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The working time directive

What's the fuss about?

By Katinka Barysch

CENTRE FOR EUROPEAN REFORM

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★ The working time directive has become a bugbear of British eurosceptics. They claim that it imposes a big burden on the UK economy and puts patients' safety at risk in hospitals.

★ British companies widely use the directive's opt-out clause that allows individual workers to put in more than the regulated 48 hours a week. Even business representatives admit that the impact of the directive on the private sector is limited.

★ The impact of the directive – or, more precisely, several judgements from the European Court of Justice that have tightened its rules – has been much greater in the public sector. British hospitals have found it harder to cope with working time limits than most on the continent because they rely heavily on trainee doctors to care for patients out of hours.

★ There would be some good reasons for the EU to repeal the working time directive: many EU countries have still not fully implemented it, some still struggle to reconcile it with the need to provide 24-hour public services, and 16 (including Britain) use the individual opt-out clause. However, since such a drastic move is unlikely, Cameron should push for a pragmatic reform of the legislation. He should be careful, however, not to call for a unilateral British opt-out. The working time directive is not worth a European showdown.

Introduction

In his big European speech on January 23rd 2013, Prime Minister David Cameron said he wanted radical reform of the European Union or, failing that, he would get "the changes we need" from the other European countries in bilateral negotiations.[1] He remained vague on what exactly he wanted to change or repeal. The only piece of EU legislation that he singled out for review was the working time directive (WTD).

This directive has become a bugbear of British eurosceptics. British Conservatives claim that the EU introduced the WTD through the 'back door' by calling it a health and safety measure rather than an employment one. Many eurosceptics today use the WTD to highlight how the EU is meddling in social policy and other areas that should be left to the nation-state; and how EU regulation is strangling the UK's otherwise liberal economy. They are right that the WTD is flawed in many ways. In particular, it has caused a big headache for the health sector. But its impact on the wider economy has been limited, and it is not costly enough for Britain to start a big battle in Brussels or leave the EU over it.

Nevertheless, given the WTD's symbolic status – and its continued impact on 24-hour public services – there is still a case for reforming it, in particular by including a workable definition of 'on-call time' and allowing more flexibility for seasonal businesses.

This policy brief is a case study on the application of one piece of EU legislation, the WTD, in one member-state, Great Britain. It explores the background to EU social legislation and clarifies what the WTD says and does not say; it sums up how modern labour markets work and what the impact of the WTD has been on the British economy. It then looks at the SiMAP/Jaeger rulings of the European Court of Justice, which have made the WTD much harder to implement for doctors, firemen and other employees who are often on call; it describes the efforts that EU governments, employers and trade unions have

1: David Cameron was careful not to use the word opt-out in his speech. David Cameron, 'EU speech at Bloomberg', January 23rd 2013.

made to reform the directive; and it tries to disentangle some of the fiendishly difficult issues that the WTD has created for the British National Health Service (NHS).

The conclusion lays out some options for the British government in pushing for change of the WTD.

Social Europe

The working time directive was part of a package of social rules and health and safety standards that the EU adopted in the early 1990s to make the single market programme more palatable to workers and trade unions. Much so-called EU social legislation is about making free movement work. Such rules ensure, for example, that an Austrian who lives and works in France does not have to pay social security contributions in two countries; and that he gets access to social benefits and pensions in the country where he works and pays taxes. There have also been a limited number of commonly agreed minimum standards for social and employment protection; prominent examples include rules on maternity leave, workers' 'co-decision' in companies, and employment rights for temps.

But it is still individual EU governments who decide the vast majority of social and employment rules as well as all those concerning social security and benefits. This is why some EU countries, such as Britain and Ireland, have very open and flexible labour markets, and others, such as France or Italy, have much stricter regulations and higher levels of social protection.[2]

British Conservatives have always been sceptical about Europe-wide social and employment rules, whereas the Labour party has usually supported them. Former Conservative Prime Minister John Major negotiated an opt-out from what was then called the social chapter, a protocol to the 1992 Maastricht treaty on future social and employment rules.

EU countries adopted the working time directive by qualified majority in the Council of Ministers in 1993. Although Britain had managed to insert an individual worker's opt-out into the final text of the legislation, the Major government refused to implement the directive, claiming that it was covered by the opt-out from all EU social rules that it had secured under the Maastricht treaty. The European Commission, by contrast, argued that treaty articles on health and safety which existed before Maastricht provided the legal base for the WTD and that the directive consequently applied to all EU member-states. The Major government took the Commission to the European Court of Justice and lost, so Britain implemented the directive in 1998.

In that year, under Tony Blair's newly elected Labour government, the UK also opted in to EU social legislation generally. That meant that the WTD would have come into force irrespective of whether it was classified as social, employment or health and safety legislation. "There was never a serious debate about NOT accepting the working time directive", recalls one former Blair adviser. But Blair did not want to give up the WTD's opt-out clause for individual workers.

While Labour was in power, from 1997 to 2010, EU social rules seemed to become a less contentious issue for most Britons, and many were actively in favour. In 2004, for example, a majority of Britons wanted the individual opt-out from the WTD to be abolished (in other words, the 48-hour working week to be applied to all workers).

> *"There was never a serious debate about NOT accepting the working time directive."*

Now that the Conservative party is back in power (albeit in coalition with the Liberal Democrats), many of its members are pushing the government to seek yet another opt-out from EU social and employment legislation. Public opinion has also swung around. Two-thirds of Britons now want employment legislation to be shaped by their government, not by the EU; and 29 per cent would like to see EU competences in employment law repatriated.[3]

By contrast, many other Europeans regard social and employment standards as an integral part of the single market. They argue that European competition would be 'unfair' if countries were allowed to engage in 'social dumping' by tolerating low pay,[4] excessive working hours or shoddy work practices.

The disagreement over social Europe runs not only between countries but also within them. Employers' federations generally want the EU to stay away from social and employment legislation while trade unions want the EU to get involved. This rift is replicated in the UK, where the Trades Union Congress (TUC) defends the WTD, while the Confederation of British Industry (CBI) and other business representatives are less enthusiastic.

Britain's European neighbours, however, do not get quite as worked up about EU social rules as the UK. The CER conducted a cursory review of the debates

2: Philip Whyte, 'Do Britain's European ties damage its prosperity?', CER essay, March 2013.

3: YouGov polls from December 2011 and January 2013, respectively.

4: Some are calling for an EU-wide minimum wage. Britain is one EU country that has a national minimum wage but Germany, for example, does not.

on the WTD in several EU countries – and found barely anything. Spaniards mostly like their 48-hour week. Germans worried about the impact of the European Court of Justice rulings on their hospitals in the early 2000s, but the debate died down quickly. Businesses in the Netherlands and Ireland – both countries with very flexible labour markets – have no problem with the directive (although they have both used its wiggle room). In Ireland there is outrage that the directive is not properly applied to trainee doctors (in the UK there is outrage that it IS applied to them). In the Nordic countries, some people dislike the WTD because it impinges on long-standing practices to negotiate working conditions between trade unions and employers' federations – although such agreements are usually more favourable for workers than the WTD. A Google search for "working time directive" yields over 320,000 hits in the UK but only a fraction elsewhere (67,000 in Germany and 17,000 in the Netherlands). Perhaps the WTD is such a big issue in the UK because both the EU and the health service are highly charged political issues, which is not the case in most other European countries.

What the directive says

The WTD's basic rules are as follows:[5]

- The maximum working week should be no longer than 48 hours. This limit does not apply to each and every week. Workers can work longer provided their working weeks average out as 48 hours over a period of four months. The reference period can be stretched to a year if trade unions and employers agree on that.
- Workers should have a break every six hours. And they should have a full day off each week; or two days off every two weeks.
- Everyone is entitled to four weeks of paid holiday.
- Night shifts must not be longer than eight hours.

The WTD allows EU countries various opt-outs (or 'derogations'):

- The 48-hour rule and rest requirements do not apply to 'persons with autonomous decision-taking powers'. Some EU countries regard all managers as autonomous workers. In Britain, company employees are generally not seen as autonomous. But farmers, family workers, clerics and all manner of self-employed and small-business owners are.
- Different rules can be adopted for sectors that need more flexibility such as night watchmen, oil rig workers, airport staff or people working in hotels.
- Trade unions and employers have leeway to agree their own rules for their respective sectors. In countries such as Sweden and Germany, collective agreements determine rules on working time, rest and holiday (as well as pay and pensions) for most workers; and these agreements often override WTD clauses. In the UK, collective agreements cover less than a third of the workforce (and mainly in the public sector) so this particular avenue towards flexibility has not been used much in the UK.
- And perhaps most importantly: member-states can allow workers to opt out of the 48-hour rule individually. Workers need to agree the opt-out in writing; they have the right to change their minds; and bosses must not threaten workers with negative consequences if they refuse to sign.

As an EU directive, the WTD does not bind countries directly. Member-states have to draft and adopt their own implementing legislation. In Britain, this is the 'working time regulations' of 1998. The original WTD is a reasonably straightforward document of six pages, of which almost two pages are derogations. The UK's working time regulations, originally 26 pages long, have been amended many times over the years so that it can be hard for non-lawyers to establish what exactly they say.

"When the directive came into force, 6 million workers got an additional week of holiday."

When Britain adopted the WTD in 1998, it immediately used the individual opt-out from the 48-hour rule. But Britain is bound by the directive's other rules, in particular on rest periods and holiday. When the WTD came into force in the late 1990s, 6 million British workers got an additional week of holiday and some (mainly women) enjoyed paid leave for the first time. Initially, Britain included all bank holidays in the mandatory four weeks leave. Trade unions then persuaded the government to count bank holidays as extra, with the result that since 2008 most British workers have enjoyed 5.6 weeks annual leave.

5: 'Council directive 93/104/EC concerning certain aspects of the organisation of working time', November 1993.

The way we work

Working time in Britain, as in most industrialised countries, is on a long-term downward trend. Working hours fell precipitously in the 1960s and 1970s, as industrialisation led to big gains in productivity. If output per hour rises, people can work less while maintaining their standard of living. The trend of falling working hours slowed in the 1980s and in some countries reversed temporarily before resuming in the 1990s.[6]

Despite the overall trend on working hours, there have always been big differences in how much European nations work; and the working time directive has not led to a convergence. In 2011, the British worked an average of 1,625 hours per annum.[7] That is less than the OECD average (which includes poorer nations with lower productivity such as Mexico and Turkey) but more than the Germans, Dutch or French (where people also tend to get more holiday).

Working hours are not a sign of economic prowess. Greeks work on average 700 more hours a year than Germans. Yet Germans are better off, in large part because German workers tend to be more productive, thanks to better machinery, skills and management.

Moreover, hiding within the overall numbers is a growing diversity of working hours and arrangements: more and more people, especially women, are working part time or flexible hours. In the mid-1970s half of British industrial workers were on a standard 40-hour week. By the mid-1990s, that share was down to a third. Around 30 per cent of workers in Britain are now part-time.

At the same time, there are still more people (especially men) in Britain working very long hours than in most other European countries. The TUC estimates that in 2011 there were still over 3 million British workers who regularly put in more than 48 hours a week. This was down from around 4 million in 1998, when the WTD came into force. Neither the TUC nor the CBI is able to say whether this decline has been the result of the working time directive.[8]

Surveys seem to indicate that around half of the workers who work very long hours do so voluntarily and half feel pressured to do so. Some companies include the opt-out as standard in the small print of their employment contracts. In many professions, people do not bother to count their hours since they do not get paid overtime anyway. Only around 12 per cent of workers say they would like to work more.[9]

Common sense suggests, and experts agree, that working very long hours increases the risk of mistakes and accidents. Most studies into the subject show that the risk of accidents starts increasing exponentially after about eight hours of work, and doubles once someone has worked a 12-hour shift. After BP's Texas refinery blew up in March 2005 (15 people dead, $1.5 billion damage), an enquiry found that the board operator had been working 12-hour shifts for almost a month without a day off.

Overstretched workers also put their own health at risk: the longer a person's working day, the higher his or her risk of suffering from all manner of ailments, such as heart attacks, insomnia, depression and back problems.

Both the risk of accidents and health hazards depend very much on the nature of the job, so experts are usually shy to make recommendations as to what constitutes a 'healthy and safe' working day. It seems that people who are in charge of their working lives, such as freelancers and senior executives, can thrive on long hours while others, such as those doing long shifts in factories, suffer from stress and illness.

	1960	1980	1990	2000	2011
France	2,048	1,705	1,591	1,523	1,476
Germany			1,473	1,471	1,413
Greece		2,116	2,121	2,130	2,032
Netherlands		1,352	1,374	1,435	1,379
Poland			1,988	1,988	1,937
Sweden	1,730	1,561	1,642	1,642	1,644
UK	1,943	1,771	1,712	1,700	1,625
OECD average	1,929	1,741	1,717	1,844*	1,776

Table: Working hours per year
Source: OECD

** In the 1990s, several Central and East European countries as well as Chile and Korea joined the OECD, driving up working hour averages.*

6: Since the 1980s, the productivity gains have often not been passed on to workers through higher wages. Simon Tilford, 'Economic recovery requires a better deal for labour', CER policy brief, November 2012.
7: Since workers in some countries get more holidays than in others, annual working hours are better for international comparisons than weekly ones.
8: I conducted off-the-record interviews with representatives of the British government, the opposition, trade unions, employers' federations, medical bodies and the European Commission in March and April 2013. Quotes that are unattributed are from these interviews.
9: Eurofound, 'Fifth European working conditions survey – 2010', April 2012.

A 2010 report that reviewed a number of studies on the impact of working time on health and safety concluded that "extending working hours beyond the limits of the current WTD [48 hours a week] would result in an increased risk of health impairments".[10] On the other hand, the House of Lords went through a number of British studies on the subject and found "no evidence quantifying how many hours would need to be worked over what period of time and in what type of employment for that risk [for health and safety] to be significant".[11]

The economic impact of the WTD

Those opposed to EU social rules often single out the working time directive as one of the pieces of EU legislation most harmful to the British economy. OpenEurope, a eurosceptic think-tank, claims that EU social policy costs British business and the government £8.6 billion a year (0.5 per cent of GDP) and that the WTD is among "the most expensive" of all EU social laws.[12] The 'Fresh Start' group of eurosceptic Conservative backbenchers thinks that "over two-thirds of the annual cost [of EU social and employment law] comes from the working time directive and the temporary agency workers directive".[13]

When the WTD was first introduced in Britain, the government at the time estimated that it would cost the country £5-6 billion a year. Around £2 billion of this would stem from the additional reporting costs. Initially, the 1998 working time regulations (not the WTD) required employers to keep track of the extra hours that opted-out workers put in. Since this requirement was too onerous, it was scrapped a year later. The WTD requires companies to keep a list of names of the employees who have opted out. In practice not many do, which is why there are no reliable numbers on the use of the opt-out. Another £3 billion of the WTD-related costs, said the government, would come from the extension of holiday entitlements to 6 million British workers.

Although there are plenty of estimates of the costs of the WTD, it seems that no-one has tried to calculate the wider benefits. Such a calculation would have to include health care savings (because workers are less stressed and have fewer accidents) and possible gains in productivity.

Academic studies show that stringent labour market rules can be bad for productivity. This applies in particular to hiring and firing restrictions, while the effects are ambiguous for other rules, such as parental leave. Working time rules could actually increase productivity if they motivated companies to invest in better management, more training and modern machinery. One study found that this was the case for the French 35-hour week. But much also depends on wages: if pay stays the same despite lower hours, companies have a big incentive to get more out of every working hour.[14]

The European Commission in 2010 asked Deloitte, a consultancy, to study the impact of lower working hours on productivity in Europe.[15] The researchers found "no clear pattern" across industries or countries. Reduced working hours seem to have driven productivity improvements in the financial sector but not in hotels and restaurants. They led to higher productivity in telecoms and construction in some countries, but not in others. In some sectors, workers became less productive when they worked less. For the UK, clear results were only obtained for textiles, banking and the power sector: in all three productivity went up as working hours fell.

> *"It is hard to say whether the working time directive has imposed any sizeable burden on British business."*

It is hard to say whether the working time directive has imposed any sizeable burden on British business – other than the original reporting requirements (since scrapped) and the increased holiday entitlement, an achievement that not even the most ardent eurosceptics now call into question.

British employment legislation, including the individual opt-out from the 48-hour week, gives companies and their workers plenty of flexibility. An employment expert at the CBI concludes: "We are perfectly happy with the framework of setting overall weekly limits and paid leave as long as we have the opt-out. Whether this needs to be regulated at the EU-level is a broader question. Within the area of European social rules, the working time directive is not our main concern." Government officials and politicians often agree in private. One ministry official sums up the debate by saying: "The working time directive is not that important. It's the philosophy behind it that gets people worked up: in the UK it is about EU over-regulation, and in France about the injustice of the opt-out. "

10: Deloitte, 'Study to support an impact assessment on further action at European level regarding directive 2003/88/EC', December 2010.
11: House of Lords European Union Committee, 'The working time directive: A response to the European Commission's review', April 2004.
12: Stephen Booth and Mats Persson, 'Repatriating EU social policy,' OpenEurope, November 2011.
13: The Fresh Start Project, 'Manifesto for change', January 2013.
14: For a review of the relevant literature see Deloitte, 'Study to support an impact assessment on further action at European level regarding directive 2003/88/EC', December 2010.
15: It not possible to establish a clear link between lower working hours and the WTD, first, because implementation of the WTD has been incomplete and inconsistent, and second, because so many factors other than regulation influence working patterns.

SiMAP/Jaeger and failed reforms

Initially, Britain was the only EU country to use the individual opt-out. However, as the European Court of Justice (ECJ) tightened the interpretation of the WTD in successive rulings, more and more EU countries sought to regain flexibility by using the opt-out. Many countries have also been implementing the WTD rules in a rather patchy way.

The WTD's brevity comes, to some extent, at the expense of clarity. There have been countless cases in national courts over how to interpret WTD rules. Dozens of them have ended up before the ECJ. The issues that have caused most confusion are first, what actually constitutes working time, and second, the extent to which soldiers, policemen and other public sector employees are covered.

Since the WTD does not define 'working time', there have been many disputes about how to count the time that doctors or firemen spend on call. In the SiMAP case of 2000, the ECJ ruled that all on-call time that an employee spends at the workplace counts as working time, even if he or she is resting or sleeping. In the Jaeger ruling of 2003, the Court added that workers were entitled to have a rest period immediately after their working day (or night). This ruling effectively made 24-hour shifts spent at the workplace – previously quite common for fire fighters and doctors – illegal.

Although trade unions regarded these judgements as "a victory", they created a big headache for many public services that need staff to be there 24 hours a day. The rulings were one of the main driving forces behind a decade-long effort to reform the directive. The original directive contained a review clause that prompted the European Commission in 2003 to look at how the WTD was working in practice and to suggest some improvements. It took EU employment ministers in the Council until 2008 to agree on a reform proposal. A year later, however, the European Parliament voted it down.[16] Further reviews and reform proposals followed in 2010.

In 2011, the Commission asked trade unions and employers' federations (the 'social partners')[17] to work out a compromise but they admitted defeat at the end of 2012. Now the Commission can present yet another reform proposal and feed it into the long 'co-decision' process in the hope that this time the Council and the Parliament will avoid a showdown; or it can cajole the social partners to try again to bridge their differences.

At the time of writing, it looks unlikely that there will be much movement before the next European Parliament election in May 2014.

Since efforts to roll back SiMAP/Jaeger have come to nothing, 15 other EU countries have since decided to resort to the individual opt-out to regain a degree of flexibility. Of these 15, five countries apply the opt-out to all sectors, like the UK does. Ten use it specifically for their health services and other sectors that rely heavily on on-call time, including Germany, France, the Netherlands and Poland.

> *"This ruling made 24-hour shifts – previously quite common for doctors and firefighters – illegal."*

Not only have most EU countries used the wiggle room provided by the WTD, they have also in many cases implemented and enforced it poorly. Half of all small and mid-sized companies in the EU and over a third of larger ones do not track the working hours of their employees at all, according to Commission surveys. In 2010, 22 out of the 27 EU countries breached one or another of the WTD's rules: Greece and Ireland had not bothered to implement the SiMAP/Jaeger rulings; France did not apply WTD rules to junior doctors; Spain excluded its public sector (other than doctors) from WTD rules; Belgium did not guarantee rest periods for boarding school teachers or soldiers; Italy had not adopted rules for dangerous and stressful night work; the list goes on. The UK – arch foe of the directive – is among the countries that implement it most assiduously.[18]

Trade unions are furious that the Commission has never taken a single EU government to the ECJ for breaching working time rules. The Commission counters that the ECJ judicial process takes a long time; and that many governments have responded to Commission pressure by bringing national laws in line with the WTD. Moreover, EU governments were still waiting to see whether the WTD reform efforts would yield results before they acted. As it became clear that SiMAP/Jaeger was here to stay, more EU countries improved their implementation, claims the Commission. However, the renewed deadlock in reform efforts will probably prompt yet more EU countries to resort to the individual opt-out.

16: The fact that Labour MEPs voted against the reform proposal backed by the Blair government caused some embarrassment in London.

17: This is common practice in EU law making: if the social partners agree on a text, this is then used as the basis for a revised directive.

18: European Commission, 'Detailed report on the implementation by member states of directive 2003/88/EC concerning certain aspects of the organisation of working time', December 2010.

Reforming the WTD

The discussions over WTD reform are extremely complex but broadly, the fault lines run as follows:[19]

- ★ Some EU governments (France, for example), a majority of MEPs and most trade unionists want to get rid of the individual opt-out altogether. In return, they would be prepared to weaken the rules governing on-call time and lengthen the reference period. Britain and some other countries that widely use the opt-out are fighting tooth and nail to keep it; so are most European employers' federations.
- ★ The European Commission and some trade unions (including some British ones) would be content with limiting the use of the opt-out rather than scrapping it. For example, bosses would be prohibited from asking workers to sign the opt-out at the same time as their contract of employment.
- ★ Many companies whose business is seasonal want the reference period for the 48-hour week to be extended from four to 12 months. At the moment, such an extension can only be done through collective agreements. But in Britain and some other countries, collective agreements are not widely used.
- ★ European health services and other public sector employers want to roll back the SiMAP/Jaeger rulings. The 2008 Council reform proposal would have left EU countries free to decide whether to count 'inactive on-call time' (when the employee is at the ready but not actually busy) as working time and to determine a 'reasonable period' in which rest needs to be taken after a shift. The European Parliament and doctors' trade unions did not like these ideas. The European Commission has suggested a compromise under which on-call time would count as working time but not hour-for-hour. For example, if a doctors spent eight hours on call, only three would be counted as working time.
- ★ Employers want to reverse another ECJ judgement that says that workers keep accruing holiday while they are on maternity leave or long-term sick leave. Small companies cannot afford to pay employees for long periods when they are not working, employers argue.
- ★ The European Parliament and the Commission want clarifications on some WTD clauses that the member-states interpret in wildly different ways. Some countries, for example Sweden and Poland, apply the 48-hour limit not per worker but per contract. That means that people who have more than one job can work very long hours. Some use the 'autonomous' worker clause to exempt whole swathes of people from the WTD – for example, anyone earning three times the minimum wage in the Netherlands and hospital doctors in Italy.

The directive and the health service

While the impact of the working time directive has been limited for British business, it has been highly disruptive for the country's health service. A large majority of British surgeons think that the WTD puts patients' safety at risk because it forces hospital doctors to hand over to one another too often and because it does not leave medical trainees enough time to learn on the job. The Royal College of Surgeons has concluded that the WTD has "failed spectacularly".[20]

Critics also say that the introduction of the WTD has cost the NHS – and hence the British taxpayer – billions of pounds. The Daily Telegraph, a British broadsheet, calculated that since 2010 the NHS has spent £2 billion on temporary doctors (so-called locums) to fill gaps in rotas that have, says the newspaper, been created by the need to observe working time limits.[21]

It is not possible to untangle the fiendishly difficult issues surrounding doctors' working arrangements and training in this policy brief. What follows is merely an attempt to provide some background to what has become a highly politicised and in many cases emotional debate.

The WTD working time limits apply only to doctors employed in hospitals. They do not apply to family doctors (GPs) because the latter are 'autonomous workers' for the purpose of the directive. Hospital staff, like all British employees, have the right to opt out of the 48-hour working time limit. Some doctors do so although the British Medical Association (BMA, the doctors' trade union) tells its members not to.

Since the opt-out is supposed to be an individual and reversible decision, British hospitals do not usually

19: European Parliament, 'No exception to the 48-hour maximum working week and opt-out scrapped after three years, say MEPs, December 17th 2008. European Commission, 'Reviewing the working time directive', December 2012. TUC Executive Committee, 'Working time directive update', February 2012.

20: Royal College of Surgeons, 'Impact of doctor working time cap on patient safety and training getting worse, says new survey', RCS website, August 1st 2010.

21: Laura Donnelly, '£2k a day for trainee doctors as costs spiral out of control', The Daily Telegraph, April 6th 2013.

devise shift and rota plans on the assumption that staff will routinely work more than 48 hours a week. One trade unionist claims that the reason why the opt-out is not more widely used in NHS hospitals is "because the medical professions have the strongest professional bodies". A roundup of working arrangements in hospitals across Europe in 2010 found that health services in many other EU countries made much wider use of the individual opt-out than the NHS. In Germany, 90 per cent of hospitals said they used the opt-out and a large majority of doctors had signed it.[22]

The 48-hour rule applies over a six-month period in the NHS (four months in the rest of the economy). Therefore, even doctors who have not opted out are free to work longer hours to cover rota gaps or emergencies, provided they get extra rest later.

Nevertheless, the WTD rules have proven hard for the NHS to cope with – harder perhaps than for most other European health systems. There may be a number of reasons for this but the most important one is that the NHS – almost uniquely among western health services – has always relied on trainee doctors (called junior doctors in the UK) to do much of the actual work in hospitals. In most other European countries, trainee doctors are only found in big-city teaching hospitals, while fully trained senior doctors (called consultants in the UK) look after patients in all other hospitals. To put it crudely: most trainee doctors in Europe are there to learn on the job while British ones are expected to do the job.

The heavy reliance on junior doctors to provide care, combined with a long-standing shortage of doctors,[23] meant that young British doctors routinely ended up working 100-hour working weeks.

Junior doctors were initially excluded from the WTD but an amendment in the year 2000 brought them within the scope of the directive. However, this does not mean that British junior doctors had to go from a 100-hour working week to 48-hours within a year.

First, the WTD working time limit did not start to bite for junior doctors until 2004; it was then gradually phased in over the following five years (first 58 hours a week, then 56 and so forth). Hence, WTD rules did not fully apply to British junior doctors until 2009. Even then, some doctors with certain specialisations or those working in rural hospitals were given another two years to comply. Therefore, the NHS had a decade to prepare for the introduction of WTD rules for junior doctors.

Second, the British government had introduced weekly working time limits for junior doctors well before the WTD. Experts and politicians had long agreed that excessive working hours were bad for doctors' and patients' health.[24] So in 1990 the Conservative government of the day and the NHS agreed on new working time regulations for junior doctors. This so-called New Deal contract imposed a weekly working limit of 56 hours, although trainee doctors could still add on-call time up to a total of 72 hours a week. The working time limits were poorly observed in the early years so the New Deal contract was revised in 2000 to give junior doctors stronger incentives to work less and get enough rest.

Third, the Labour government oversaw a big increase in doctor numbers after 2000, which should in principle have alleviated the strains imposed by working hour limits.

"The British government had introduced weekly working time limits for junior doctors well before the WTD."

The NHS claims that by 2005, 98 per cent of junior doctors were fully compliant with the New Deal.[25] However, in a 2010 survey of the Royal College of Surgeons, almost three-quarters of trainees (and two-thirds of consultants) said they consistently worked more than the permitted hours. More recent investigations have shown that many trainee doctors were still doing 90-hour weeks – in breach of both the WTD and the New Deal.[26] Reliable figures on doctors' working hours are hard to come by because most hospitals make their own "local arrangements under the radar", as one health expert puts it. The fact is that even if junior doctors opted out of the WTD en masse tomorrow, they would only be allowed to work an extra eight hours a week under the New Deal rules.

One big problem for the NHS is that the (extremely complex) rules of the New Deal and the (inflexible) ones of the WTD are poorly co-ordinated and often cut across each other. "A lot of people blame the working time directive for everything," says one NHS manager, "but many of the difficulties are caused by the complexities of the New Deal."

Another, and interrelated, reason why it has been painful for the NHS to implement the WTD – or more precisely the WTD as interpreted by the SiMAP/Jaeger rulings – is that hospital doctors, both senior and junior, used to spend so much time on call. A team of doctors would

22: Deloitte, 'Study to support an impact assessment on further action at European level regarding directive 2003/88/EC', December 2010.
23: The House of Lords enquiry in 2003 found that there were 0.7 senior doctors for every junior doctor in the UK while the EU average was four senior doctors for each junior doctor.
24: House of Commons debate on the working time directive, Hansard, March 19th 2009.
25: NHS Employers, 'EU working time regulations and the NHS', briefing for the Westminster Hall debate, April 26th 2012.
26: 'The truth about junior doctors', Channel 4 Dispatches, March 25th 2013. Rebecca Smith, 'Patients at risk from junior doctors working 100 hour weeks: GMC', The Daily Telegraph, February 14th 2013.

work during the day and then sleep at the hospital for several nights in a row to cover emergencies. Such arrangements saved the NHS from having to hire extra doctors; they also ensured what doctors call 'continuity of care' because the same medical staff would look after a patient day in day out, without the need for handovers.

Following the SiMAP/Jaeger rulings in 2000/03, doctors moved from a system based on on-call time to one based on shifts (or rotas). They now work either during the day or at night but rarely both. Nurses have always worked shifts, which is why the WTD has created less of a problem for the nursing profession.

The Kings Fund (a think-tank that studies the health system) thinks that on balance the move to rotas was a good idea because it stopped doctors working very long weeks: "We made big gains in safety. And what we lost in terms of continuity of care, we can compensate through safe handovers", says one expert at the Kings Fund. Professional bodies have issued a host of recommendations on how to make handovers safe and efficient but these have only partially been implemented. Some hospitals (but by no means all) now rely heavily on locums to fill rota gaps – an expensive and complicated solution. Dan Poulter, a health minister and not a friend of the WTD, thinks that this is "frankly a sign of poor management".[27]

The NHS has long had the objective of moving from its reliance on junior doctors to a 'consultant-led system' in which fully trained doctors provide most of the care. The trouble is that by hiring more senior doctors, hospitals would not only face higher wage bills, they would also lose much of the state subsidy that they currently get for training junior doctors. This, however, is hardly a WTD-related issue.

There remains the question of whether 48 hours a week are enough to train junior doctors. Some surgeons claim that trainee doctors do not have enough time to work alongside their senior colleagues and thus learn on the job. The BMA claimed that New Deal working time limits reduced training hours from 30,000 to 8,000 between the early 1990s and 2003 and that the WTD would cut this further, to 6,000 hours.[28]

A study by the Royal College of Surgeons found that the challenge was not so much working time limits per se but the reliance of hospitals on junior doctors to work night shifts. The report said that since surgeons did not usually operate at night, junior doctors who worked mostly nights had no-one to learn from. The College recommended smarter rotas so that trainee doctors would spend more time in hospitals during normal working hours when their senior colleagues are around.[29] An independent review, commissioned by the government in 2010, concluded that "high quality training can be delivered in 48 hours"[30] (see also box on page 10).

Experts and NHS representatives welcome the fact that working time limits should in theory encourage hospitals to train doctors in a more systematic way rather than "by some undefined and vague osmotic process".[31] The government is pondering a more structured curriculum for trainee doctors as well as new financial incentives for hospitals to deliver quality training.

"There remains the question of whether 48 hours a week are enough to train junior doctors?"

The move towards a standard 48-hour week was difficult for the health sector but it has "for the most part, been successful", says the NHS.[32] It also admits that in some respects the WTD has led to improvements: rather than relying on overtired junior doctors to be available at all times, most hospitals now have shift systems and more structured training provision. The problem for the NHS is not the WTD as such but the ECJ's SiMAP/Jaeger rulings on on-call time and compensatory rest. "We like that the directive puts a limit on hours", says one senior NHS person, "but the wording of the [SiMAP/Jaeger] judgements is too rigid." The BMA, on the other hand, broadly supports the SiMAP principle that on-call time should be counted as working time.

Given this rather nuanced picture of a health system in transition, it is somewhat surprising that the WTD still encounters so much hostility from British doctors. Surveys hint at a generational split in attitudes. More experienced doctors (represented in the Royal College of Surgeons) tend to be more critical of the WTD. One NHS insider thinks that this is because older surgeons have cut their teeth under the traditional on-call system and are more prepared to accept long working hours as part of their professional ethos. Younger doctors (half of whom are women now) tend to be happier with working time limits: "Our younger doctors want a life", says the NHS insider.

27: Quoted in Laura Donnelly, '£2k a day for trainee doctors as costs spiral out of control', The Daily Telegraph, April 6th 2013.
28: House of Lords, 'The working time directive: A response to the European Commission's review', April 2004.
29: The Royal College of Surgeons in England, 'The working time directive 2009: Meeting the challenge in surgery', June 2008.
30: John Temple, 'Time for training: A review of the impact of the European working time directive on the quality of training,' May 2010.
31: House of Lords European Union Committee, 'The working time directive: A response to the European Commission's review', April 2004.
32: NHS Employers, 'EU working time regulations and the NHS', briefing for the Westminster Hall debate, April 26th 2012.

Are working time rules bad for your health?

Experts at Durham University looked at over 700 studies on the impact of working hour rules on doctors' training and clinical outcomes.[33] They found the following:

- ★ Doctors who are fatigued and stressed after long shifts and too little rest are more likely to arrive at a wrong diagnosis or botch a treatment. But many doctors are not conscious of the effect that tiredness has on their ability to perform.
- ★ There is no clear evidence that working hour restrictions per se harm junior doctors' training. Comparisons that look at how many operations junior doctors attend are misleading since the quality of training is as important as the quantity. If junior doctors get to attend fewer procedures, their overall training period might have to be longer.
- ★ There is no clear evidence that introducing limits on working hours harms patient safety. Some studies reported increased risks to patients as diagnosis and treatment was more likely to be delayed. Other studies found that after the introduction of working time limits, patients were less likely to die or end up in intensive care, and quicker to recover.
- ★ A study specifically in the UK found a longer-term trend of improvements in health sector outcomes that had little to do with the tightening of working hour rules.

Durham's overall conclusion: "The balance of evidence appears to be that while working time restriction is neutral or beneficial in terms of its effects on medical education, patient care and patient safety, attitudes towards it still tend to be negative."

Conclusion: Options for David Cameron

The working time directive was in many ways a child of its time. 'Social Europe' was in vogue in the 1990s. European trade unions and centre-left politicians demanded common employment and social standards as a quid pro quo for accepting the single market programme. And many politicians (and quite a few economists) thought that working time limits would be a smart way of reducing unemployment: if employees did fewer hours, some work would be 'freed up' for others. This 'lump of labour' fallacy has few supporters today (outside, perhaps, the French Socialist party, and even they admit that the 35-hour week has not delivered full employment).

Modern labour market regulations must be able to accommodate seasonal peaks, just-in-time demand management, teleworking and other non-standard job practices. Families in which both parents work need adaptable working arrangements. Some people may want to pack in lots of hours at one stage in their lives while taking it easy at others, for example when they have babies or towards the end of their working lives. Some EU countries are therefore thinking about establishing 'lifetime working accounts' to give people greater leeway to manage their careers. The European Commission admits that some bits of the WTD "have lagged behind rapid changes in working patterns".[34] More flexibility is needed.

At the same time, few people in Europe would cherish the thought of workers slaving away 12 hours a day in factories, supermarkets, slaughter houses or call centres. Some form of working time limits, whether European or national, are still needed. Trade unions agree that the WTD needs updating. But they believe that modern work practices require more, not less, protection for workers. Many EU countries already grant their workers greater protection than is required by the WTD.

As it stands the WTD satisfies few and annoys many. With 16 countries now using the opt-out, and implementation of the directive patchy in 22 out of 27 countries, the WTD has not brought about the 'level playing field' that trade unionists wanted to see. Nor has the directive made it easier for European companies to do business across borders by harmonising employment practices. David Cameron therefore has a point when he asks the EU to have a fresh look at the directive.

Not much is going to happen in the foreseeable future. Cameron says he will only start his big push for EU reforms if he gets re-elected in 2015. At the EU level, WTD reform is probably on hold now until after the 2014 European Parliament election and the arrival of a new Commission.

33: Durham University Centre for Medical Education Research, 'The impact of the working time regulations on medical education and training: Literature review', August 2012.

34: European Commission, 'Reviewing the working time directive', December 2010.

If Cameron was still in power after 2015, what would be his options for the working time directive?

★ Scrap

The political balance in Europe has been shifting against WTD-type rules. Many North European countries have liberalised their labour markets since the 1990s, and the euro crisis is now forcing some of the traditionally more protectionist South European countries to follow suit. Critics of the WTD are not only found in the British Conservative party. Many European liberal and centre-right politicians, as well as most business federations, would gladly get rid of it.

If the WTD disappeared tomorrow, not much would change in practice. Rules on working time, holiday and rest are well enshrined in national law or collective agreements. Even Britain would most likely not abolish rules on night work or holiday entitlements. "We often oppose rules only because they come from Brussels", admits one of Cameron's cabinet ministers in private, "we are not against the legislation, just the fact that it's not from here."

So a repeal of the WTD would probably have more symbolic significance. It would show the eurosceptics that the flow of competences in Europe is not always one way and that the EU can also hand regulatory powers back to individual EU countries.

However, repealing (as opposed to amending) EU legislation is very hard because it requires unanimity among all 27 countries. (Making the review and repeal of outdated EU legislation easier would be a more worthwhile target for Cameron's political energy than the working time directive.)

Although several EU governments might in principle like to get rid of the WTD, none other than Britain's regards the WTD as important enough to warrant a showdown with the trade unions. At the very least, the unions would demand concessions in other areas if they were to agree to repeal or fundamentally reform the WTD.

Defenders of the WTD also say that it is rooted in article 31 of the Charter of Fundamental Rights (''every worker has a right to limitation of maximum working hours, to daily and weekly rest periods and to an annual period of paid leave"). They argue that it cannot be abolished or hollowed out without changing the underlying EU treaty, although some diplomats take a different view.

★ Exempt

The WTD, or more precisely the SiMAP/Jaeger rulings, have had the biggest impact not on business but on hospitals, firemen, prison wardens and other 24-hour public services. Some countries have also found it troublesome to apply the directive to soldiers and police forces.

Although it is widely agreed that public sector employers should work decent hours, the sceptics insist that this is not an EU issue since public services are not traded across borders. Allegations of 'social dumping' do not apply here. So one idea would be to exclude the entire public sector from the directive.

"A repeal would show the eurosceptics that the flow of competences in Europe is not always one way."

Public sector trade unions – usually the strongest in the land – might even go along with such a move if more powers to set working time, rest and holiday were handed over to the social partners instead. However, it would be almost impossible to define what falls under a public sector exemption across 27 countries. In some countries, for example, boarding school teachers are civil servants, in others they are not. Negotiations on a public sector exemption would quickly get bogged down over such underlying differences while the gains in flexibility could more easily be had through rolling back SiMAP/Jaeger.

★ Opt out

Given the difficulties involved in repealing or radically reforming the WTD, should Britain even bother? Would it not be much easier to ask the other Europeans for a country-specific opt-out?

Although several EU leaders have already told David Cameron that there would be no more special deals for the UK, it is not inconceivable that they would grant him this one concession. Angela Merkel and most other European leaders want Britain to stay in the EU. They would probably oblige Cameron if they thought that an opt-out from the WTD would allow him to argue that a 'new deal' with Europe had been struck and helped him to win a referendum on continued membership.

However, Conservative eurosceptics would not be content with such a small gain. Knowing this, some European leaders already suspect that Britain would not stop at the WTD but demand an opt-out from all EU social legislation and a veto on future rules in this area. The other Europeans could not grant Cameron such wide-ranging concessions because other EU countries would then ask for exemptions from, say, EU environmental standards or limits on industrial subsidies.

What is more, Cameron must be careful not to appear to be blackmailing his European colleagues, by linking reform demands directly to the referendum question. According to some media reports, Cameron persuaded Merkel to let Britain opt out of some bits of the WTD in November 2011. Cameron would in turn have allowed Merkel to enshrine tougher fiscal rules in the EU treaty.[35] However, at the EU summit a month later, Cameron was left empty-handed and isolated. EU leaders sidestepped his demands for concessions, linked to a veto threat, by signing the fiscal compact outside of the EU framework.

★ Ignore

Most British companies do not seem to mind the WTD much. Some complain about the bureaucracy involved in monitoring their employees' working hours and listing those who have signed an opt-out. But many, especially smaller ones, seem barely aware of these requirements.

Some people suggest that Britain should be less assiduous in its application of EU law. For example, the Fresh Start group advises Cameron to "look at how other countries implement EU laws (indeed, if they implement them at all) and consider the best ways to do so in the UK".[36] In other words, if Britain became as relaxed about applying the WTD as some other EU countries, the alleged burden of the directive would be lightened. However, such a relaxation would come at a time when the European Commission intends to get tougher on countries that infringe the WTD. Some might well find themselves in front of the European Court of Justice.

In the health sector, Britain could alleviate the restrictions imposed by SiMAP/Jaeger by encouraging doctors to make wider use of the individual opt-out. This would not be in the spirit of the WTD but it would presumably be legal. However, the British Medical Association advises that doctors, especially junior ones, should only use the opt-out in exceptional circumstances. So any strategy that relies on a wider use of the opt-out in hospitals would pit the government against parts of the health service – not a position that British governments usually find comfortable.

★ Amend

Cameron's best bet would be to restart EU efforts to roll back the SiMAP/Jaeger rulings on on-call time and rest periods (see box page 7 for possible reforms). Exactly where the different EU countries stand on these issues is impossible to say since the Council of Ministers has not had a formal debate on the WTD since 2008. The other 15 countries that use the opt-out would presumably go along with a reform. Unlike a full repeal, an amendment only needs a qualified majority in the Council.

"The other 15 countries that use the opt-out would presumably go along with a reform."

Headwinds may once again come from the European Parliament, which still insists that the individual opt-out must go before it compromises on SiMAP/Jaeger. After the 2014 European Parliament election, there might well be more eurosceptic MEPs who would support changing the WTD. But there might also be more MEPs willing to grasp any opportunity to show to European voters that the European Parliaments stands up for their rights and interests. In many ways the smartest move Cameron could make to reform the WTD would be to restore British influence in the European Parliament by returning Conservative MEPs to the powerful EPP faction. That, of course, would not please his eurosceptic backbenchers at home.

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35: Nicholas Watt, 'Eurozone crisis: Cameron and Merkel agree framework for EU negotiations', The Guardian, November 20th 2011.

36: The Fresh Start Project, 'Manifesto for change', January 2013.