetermined or determined by the worker and partly not. The 48-hour limit applies only to the work that is predetermined or measured. In respect of the part of the job that is not predetermined, the 48-hour limit does not apply.

Regulation 23, the other derogation that is of relevance to working time, concerns collective agreements and workforce agreements. Using 'collective agreements and agreements between the two sides of industry at national or regional level', as envisaged by the Directive, to implement, derogate or negotiate working time limits, presented particular difficulties in translating the Directive into UK law. Legislation dating from the 1970s has favoured the recognized trade union as the 'single channel' to worker representation. However, in Case C-383/92 *Commission v. UK*<sup>7</sup> the Court ruled that the UK had failed to fulfil its obligations under Articles 2 and 3 of Directive 75/129/EEC (now Directive 98/59/EC) on collective redundancies by not providing a mechanism for the designation of workers' representatives in an undertaking where the employer refused to recognise a trade union. At this point, over half the British workforce worked in workplaces where trade unions were not recognised. The ECJ's ruling eventually led to the emergence of modified form of the single channel, where worker representation is primarily conducted by recognised trade union but, in the absence of such representation, workers can be represented by elected representatives who negotiate a 'workforce agreement'.<sup>8</sup> This is the approach adopted in the Working Time Regulations. Most importantly for current purposes, under regulation 23 a collective or workforce agreement can be used to vary the 'reference period' over which the 48-hour week can be averaged from the default period of 17 weeks to up to 52 weeks for objective or technical reasons concerning the organisation of work.

### **3. The Industrial Relations Context**

#### 3.1 The legacy of partial regulation

As we noted above, until recently the regulation of working time in the United Kingdom depended on collective bargaining rather than legislation. The Factories Acts of the nineteenth century, despite their historical importance in the history of labour law as one of the first attempts of a legislature to regulate industrial employment, did not bequeath a viable model to modern employment relations. The controls which these Acts laid down, dating from the 1840s, were confined to regulating the terms and conditions of women and young children in factories and workshops. From the 1870s onwards, statutory regulation increasingly gave way to voluntary collective bargaining between employers and trade unions as the principal mechanism for regulating working time. Although some unions campaigned for a statutory eight-hour day, this won the support of a minority only of the Royal Commission on Labour of 1892-4.

Subsequently the main instrument of regulation was the sector-level or multi-employer collective agreement, covering employers in a given industry or trade. The state intervened directly through legislation only in those sectors of the economy where collective bargaining had failed to develop of its own accord (mainly the sectors in which there were trade boards or wages councils). Indirect government encouragement was given for voluntary arrangements for multi-employer bargaining at industry or sector level, and these forms (collectively known as the 'Joint Industrial Council' model) became widespread in British industry during the inter-war period. In the 1920s, a basic 48-hour week was established in the engineering industry by collective bargaining, and from this point on the national engineering agreement set a benchmark for industry-level practice. The national engineering agreement brought about reductions in the basic working week to 44 hours in 1927, 42 hours in 1960, 40 hours in 1965 and 39 hours in 1979. Other sectors tended to follow engineering in reducing working hours after a gap of a few years. However, even at its height in the immediate post-1945 period, the system of sectoral collective bargaining was more concerned with ensuring premium rates of pay for overtime and unsocial hours working, than with restricting working hours as such. During the 1980s, what little legislation there was on the subject of working time was repealed, at the same time as sectoral collective agreements were also on the decline. This process reflected the then policy of 'lifting the burden' of regulation in the labour market.<sup>9</sup>

At the start of the 1990s, a Department of Employment study found that only 10% of all employees in the UK normally worked precisely 40 hours per week,

in contrast to 34% of employees in the rest of the European Community. Over 72% of employees in the other (then) eleven member states worked between 35 and 40 hours per week, compared to 36% in the UK.<sup>10</sup> Both overtime and shift working, although they tended to fluctuate with the economic cycle, were in widespread use. Figures from 1988, when overtime working was at historically high levels, showed that over 41% of British male workers were employed for 46 hours or more per week, compared to a figure of 23% for the EC as a whole.<sup>11</sup> Studies from this period found some sectors in which hours worked were extremely long, regardless of cyclical factors. Railway workers, lorry drivers and merchant seamen had a working week of around 50 hours or more. In the absence of a legal basic working week, and with the decline in collective bargaining coverage, it was possible for employers in certain sectors to avoid paying overtime altogether. This was the case in security work, where low wages were combined with long hours (60 or more per week) but without overtime premia.<sup>12</sup>

### 3.2 The initial impact of the Working Time Directive

A number of more recent studies have updated the picture presented by the research of the early 1990s. The message from these studies is that while the new legislation has had some impact in terms of reducing working hours and stimulating changes to working practices, the familiar features of the system remain largely intact. A TUC study from February 2002, based on analysis of the government's Labour Force Survey and a TUC-commissioned survey, reported that nearly 4 million persons or 16% of the labour force were working over 48 hours per week compared to 3.3 million (then 15%) in the early 1990s, and that the numbers working over 55 hours per week had risen to 1.5 million. The average working week for the UK was 43.6 hours, compared to an EU-wide average of 40.3 hours. Long hours were particularly prevalent among managerial and professional workers of both sexes, and among male workers in more highly skilled jobs in manufacturing, construction and transport. The main reason given by managers and professionals for working long hours was excessive workloads, while for manual workers it was the need to enhance earnings through overtime.<sup>13</sup>

A DTI research note<sup>14</sup> reported in July 2002 that 16% of all employees and 22% of full-time employees were working over 48 hours per week in the spring of 2001. Three quarters of those working such long hours were men. Almost 9% of full-time employees were working over 48 hours per week without receiving overtime. This note also reported that long-hours working in excess of the 48-hour figure differed substantially across occupational groups. The highest proportions of employees working in excess of 48 hours per week were found in

‘managers and senior officials’ (37%), ‘professional occupations’ (30%) and ‘process, plant and machine operatives’ (28%). By industry, the sectors reporting the highest numbers of workers working for more than 48 hours per week were ‘agriculture and fishing’, ‘transport and communication’, ‘construction’ and ‘energy and water’, which were all in excess of 25%.<sup>15</sup>

This DTI research also reported on the impact of the WTR 1998. The proportion of employees reporting that they regularly worked for more than 48 hours per week fell slightly in 1998, and this small reduction was repeated in 1999, 2000 and 2001. Prior to this, the numbers reporting hours over 48 per week had risen consistently since the early 1980s. The fall in hours after 1999 was driven by a reduction in the hours of male workers. The DTI note attempted to estimate one of the possible effects of removing the individual opt-out from the 48-hour week, by calculating the numbers employed for more than 48 hours a week over a period in excess of the default reference period of 17 weeks. Analysis of the Labour Force Survey showed that 16% of all full-time employees or three million individuals approximately usually worked more than 48 hours per week on two successive quarterly reporting points (three months), and 10%, or two million individuals, over five successive quarters (twelve months). On this basis it was concluded that ‘approximately three million people would be affected by a removal of the [individual] opt-out in the UK (because they said that they usually worked for over 48 hours on two successive quarters, when they were interviewed)’. While a segment of this group could benefit from collective or workforce agreements with lengthened the normal 17-week reference period, the note concluded that this would not help the 2 million working in excess of 48 hours per week on a year-round basis. However, the note did not consider that a certain proportion of this group might fall under the derogation for ‘unmeasured working time’.

Case study evidence on employers’ responses to the WTR is provided by Fiona Neathey and James Arrowsmith’s 2001 study, carried out for the DTI.<sup>16</sup> This research was based on a non-random sample of 20 employers, selected to reflect a variety of different types of organisations. Around a third of the sample reported that, as a result of the implementation of the Regulations, working practices had been reviewed with the aim of putting in place a ‘work smarter’ strategy. Shorter working hours and/or the reduction of operating time to a reduced number of working days had led to greater flexibility of employment and, in some cases, improved operational efficiency and customer satisfaction. Half of the sample reported that the Regulations had had little or no impact on them: these tended to be smaller establishments, those making use of individual opt-outs and/or derogations established through collective agreements or



workforce agreements, and those with working practices which were already in line with the Regulations.

The study found that management had been proactive in implementing the new standards, and that while there was evidence that collective agreements (in five cases) and workforce agreements (in three cases) had been used to implement derogations and flexible working arrangements, the principal form of employee involvement was consultation rather than negotiation. The individual opt-out was the most common response to the need to provide for working in excess of the 48-hour week, but collective and workforce agreements were also used to change reference periods. A number of sample employers had also achieved compliance with the 48-hour week by changing working practices, increasing staffing levels, and revising shift arrangements.

Neathey and Arrowsmith's case studies were supplemented by evidence from the Warwick Pay and Working Time Survey.<sup>17</sup> This is based on a sample of around 300 employers in four sectors (printing, engineering, health, and retail). The WTR was reported to be a significant factor in changing working time practice, in particular in health, printing and retail, but to a lesser degree in engineering. Around half of printing and engineering employers, three out of five NHS trusts and virtually all the retail employers had either made or proposed a collective or workforce agreement in order to derogate from aspects of the WTR. Unions were involved in changes in all but one of the relevant NHS trusts, half of the print employers, and two thirds of the engineering and retail employers. Two thirds of engineering employers reported making use of individual opt-outs, along with half of the sample in each of the other three sectors.

The Warwick Pay and Working Time Survey evidence suggested that 'managers expect the substantive terms of the WTR to have important implications in the future' and that the Regulations' procedural effects were also significant: '[b]y lending statutory support to the principle of consultation and negotiation over hours of work, the Regulations help to clearly and more widely establish working time arrangements as a primary concern of workplace industrial relations'.<sup>18</sup> At the same time, Neathey and Arrowsmith<sup>19</sup> interpreted their case studies as showing that 'only in organizations which decided to use the WTR as the basis for a review of, and change to, existing working time practices, have the Regulations had any significant impact on the organization of working time', and in these organizations 'the absence of external pressure meant that the initial impetus for change diminished in the 18 months after implementation of the Regulations'.

A follow-up study published in 2003<sup>20</sup> reported little further change in most organizations. However, one company (in the printing sector) that had previously used individual opt-outs had dispensed with them, replacing long-hours working with a new, permanent night shift. In another case, a contracting company had succeeded in reducing the hours of most of its employees to below the 48-hour average over a 52-week reference period, and saw the WTR as ‘helping the company to change working practices which in some areas were threatening the health of employees’.<sup>21</sup> This study also reported concern on the part of some employers at the possibility that the opt-out might be ended following the European Commission’s review.<sup>22</sup>

## **4. The Empirical Study**

### **4.1 Methodology**

Our empirical study focused specifically on the use of the individual opt-out and of the other derogations permitted by legislation. A total of forty interviews were conducted in the period August-November 2002. We concentrated on five sectors where it was believed that working time often exceeded the average 48-hour limit, so that the individual opt-out would be a pertinent issue. These were Education, Health, Manufacturing and Engineering, Financial and Legal Services, and Hotel and Catering. Interviews were also carried out with twelve trade union officers,<sup>23</sup> the TUC, seven employers’ organisations,<sup>24</sup> and HR managers in thirteen case study employers. The sample of case studies is not statistically representative but was selected to reflect the different pressures and conditions operating on organisations and to provide a range of contexts in which individual opt-out agreements have been used. The sample was designed to ensure that organisations with small, medium and large workforces were included and to cover a mixture of unionised and non-unionised establishments. The aim was also to include organisations that had implemented collective and workforce agreements. In the end, no detailed case studies were undertaken in the Education sector because it was evident from the initial interviews with employer and employee representatives that the individual opt-out had been rarely used in this sector. Table 1 sets out the characteristics of the case study employers. Here, a ‘unionised’ employer is one which recognised an independent trade union for the purposes of collective bargaining for all or part of its workforce.

In addition, interviews were conducted with a range of public officials with responsibility for working time. The officials represented the Department of Trade and Industry (DTI); Advisory Conciliation and Arbitration Service

(ACAS); Health and Safety Executive (HSE); and a Local Government Environmental Health Department. A search of the register of cases at the offices of the Employment Tribunal Service (ETS) was undertaken. An employment law practitioner with practical experience in this area was also interviewed.

Table 1. *Characteristics of case study employers*

<b>Name</b>	<b>Sector / Description</b>	<b>UK Staff</b>	<b>Unionised</b>
<b>Health</b>			
H1	Hospital Trust providing emergency and elective acute medical services	6000	Yes
H2	Hospital Trust providing emergency and elective acute medical services	5000	Yes
<b>Manufacturing / Engineering</b>			
ME1	A first tier manufacturer supplying components directly to the automotive industry	148	Yes
ME2	Manufacturer of high pressure aluminium die castings mainly for the automotive industry	420	No
ME3	Subsidiary of an international construction company specialising in foundation and underground engineering	220	Yes
ME4	Service engineers for supermarket commercial refrigeration equipment. Another (unionised) company in the same Group manufactures the equipment	350	No
ME5	Foreign-owned major manufacturer in the automotive industry	3000	Yes
ME6	Major food manufacturer with 18 operating companies	24000	Yes
<b>Financial and Legal</b>			
FL1	Medium sized global private investment bank specialising in mergers and acquisitions	550	No
FL2	Large European owned Investment Bank	1500	No
FL3	International law firm	1500	No
<b>Hotel and Catering</b>			
HC1	International hotel and leisure company with four hotel brands and 2000 pubs and restaurants in UK	45000	No
HC2	Hotel company operating 62 hotels in UK. Subsidiary of major hotel, restaurant and leisure business	10000	No

In the following sections we first present evidence illustrating how widely individual opt-outs have been used. Secondly, we examine the business case for using opt-outs. We then address the use of opt-outs in the light of pragmatic and industrial relations considerations. Finally we explore the process by which individual opt-outs are agreed between employers and their employees.

## 4.2 How widely are individual opt-out agreements used?

As there is no requirement to register agreements with any public or other authority, it is not straightforward to determine exactly how extensively individual opt-outs are being used. As we have seen, in 2002 the Labour Force Survey reported that 16% of full time employees, approximately 3 million individuals, said that they usually worked for more than 48 hours per week on two successive quarterly reporting points. It cannot be assumed, however, that all of these individuals will necessarily have opted out because some may fall under other derogations, such as that for ‘unmeasured working time’ in Regulation 20.

In our sample, the use of the opt-out varied considerably according to sectoral conditions. Table 2 indicates how extensively opt-out agreements were used by the case-study organisations and the main business reasons given by each of the employers for making use of them.

Table 2. *Extent of and business reasons for opt-outs*

<b>Case Studies</b>	<b>Basic Hours</b>	<b>Use of Opt-outs</b>	<b>Business Reasons for Working over 48 Hours</b>
<b>Health</b>			
H1 (acute hospital trust)	Various	Targeted groups	Applies to: consultants; 24/7 cover and shortages in specialist areas like operating theatres, medical imaging and pathology; bank nurses. Limit to 56 hours.
H2 (acute hospital trust)	Various 36-40	Estimates 10-15% of all staff	Will apply opt-out where there are staff shortages, and to senior medical staff and bank nurses.
<b>Manufacturing / Engineering</b>			
ME1 (engineering manufacturer)	37	85-90%	‘Overtime culture’ previously existed with average of 25-30% overtime hours, weekly hours ranging 46-77. No one currently exceeds 48 hours. Demand has fallen, overtime is limited and shift pattern has changed.
ME2 (engineering manufacturer)	38 <sup>3</sup> / <sub>4</sub>	100%	Overtime provides flexibility in production. Only 5-6 operatives and maintenance workers consistently exceed 48 hours.
ME3 (construction engineering)		136 of 151 hourly paid operatives	Facilitates processes that, once started, must continue uninterrupted, such as concrete pours. Also enables company to meet client deadlines without incurring penalties. Site workers maximise earnings while away from home.

Table 2. *Extent of and business reasons for opt-outs (continued)*

ME4 (service engineers)	38	Almost all staff as a matter of course	On call service engineers repairing supermarket refrigeration systems. Consistently work 70-80 hours per week, but not all booked time is spent actually working. Earnings £50-60,000 per annum.
ME5 (car manufacturer)	39	<10%	Opt-outs only offered after management have reviewed other options such as reallocating and deleting work. Depends on annual sales cycle for cars and life cycle for new models.
ME6 (food manufacturer)	39	95%	Fluctuating demand from retailers. Most subsidiaries do not exceed 48 hours. One ex-privately owned subsidiary has standard shift pattern of 57½ hours. Difficult to cut wages.
<b>Financial and Legal</b>			
FL1 (banking)		>90%	Need to complete merger and acquisition deals in a time frame dictated by clients and by regulation.
FL2 (banking)	Varies 9-6 7-5	100%	60 hours norm expected of senior staff because of high volume of work, and importance of personalities to deals. Lower levels of staff claim overtime.
FL3 (law)	35-37	Extensively	Supporting clients; personality-driven work; continuity of personnel; individuals' understanding of deals. Income is generated from hourly fees.
<b>Hotel and Catering</b>			
H1 (hotels pubs and restaurants)	38 Mostly part-time	10% total workforce, but almost 100% of management	Almost entirely management and sales. Corporate managers need to travel across dispersed business units. Unit managers run promotions.
H2 (hotels)	35	10% of total workforce but almost 100% of management	Team leaders and above, and seasonal associates. Some managers travel extensively across business units so flexibility required. Extra recruitment not really a solution. Monitoring would be a major issue.

Neither the individual opt-out nor the 48-hour limit has been an issue in the education sector despite concerns over long hours working and workload. This is due in part to the statutory framework for schoolteachers' pay and conditions. This distinguishes between directed and non-directed working time, thereby triggering the unmeasured working time derogation.<sup>25</sup> In higher education we were told that the WTR has had limited impact because of 'the context of professional autonomy' and a perception that academics 'do not necessarily want to be tied to a prescriptive set of terms and conditions'.<sup>26</sup>

In the health sector the two case study employers in our sample used opt-outs for about 10-15% of the workforce, in areas where there was a need to maintain the 24-hour service but there were particular labour shortages. These were radiologists, pathologists, anaesthetists, career grade doctors and some nurses. In hotel and catering opt-outs were rarely used for general staff.<sup>27</sup> However, for supervisory and managerial staff, about 10% of the total workforce, the take up of opt-outs was almost 100%. In the manufacturing and engineering and financial and legal sectors, opt-outs were used far more extensively, covering about 90% of the workforce in most of the case study employers in these sectors.

The evidence therefore suggests that there is quite *extensive* but *varied* use of individual opt-outs. This raises the question of why employers use individual opt-outs.

#### 4.3 The business case for using individual opt-outs

Several employers argued that it was necessary to use opt-outs because limiting the average working week to 48 hours would impair efficiency. Several employers, in particular in the manufacturing and engineering sector and in financial and legal services, argued that if the opt-out were not available, the costs of running their business would increase significantly as they would have to recruit more labour to do the work. Furthermore, additional recruitment would create practical problems and indirect costs, such as the need for extra plant and machinery or extra space in the office, staff restaurant or staff car park. The EEF relayed to us the opinion of a domestic appliance manufacturer that 'the consumer will have to bear' the 'significant cost' of complying with the 48-hour limit, which 'will make our products less competitive against foreign competition.' Moreover, not all companies are able to pass on additional costs. For example, one of the small engineering companies in our sample believed that they could ultimately be put out of business because they supplied a major motor manufacturer, and the terms of their contract dictated that there should be annual price decreases.

Some employers made the slightly different argument that existing staff were trained and experienced, and that it would therefore be more efficient to utilise them for longer hours than to recruit additional staff. Furthermore, the investment banks and international law firm argued that it was necessary to develop very strong personal relationships so as to support the needs of very demanding clients. Their business was therefore 'often personality driven, so you really want the same person doing the work'.<sup>28</sup> Moreover, critical knowledge of issues involved in particular projects was often stored in the

minds of individuals rather than being written down. So, additional recruitment and limiting individuals to 48 hours per week was not seen as a practical way forward.

Some employers also argued that individual opt-outs provided operational flexibility that could not be satisfactorily compensated for even by averaging the 48-hour limit over a reference period as long as 52 weeks. For example, a subsidiary of the food manufacturer, a bakery, supplied supermarkets for which the volume of orders fluctuated by up to 50% on a daily basis. The company felt that the opt-out was necessary because it was not feasible to handle such wide daily fluctuations in demand through a formalised system of annualised hours. Similarly, the investment banks and the international law firm in our sample said that opt-outs were necessary because merger and acquisition deals required intense periods of working so as to complete documents and to finalise deals within very strict time scales. These firms felt that although it was possible to compensate for these intense working periods through informal systems of time off in lieu, it was not feasible to plan these periods into a formal annualised hours system. The CBI also argued that it is not always straightforward to move to annualised hours or other systems based on reference periods because 'you have still got to do enormous amounts of monitoring and to know exactly what people are doing'.

On the other hand, there was evidence supporting the claim that long hours working can lead to the inefficient utilisation of labour. For example, one of the small engineering companies said that on some occasions, when they had asked workers to do additional shifts and extra hours to meet demand, 'the following week half of them go sick. So, it does not always pay'. Other evidence illustrated how reducing working hours could improve efficiency. The Working Time Officer we interviewed told us of one firm which 'had done a cost exercise, got lots of additional staff in, cut down the overtime, and in the longer term they have actually saved money because [they do not have] all the overtime to pay for'.

On this basis, several respondents on the trade union side argued that the use of individual opt-outs was disadvantageous for UK business because it meant that both employers and unions could avoid negotiating over the re-organisation of working patterns and so inefficient practices were perpetuated. According to the TUC, 'the Working Time Regulations have [thus] been a much less useful instrument to reduce working time and to go through this process of thinking about pay, hours and productivity because the individual opt-out was implemented'.<sup>29</sup>

Several union respondents pointed to the difficulty of voluntarily negotiating reductions in working hours without any legislative imperative to do so when the consequence would be lower earnings and living standards for their members. According to the TUC, this explained why work re-organisation has not been high on many union agendas. The difficulties from the employers' perspective were best illustrated by the example of a subsidiary of food manufacturer ME6. The HR Director accepted that a 57½ hour standard week (39 hours basic and the rest paid as overtime) was unproductive because workers were often tired. But, without any legislative imperative to implement change it was difficult for the company to 'make people suddenly lose their hours because they have mortgages based on this level of income'. The company therefore believed removal of the opt-out and imposition of the 48-hour limit would be a useful lever in negotiations with unions.

Furthermore, the CBI acknowledged that 'certain companies may be over reliant on the individual opt-out [in that] there are currently companies out there that have yet to begin that process of reorganising working [patterns] where it is warranted'. In addition, the TUC pointed to some examples where employers had been motivated to negotiate changes in the belief that the opt-out will be removed following the review of the Working Time Directive in 2003. One such case was a dairy company where 70 hours per week had been the norm because of the need to meet the requirements of supermarkets. However, the company had moved to annualised hours, had offered employees a range of shift patterns between 40 and 48 hours per week, and now produced the same amount of milk more efficiently. The TUC argued that these examples of negotiating in the shadow of an anticipated change in the law illustrated how the availability of the opt-out was presently a barrier to innovation.

However, there was also evidence indicating that use of the individual opt-out does not necessarily preclude innovation. In the study by Neathey and Arrowsmith, referred to above, three-quarters of the case studies were using individual opt-outs but twelve of the twenty organisations had seen changes in their working time arrangements. In most cases changes were prompted by competitive pressures to better meet customer needs.<sup>30</sup> In our study all thirteen case study employers used opt-outs, but nine of them had recently introduced changes in working practices. In some cases this amounted to the introduction of flexible working. In other cases, such as the two small engineering manufacturers ME1 and ME2, there had been radical reorganisation of shift patterns.

ME1 said it had been through 'a massive change process with changing working practices accompanied by job losses'. The company previously worked a day



shift and a night shift four days per week, 'which allowed everyone to work overtime on Friday and Saturday.' The company had now moved to 'double-day shifting of 6 a.m. – 2 p.m. and 2 p.m. – 10 p.m., working five days a week.' ME2 used to run a day shift of 8 a.m.- 4.15 p.m. and a night shift of 8 p.m. – 8 a.m. for four nights per week. The company now operates alternating day shifts of one week 6 a.m. – 2.15 p.m. and the following week of 2 p.m. - 10.15 p.m. There is also a fixed night shift of 10 p.m. – 6.15 a.m. Both companies stressed that the changes were not driven by the Working Time Regulations. ME1 had been taken over by a French sister company and the French management had introduced a more 'continental culture'. More significantly, the company had suffered a 50% reduction in demand 'due to market conditions, closures in the automotive industry and relocation to foreign countries'. According to ME2, 'the main driving force...whether there was a Working Time Directive or not, was that [the previous shift pattern] was not operationally economic for us. So, by our own process of change we changed it to three shifts'. Both companies believed it was necessary to retain the individual opt-out.

Moreover, other evidence indicated it was not so much the opt-out as structural and cultural barriers that have stymied the re-organisation of working hours to comply with the 48-hour limit. Employers in health, engineering and construction told us that it was necessary to exceed the 48-hour limit because of labour/skills shortages. Furthermore, the TUC believed that removing the individual opt-out would have little impact in the case of white-collar workers 'because you are talking about ingrained overtime cultures that are not pay driven'.

The evidence for and against the continued use of opt-outs on business efficiency grounds was therefore inconclusive. However, it was clear that some employers use opt-outs for pragmatic reasons.

#### 4.4 Pragmatic reasons for using individual opt-outs

Employers' organisations told us that individual opt-outs are the 'only simple, straightforward bit of the legislation';<sup>31</sup> as such they are used to ameliorate what is seen to be the undue complexity of WTR. The UK practice of copying out European Directives with only minor textual amendments was largely blamed for this. The EEF commented: 'if you have something incomprehensible you are copying out, like the definition of working time, [the practice of copy-out] passes the burden of understanding the terms of the law to business, to the employer'.

Employers told us that one source of confusion was the concept of ‘unmeasured’ working time in Regulation 20. Table 3 illustrates how most case study employers preferred using opt-outs rather than relying on Regulation 20. Most employers said it was less risky and administratively easier to issue individual opt-outs, even in circumstances where they might have been able to rely on other provisions of the regulations.

At the same time, there were indications in several interviews suggesting that employers of ‘white-collar’ employees would rely more heavily on the Regulation 20 derogation for ‘autonomous workers’ if the opt-out were to be removed. This route is potentially easier for employers given that the UK Government broadened the scope of the Regulation 20 derogation in 1999 (see section 2.1). As one of the union interviewees put it to us, ‘even if we get rid of the opt-out there are a lot of white-collar workers who effectively are not covered by the 48-hour limit because of those amendments’.<sup>32</sup> This suggests that removing the opt-out will not guarantee greater protection of workers’ rights in all circumstances.

Employers also used opt-outs to minimise the costs of record keeping and monitoring. Given the general obligation to keep records in order to demonstrate compliance with WTR, there is an implicit obligation to record the hours of those workers approaching the 48-hour limit that have not opted out. However, following the 1999 amendment to the WTR, employers only have to keep a record of the names of those individuals that have signed opt-out agreements and are no longer required to record the hours worked by those workers who have opted out. According to the HSE Working Time Officer we interviewed, the desire to avoid having to record hours has ‘meant that occasionally the pressure has been put on from the employer to persuade workers to sign opt-outs’. Moreover, several case study employers told us that if the opt-out were removed it would, for example, ‘really increase our record keeping activity, which is not something we would want to do, as it does not add value to anybody’.<sup>33</sup>

Employers’ organisations also argued that using opt-outs reduced the likelihood of industrial disputes over the interpretation of WTR. Both employers and unions pointed out that ‘the definition of working time [can be a] most contentious issue.’<sup>34</sup> So, ‘many employers have got individuals to sign opt-outs, not because they want them to work consistently long hours, but just to avoid the issue arising, because they do not wish to spend time in fruitless debate.’<sup>35</sup> Using opt-outs provides flexibility, especially in situations where not all of the time booked as working time for pay purposes is spent working. For example, the firm of service engineers said they allowed their engineers to book as

working time periods they may have spent having a sleep in the van while waiting for parts to arrive on site. Employers said that a stricter limit on working time would require a stricter definition of what constituted working time and also more invasive monitoring, and that this could lead to disputes.

Table 3. *Impact of Regulation 20*

<b>Case Studies</b>	<b>Regulation 20</b>
<b>Health</b>	
H1	Reg. 20 applied to all management. Auditors found flexible approach to individuals managing their own time rather than evidence of a long-hours culture.
H2	Reg. 20 applied to all management. It was acknowledged that managers, although self-directed, have to do long hours to complete the job. There was awareness of the health and safety implications of long hours for managers.
<b>Manufacturing / Engineering</b>	
ME1	Only General Manager seen as exempt under Reg. 20. Everyone else offered individual opt-outs.
ME2	No reliance on Reg. 20. Easier to offer all managers opt-outs for administration purposes.
ME3	Reliance to 'some extent' for staff professionals and managers. They are often able to determine their own workload in accordance with peaks/troughs of site-work, current/future workload & client demands.
ME4	No reliance on Reg. 20. Opt-outs administratively more efficient. Service engineers seen as 'independent agents' but not within definition of 'autonomous workers'.
ME5	About 30 General Managers at director level, the top 1% in the organisation, regarded as coming under the definition of 'unmeasurable work'.
ME6	Middle managers and above, i.e. those above the £30,000 salary bracket, deemed to be self-directed and so outside the regulations, roughly about 12% of staff. Company had had a 'huge debate' as to where to draw the line and was still uncertain.
<b>Financial / Legal</b>	
FL1	Even senior employees opted out individually as the employer preferred not to rely on Reg. 20. It was not convinced that other managers fell under Reg. 20, although aware that firms in sector have relied on it.
FL2	Looked at Reg. 20 but it was not seen as relevant. Opt-outs seen as easier to administer.
FL3	No reliance on Reg. 20. Using opt-outs allows individuals personal choice.
<b>Hotel / Catering</b>	
HC1	Not convinced Reg. 20 covers managers. Opt-outs much safer approach.
HC2	Respondent not sure how far Reg. 20 had been considered but felt some managers would fall under that category.

#### 4.5 Industrial relations considerations

As Table 4 illustrates, only four case study employers had used either a collective or workforce agreement to extend the reference period beyond the default of 17 weeks.

Table 4. *Use of collective agreements and workforce agreements*

<b>Case Studies</b>	<b>Reference Period</b>	<b>Extent of Collective / Workforce Agreements</b>
<b>Health</b>		
H1	17 weeks	Negotiated with unions about implementing WTR. National level union opposed to changing reference periods at local level.
H2	6 months	Negotiating collective agreements to implement WTR. 6-month reference period allows for winter pressures / summer accidents.
<b>Manufacturing / Engineering</b>		
ME1	17 weeks	Heavily unionised. Separate agreement on WTR outside collective agreement covering wage negotiation. Saw no benefit in changing default reference period.
ME2	17 weeks	Not unionised. Works committee communicates with workforce. Saw no need for changing default reference period.
ME3	26 weeks	Local agreement with TGWU. 26-week reference period agreed to allow for fluctuations of site work.
ME4	17 weeks	Service engineers not unionised. They would exceed limit regardless of reference period.
ME5	12 months fixed	Collective agreement negotiated with committee representing all employees. Extended reference period accommodates cyclical fluctuations in car sales.
ME6	12 months	Each operating company has local level collective agreements with the recognised union. Allows for cyclical fluctuations.
<b>Financial / Legal</b>		
FL1	17 weeks	Not unionised. WTR have never been raised at staff committee.
FL2	17 weeks	Do not recognise a union and have no collective agreements.
FL3	17 weeks	Not unionised. No collective agreements
<b>Hotel / Catering</b>		
HC1	17 weeks	No collective agreements. Very low union representation.
HC2	17 weeks	No union recognition. No workforce agreements

A major problem with using collective agreements to vary the reference period is that in many UK workplaces the infrastructure for collective bargaining does not exist. Figures from the 2002 Labour Force Survey reveal that only 29.1% of

employees in the UK were union members and only 48% of employees were in a workplace where trade union members were present. Moreover, the pay of only 36% of UK employees was affected by collective agreement, and in the private sector collective bargaining coverage was only 22%.<sup>36</sup> In contrast, in most other EU Member States 70% or more of employees are covered by collective agreements, multi-employer bargaining prevails and there are legal mechanisms for the extension of the terms of collective agreements.<sup>37</sup> In the UK, single employer bargaining prevails and there are no mechanisms supporting sectoral collective agreements along continental European lines. For the non-unionised employers in our sample, this was one reason for choosing the route of the individual opt-out.

Furthermore, although workforce agreements (see section 2) potentially provide an alternative flexibility to the individual opt-out in non-unionised workplaces, the evidence suggests that they have been rarely used. An Institute of Personnel and Development Survey in 1999 suggested that only 18% of employers had introduced or were thinking of introducing one.<sup>38</sup> None of the case study employers in our sample had considered a workforce agreement and their incidence across the UK would seem to be extremely limited. Three of twenty case study organisations in the Neathey and Arrowsmith study, referred to above, had used a workforce agreement. Two of these organisations had long established procedures for negotiating with in-house staff associations as opposed to an independent trade union.<sup>39</sup> It is known that one workforce agreement has been the subject of an Employment Tribunal case,<sup>40</sup> and the Engineering Employers' Federation told us that one of their members had introduced one. The employment law practitioner we spoke to had drafted two workforce agreements, one for a weather and disaster forecasting company and the other for an airfreight company. Both companies had complex 24-hour shift patterns and the workforce agreement was used to cover the whole ambit of working time limits and entitlements, with night-working a particularly important issue, rather than just the 48-hour limit.

Two reasons were put to us in our interviews to explain the limited use of workforce agreements. The first was the complexity of the procedure. The EEF told us that they had drafted a workforce agreement for a firm of service engineers, but that the firm had been so daunted by the procedure they decided to issue individual opt-outs instead. The second reason was that the workforce agreement route is 'counter-cultural' to the practice of UK industrial relations. The legal practitioner believed that none of the employers he dealt with would have the institutions in place to create a workforce agreement. This view is supported to some extent by evidence from the most recent Workplace Employment Relations Survey (WERS), which suggests that only 20% of

workplaces with fewer than 100 employees and only 43% of workplaces with 100-999 employees operated some kind of ‘joint consultative committee’.<sup>41</sup> Moreover, even if the structures were in place, the legal practitioner believed employers ‘would not want to be seen to be negotiating with the workforce about these sorts of issues... which are classic collective bargaining issues’. The CBI also suggested that staff representatives on *consultative* committees would not want to step into the shoes of an absent trade union and start *negotiating* terms and conditions.<sup>42</sup>

#### 4.6 The process of agreeing individual opt-outs

Table 5 provides a summary of the means by which opt-out agreements were obtained by employers from new employees. In general, opt-out forms were presented to employees for signature at the time of their induction, when they were completing other administrative documentation. Occasionally, the opt-out was presented as a standard contract term that employees would have to take positive steps to avoid. This was the case with investment bank FL2. The legal practitioner informed us that the opt-out was a standard term in about half of the contractual packages he drafted. This kind of practice raises the question of how employees come under pressure, direct or indirect, to agree to opt-outs.

Table 5. Processes for obtaining opt-outs from new employees

Case Studies	Process
<b>Health</b>	
H1	Not offered to new staff. Opt-outs only offered to staff as they move into a work pattern, such as on-call working, which will entail working in excess of 48 hours.
H2	Individual opt-out has not been implemented yet, although 15% of staff work in excess of 48 hours.
<b>Manufacturing / Engineering</b>	
ME1	Form included with other personnel forms that have to be signed at induction.
ME2	Opt-out form is part of induction pack. At induction all employees are given the note, given time to read it, they are given the opportunity to discuss what it means to them and what it means for the company and they decide whether or not to opt out.
ME3	New starter packs contain brief guide to WTD and an opt-out form if employees wish to complete it.
ME4	‘An employee turns up and we give them an opt-out agreement to sign. It goes out as a separate form but it goes in the pack of documents that form the contract at the end of the day. It is totally voluntary of course, if the employee does not wish to sign it then he is not pressurised to do so.’

Table 5. Processes for obtaining opt-outs from new employees (continued)

ME5	Opt-outs not offered to new employees.
ME6	‘As part of the induction they are told what is in the collective agreement concerning the 12-month reference period. They are then given a choice of two forms depending on whether they want to opt in or out. Where people are opted in and want to be covered by the legislation they are given specially adjusted shift patterns and our personnel system monitors their hours.’
<b>Financial / Legal</b>	
FL1	‘In our recruitment process and in the launch process we send out opt out forms. When someone has accepted a role with the firm then they receive a detailed offer pack, within which is the employee handbook, which explains the working time regulations under a section called hours of work. The opt-out form is also in that pack.’
FL2	‘Everybody has opted-out. It is a standard term of our contracts now for everybody that’s here and for new people that start. They agree to disapply Regulation 4(1). It’s in both the contract and the handbook.’
FL3	Information about implications of the working time regulations and the opt-out are provided at recruitment presentations. Letter is sent out in general pack of offer documents. It is also discussed at induction.
<b>Hotel / Catering</b>	
HC1	‘We send them a form with a description of the legislation and what the opt-out means to them and they are asked to sign the opt-out agreement to say they are willing to work on average over 48 hours if need be. We have it as a separate document; it is not part of their contract.’
HC2	At induction a pack is given out containing a standard pro forma summarising and explaining the regulations and opt-out form.

Some respondents reported that pressure was being brought to bear on employees. The TUC had anecdotal evidence both ‘from unions and from members of the public saying that there is pressure put on people to opt out’ and the GMB believed that this practice was widespread in the construction sector. The experience of the HSE Working Time Officer was that ‘there had been examples where there has been pressure’ but this was ‘not a general practice’. UNISON suggested that there was ‘some moral pressure’ in hospitals and the HR Director of one hospital trust largely confirmed this view: ‘a lot of [operating theatre staff] would say “I would like to work fewer hours but I do not want to leave my colleagues in it and I feel obliged to do it”’. The practice of the international law firm could also be seen as amounting to a form of indirect influence. The firm highlighted the widespread practice of long hours working and the availability of the opt-out at recruitment presentations, in documents sent out when a position was offered, and upon induction.

On the other hand, there was evidence suggesting that employees freely sign opt-outs believing that it is in their own interests to do so. ACAS indicated that in its experience agreements were predominantly entered into voluntarily. The legal practitioner suggested this was because ‘no one wants to fetter themselves by having these limits... primarily because people want to have the individual freedom to earn overtime’. Moreover, several of the trade unions accepted that the freedom to work overtime rather than employer pressure was the major incentive for workers to sign opt-outs. Significantly, this is not just the case for low paid workers. For example, the service engineers earned approximately £50,000 per annum, a third of which is overtime, and AMICUS provided the example of semi-skilled workers in the tobacco industry where ‘if they applied the Working Time Directive they would lose £500 per week’.

Several trade unions and the TUC also acknowledged that the willingness of their members to work longer hours in order to enhance their earnings created a ‘rhetoric-reality gap’<sup>43</sup> for the union movement. Their official position is to campaign for an end to the opt-out but then they ‘find it very hard to say to their members, ‘we are going to be taking money out of your pockets’.<sup>44</sup> ACAS also referred to the dichotomy in the position of trade unions and the fact that ‘some [ACAS] operational staff have witnessed tensions between the official position of some trade unions and their members on the issue of working hours.’

In other cases, opting out of the 48-hour limit is not pay driven but is motivated more by a sense of the need to preserve individual autonomy. Flexibility and the ability to manage one’s own time is seen as a crucial aspect of many management and professional roles. Employers in the finance and law sector and hotel and catering sector suggested that, for many employees, work is an important and rewarding part of their life and that some individuals are ‘driven by results, getting the work done and delivering.’<sup>45</sup> It was further argued that limiting the working hours of some individuals so that they could not do their jobs to the best of their ability could cause them more stress than working long hours.

## **5. Assessment**

At the time of the implementation of the Working Time Directive in 1998, legislation in this area was expected to bring benefits to the UK economy in terms of enhanced productivity and innovation, in addition to meeting the more traditional social policy objectives of health and safety protection (the legal justification for the Directive) and a better balance between work and family life.<sup>46</sup> More recently, however, the government’s view, as expressed by the



Chancellor of the Exchequer in his 2003 Budget Statement, has been that ‘in striking the balance between dynamism and social standards, our position is that no change to European regulations, like the working time directive, should risk British job creation’.<sup>47</sup> The clear implication is that the derogations contained in the Directive are an important element in ensuring that the British labour market remains more ‘flexible’ than its continental European counterpart. More generally, the British model of labour market regulation is one which the government commends to its EU partners: ‘flexibility at a UK level should be matched by flexibility in Europe’.<sup>48</sup>

In the Chancellor’s Budget Statement, the term ‘flexibility’ appears to be a synonym for ‘freedom from external constraint’, the constraint, that is, of legal regulation. Working time legislation is therefore perceived to represent, in microcosm, the difference between the lightly regulated UK labour market, and the apparently more intensive regulation of the continental systems. Our case studies show that this is a perspective shared not just by some employers but also by some workers and their representatives. Employers see the individual opt-out as necessary if they are to meet customer demands or client requirements that presuppose long working hours. Employees, likewise, accept a long-hours culture, which is bound up with access to higher earnings and, in some cases, a feeling of individual autonomy and control over working arrangements.

From another point of view, however, the current UK working time régime is rigid and inefficient. As our case studies show (see section 4.3), there is a perception on the part of all the relevant actors – employers and their associations, unions, and public bodies – that, under certain circumstances, a long-hours culture may lead to high rates of sickness and absenteeism and lower productivity (in the sense of firms producing the same level of output for a higher level of labour inputs). Reductions in working hours can avoid some of these costs while also paving the way for the simplification of working time systems. This pattern has been followed in a number of continental European systems since the implementation of major working time reductions in the mid-1980s.<sup>49</sup> These reductions were accompanied by moves towards annualisation of hours, which created the conditions for mutual gains on the part of management and labour. The longer the reference period, the greater the flexibility available to management in terms of varying labour inputs to meet fluctuations in demand. Savings can also be made from the abolition of overtime payment systems, which are complex to administer (although it must also be noted that annualisation may give rise to administrative costs of its own). Employees benefit from the reduction in overall hours, across the reference period as a whole, which is generally seen as a quid pro quo for

annualisation. Reduced hours, in turn, have positive knock-on effects for employers in terms of lower rates of absenteeism and sickness.<sup>50</sup>

If there are mutual advantages to be gained from a dual strategy of annualisation and reduction of working time, why do we not see it being taken up more frequently in the UK? As we have seen, some or all of the features just described are present in those workplaces in our study (in particular ME1, ME2 and ME5), which have recently altered their working time systems. In each case, these changes were not solely attributable to a need to comply with the Directive. They appear to have been stimulated by other external factors, such as a shift in customer demand which prompted workforce reorganization (ME1), or the influence of an overseas sister or parent company (ME2 and ME5). Organisational change which goes against deeply-embedded and mutually-reinforcing expectations often requires a catalyst of this sort. For this reason, we should be cautious about accepting the claim that the existing UK practice should be preserved simply because it reflects the preferences of employers and employees alike for a long-hours culture.

This is not a new debate. The Fawley productivity agreements that were the subject of Allan Flanders's classic industrial relations study, published in 1964,<sup>51</sup> were aimed, among other things, at cutting overtime working. During this period, overtime was regarded as a wasteful practice which led to the under-utilisation of labour: 'systematic overtime means not hard working, but the working of unnecessarily long hours in order that a basic wage rate shall be supplemented by the payment of overtime premia to make up an acceptable wage packet'.<sup>52</sup> Flanders found that while overtime could be 'the best or only way of coping with temporary or seasonal upsurges in labour requirements',<sup>53</sup> its 'indiscriminate' and 'habitual' use engendered expectations on the part of workers which made it difficult for management to curtail it when the immediate need had passed. In the absence of effective legal constraints on working hours, overtime 'has become a flourishing institution embedded in the special circumstances of individual firms and factories'.<sup>54</sup> Forty years later, the concern is no longer that overtime results in under-employment; rather, now that long hours are now combined with a high degree of intensification of work,<sup>55</sup> the implications for health and safety and work-life balance are the focus of attention. But in all other respects it is sobering to find Flanders' conclusions on the durability of a long-hours culture in British industry so faithfully replicated in today's experience.

There seems little doubt that a complete ban on long-hours working would be unfeasible in many firms and sectors. At the same time, the way in which the individual opt-out has been implemented reduces the pressure on both

employers and unions to negotiate towards meaningful working time reductions. So one conclusion to draw from our study is that as long as the individual opt-out continues in place, a much needed stimulus for the modernisation of working time, which could have come from the Directive, will fail to materialise. But to focus solely on the individual opt-out would be to miss the wider picture. The simple removal of the opt-out, without more, would almost certainly not have the desired effect of encouraging collective solutions to the working time issue to emerge.

This is because, firstly, the UK lacks the infrastructure of employee representation that allows the continental systems to achieve flexibility in the application of working time standards. Collective bargaining is present in only a minority of UK workplaces and there is little evidence so far of workforce agreements filling the gap in non-unionised establishments. Informal enterprise committees and works councils are becoming more common, but neither employers nor employees see them as having as a significant role to play in negotiating terms and conditions of employment. In addition, many employers feel that the individual opt-out is necessary not so much to get round the 48-hour limit as to avoid the complexity and record keeping requirements of the Regulations. This suggests that there needs to be a more general review and simplification of the existing legislation for removal of the opt-out to be an option. A further factor to consider is the likelihood that, in the event of the removal of the individual opt-out, employers would shift their attention to the derogation for ‘unmeasured’ working time. This would have the perverse effect of undermining the contractual definition of working time, while doing nothing to add to statutory protection. Indeed, it would exclude other protections, in particular those relating to daily and weekly rest periods, which do not apply to workers under Regulation 20.

## **6. Conclusion**

The evidence presented in this article suggests that the Working Time Directive has yet to have a significant impact on employment relations in the UK. Although, across the economy as a whole, surveys report a small reduction in hours worked by full-time male workers since 1998, the implementation of the Directive has not led to widespread changes in the way working time is organized. In particular, it has not been a catalyst for organizational reforms aimed at using a reduction in the length of the working week to bring about productivity improvements. Employers and employees alike remain wedded to a long-hours culture. In the case of industrial workers this is based on substantial reliance on overtime to boost earnings; for professionals, it is often seen as a

necessary part of maintaining client loyalty, meeting the expectations of superiors and peers in the organization, and maintaining individual autonomy over the organization of working time.

The individual opt-out is the principal means by which the potential impact of the Directive has been diluted. The opt-out provides employers with a low-cost mechanism to avoid the 48-hour limit, and the ease with which it can be deployed is one of the reasons for the limited use by employers of the collective derogations. These are complex to arrange, in particular for employers who, in the absence of a recognized trade union, only have available the route of a workforce agreement. In addition they provide a less complete exemption than that offered by the individual opt-out, since they take the form (principally) of an extension of the reference period for calculating the 48-hour week from 17 weeks to one year.

The Member States of the EU, acting through the Council, are required to review the individual opt-out on the occasion of the seventh anniversary of the Directive's adoption in November 2003, and to that end the Commission is currently undertaking a review of its effects. The preservation of the opt-out is seen by its supporters, including the UK government, as contributing to much-needed labour flexibility. It might be more to the point to say that the opt-out allows for one form of flexibility – autonomy from the external constraints imposed by regulation – at the cost of sacrificing another, namely the kind of flexibility in the use and deployment of labour which could flow from the modernization of working time arrangements. However, it should also be recognized that the individual opt-out is not the only obstacle to modernization. Because the UK lacks effective mechanisms of employee representation, it does not have the means needed to implement the continental European model of the annualisation and reduction of working time. Moreover, the Directive itself contains other derogations – in particular the exception for unmeasured working time – which would to some degree duplicate the effect of the individual opt-out were it to be removed. The fate of the opt-out may not warrant the hopes and fears that have been invested in it.

## Notes

- <sup>1</sup> *Fairness at Work*, Cmnd. 3968 (1998), at para. 5.6.
- <sup>2</sup> At the time the final draft of this paper was written (early September 2003), the Commission had yet to complete and publish its review.
- <sup>3</sup> On the 1998 Regulations, see Barnard, 1999.
- <sup>4</sup> On the 1999 Regulations, see Barnard, 2000.
- <sup>5</sup> The original DTI guidance notes explained (para.2.2.2) that, essentially, the derogation applied to workers who had complete control over the hours they worked and whose time was not monitored or determined by their employer. Such a situation might occur, it was suggested, if a worker could decide when the work was to be done, or could adjust the time worked as they saw fit.
- <sup>6</sup> In *O’Keefe v. Wolfenden*, Case Number 2700214/02 the majority in the ET found that the head chef in a pub fell within this derogation: he was ‘master in his own workplace’; cf. *Steward v. Martin Retail Group*, Case Number 2407135/99, para.11 where the 20 year old acting manager of a shop was not found to fall within Regulation 20; nor was a woman working as a sales rep for a company selling paper, in *Compton v. St.Regis Paper Company*, Case Number 1201178/99 & 1202171/99.
- <sup>7</sup> Case C-383/92 [1994] ECR I-2479. The Court reached similar conclusions in Case C-382/93 *Commission v UK* in respect of Directive 77/187/EEC on transfers of undertakings (now Directive 2001/23).
- <sup>8</sup> A workforce agreement may not be made with any part of the relevant workforce that is covered by a collective agreement between the employer and an independent trade union: WTR 1998, Sch. 1, para. 2; see Deakin and Morris, 2001: 308.
- <sup>9</sup> See Deakin, 1990.
- <sup>10</sup> Wareing, 1992.
- <sup>11</sup> Marsh (1991).
- <sup>12</sup> Rubery et al., 1994.

- <sup>13</sup> TUC (2002). See also the evidence of long-hours working reported in DTI (2002).
- <sup>14</sup> Hicks, (2002).
- <sup>15</sup> Similar evidence of long hours working and the absence of overtime pay in many sectors was found in research carried out for the DfEE by the Institute of Employment Research, University of Warwick and IFF Employment Research (2002).
- <sup>16</sup> Neathey and Arrowsmith (2001). Evidence on employers' attitudes is also provided by two reports from the Chartered Institute of Personnel Development (1999, 2002).
- <sup>17</sup> This is reported in Appendix 2 of Neathey and Arrowsmith (2001).
- <sup>18</sup> Op. cit., at p. 87.
- <sup>19</sup> Op. cit, at p. 72.
- <sup>20</sup> Neathey (2003).
- <sup>21</sup> Ibid., at p. 16.
- <sup>22</sup> Ibid., at pp. 16-18.
- <sup>23</sup> The officers represented the following trade unions: AMICUS, Association of University Teachers (AUT), General Municipal and Boilermakers' Union (GMB), National Union of Teachers (NUT), National Association of Schoolmasters and Union for Women Teachers (NASUWT), National Association of Teachers in Further and Higher Education (NATFHE), Transport & General Workers Union (TGWU), UNIFI, the largest finance sector union, and UNISON, the public sector union.

- 24 These were: Confederation of British Industry (CBI), Institute of Directors (IOD), Chartered Institute of Personnel and Development (CIPD), Association of Colleges (AOC), Engineering Employers' Federation (EEF), Local Government Employers' Association (LGEA), and London Investment Banking Association (LIBA). The Department of Health, The Law Society, the Universities and Colleges Employers' Association were contacted for their views but were not interviewed.
- 25 The School Teachers Pay and Conditions Act 1991 requires teachers to be available to carry out duties at the direction of the Head Teacher for 1265 hours over a reference period of 195 days. So directed working time falls within the 48-hour limit averaged over the 17-week reference period set out in the WTR.
- 26 Interview with Association of University Teachers (AUT).
- 27 One of the hotel companies did say that they used opt-outs for seasonal temporary staff covering Christmas and Summer.
- 28 Interview with Investment Bank FL2.
- 29 Interview with TUC.
- 30 Neathey and Arrowsmith (2001), at p. 11.
- 31 Interview with Engineering Employers' Federation.
- 32 Interview with GMB union.
- 33 Interview with Employer HC2 (Hotel and Catering).
- 34 Interview with AMICUS.
- 35 Interview with Chartered Institute of Personnel and Development.
- 36 DTI (2002) *Trade Union Membership: an analysis of data from the Autumn 2001 Labour Force Survey*, available at [http://www.dti.gov.uk/er/emar/artic\\_01.pdf](http://www.dti.gov.uk/er/emar/artic_01.pdf)  
73% of public sector employees are covered by Collective Agreements.

37 European Industrial Relations Observatory (2002) *Collective bargaining coverage and extension procedures*, available at:  
<http://www.eiro.eurofound.ie/2002/12/study/TN0112102S.html>

38 Chartered Institute of Personnel and Development (1999).

39 Neathey and Arrowsmith (2001), pp. 15-16.

40 *Watson v Swallow Hotels* Case 6402399/99, Carlisle Industrial Tribunal.

41 See DTI, 2002b.

42 Evidence from WERS suggests that where there were ‘joint consultative committees’ in place, only 50% dealt with pay issues, whereas working practices (88%) and health and safety (86%) were the most common issues dealt with.

43 Interview with TUC.

44 *Ibid.*

45 Interview with International law Firm.

46 See Barnard (1999), *op. cit.*

47 Hansard, House of Commons, 9 April 2003, The Chancellor of the Exchequer, Gordon Brown MP, Budget Statement, at col. 277.

48 *Ibid.*

49 See the essays collected in Bosch (1994).

50 See our discussion of case ME6 in section 4.3, highlighting the potential costs, in terms of employee sickness, of long-hours working.

51 Flanders (1964). We are grateful to Willy Brown for pointing out the relevance of Flanders’ study for our present analysis.

52 Foreword by Aubrey Jones, the then Chairman of the National Board of Prices and Incomes, in Flanders (1964), at p. 9.



<sup>53</sup> Flanders (1964), at p. 227.

<sup>54</sup> Ibid, at p. 228.

<sup>55</sup> On the growing intensification of work in the UK, see Burchell et al., 2001.

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