



TIME'S UP!

The case against the EU's 48 hour working week

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Open Europe

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1. INTRODUCTION

There are currently over 3 million people in the UK working more than 48 hours a week. The right to choose flexible working hours is seen as fundamental part of the British economy, and now paramount to help businesses, the public sector and individuals to cope with the recession.

However, on Tuesday 17 March, formal talks began in Brussels between the European Parliament and EU ministers which could threaten this right. On the agenda was the future of the UK's opt-out from the EU's maximum 48 hour working week – which the European Parliament voted to abolish back in December 2008. If the UK Government loses, working more than 48 hours a week will become illegal in the UK.

The outcome is unpredictable. The European Parliament is resisting a proposal from the Council to retain the opt-out and has vowed not to give in. The UK Government has said it will fight to retain the opt-out, but crucially, it does not have a veto in the negotiations, and could be outvoted – as has happened before, and with disastrous consequences.

In 2000, the UK Government gave way in a similar stage of the negotiations, that time on a proposal which limited working hours for junior doctors – the effect of which was tantamount to losing between 4,300 and 9,900 junior doctors, according to the British Medical Association.

On the eve of the negotiations, Open Europe published new anecdotal and quantitative evidence showing why ending the right to flexible working hours would be devastating for the UK.

In the middle of a full-blown recession, we estimate that the Working Time Directive as it currently applies in the UK is already costing the economy between £3.5 billion and £3.9 billion every year. Through a series of unfortunate amendments and court cases, the cost of this Directive has risen steadily year-on-year since its introduction in 1998.

Should the UK Government lose in the negotiations in Brussels, we estimate this cost could rise to between £9.2 billion and £11.9 billion by 2011.

These are astronomical figures for one single EU Directive.

In January, the Government admitted that losing the opt-out would “cost the UK billions both in costs to industry and lost earnings. As a result, it could also only have a negative impact on overall employment levels.”¹ However, despite these costs and the fact that the opt-out is in a late stage in the EU's negotiation process, the UK Government has still not produced an Impact Assessment for the potential impact of what losing the right to flexible work might mean for the British economy.

¹ The Parliamentary Under-Secretary of State, Department for Business, Enterprise and Regulatory Reform & Cabinet Office (Baroness Vadera) quoted in Hansard 12 Jan 2009 : Column WA130, <http://www.parliament.the-stationery-office.com/pa/ld200809/ldhansrd/text/90112w0008.htm>

In fact, extraordinarily, a BERR official told Open Europe that an IA had never been produced because “no one expected the opt-out to come up for negotiation.”² An answer to a Freedom of Information request also revealed that the Government plans to produce such an assessment only after the negotiations are finished and the proposal is passed.³

However, to illustrate what this cost will mean in practice, we have asked ten people from across different sectors of industry – from the health services to the construction sector to the legal professions – to explain the consequences of ending the opt-out for their industry as well as for them personally.

These accounts tell a very clear story. Taking away the right to flexible work would land a heavy blow to real people in the real economy – at a time when we can least afford it.

The arguments summarised:

- **Mary Piper, an NHS Nurse in London**, says the important practice of ensuring patients see the same nurse could be threatened by a maximum 48 hour week. “It is common sense”, she says “that there will be nurse shortages once all the nurses have worked their maximum permitted number of hours.”
- **Allan Gallagher, a Hotel Supervisor and Night Porter in Fort William**, says he is “shocked that any government body thinks this is a feasible option”. He says: “Working in the hospitality industry means that I am required to be as flexible as possible in my work, often working long hours in the height of the season, and less through quiet times.”
- **James Sloane, a Foreman and Steel Erector in Dorset**, explains why the flexible working hours are crucial for the specific nature of his industry. He argues, “All sorts of things affect our working week, sometimes we get delays that we have to overcome by working longer, sometimes we can sit in our van or a cabin for days due to inclement weather waiting for it to improve and of course we have to work longer to be able to try and recover some of the lost time.”

He says, “If we were to have restrictions on our working hours it would significantly reduce our earning potential and also probably damage our company which could mean some of us losing our jobs. As you can imagine this would be disastrous for our families.”

- **David Dalziel, Secretary of the Chief Fire Officers Association in Scotland**, looks at the potential impact on the fire services, warning that “The potential loss of the individual opt-out in the UK would have catastrophic effects. 91% of the UK landmass is protected by firefighters on the retained duty system (RDS). These men and women provide the national resilience and emergency response to natural and man made disaster, major incidents and other emergencies crewing 2 out of every 3 fire stations in the country.”

He continues, “They hold other jobs in their local communities and also provide around 120 hours availability every week of the year to deliver a local fire and

² Telephone conversation with a BERR representative on 15 December 2008.

³ FOI request 08/0899

rescue service. Any adverse impact on that would expose this country to an unacceptable level of risk.”

- **Barry Trevers, a Senior Rigger at Cable & Wireless in Suffolk**, says: “With a rigidly enforced maximum 48 hour week ruling, we could not continue to operate a business model anywhere close to its current level of efficiency.”
- **Steven Duncan, a Human Resources Consultant in Gosforth** warns that the loss of flexibility could do substantial damage to businesses across the UK: “Many companies take the view that it is more cost effective to employ a core number of staff and to balance out the working week’s peaks and troughs by asking people to be flexible when it comes overtime or reducing their hours.”
- **Karl Watson, a Nursing Assistant in Wolverhampton**, explains that losing the right to work flexible hours would make it hard for him to cope financially. “I take home after tax etc around £850 per month. I top this up with working extra shifts when available. ...The country is in deep trouble as it is, people are struggling to make ends meet; please do not take away our other income.”
- **Ruth Pott, Director of Employment Affairs at the Road Haulage Association** looks at the inconclusive evidence with regard to the impact of long hours on safety and accidents. She notes, “Research actually finds that individual motivation and attitude play a significant role in well being, and equally importantly, there is no evidence that work itself is bad for individuals. For most, it is acknowledged to be a positive contributor to health and well being.” She concludes that “there is no evidence to suggest there is a problem that needs addressing.”
- **Steve Cooper, a Forklift Truck Driver from Cumbria**, says that “Being restricted to 48 hours would cost me roughly £3,000 a year, leaving me on £15,000 a year, which I could not pay my mortgage and bills with.”
- **Peter Shutt, a Lawyer in London**, explains that “The increasingly globalised nature of high finance requires UK-based legal firms to provide their services around the clock.” Ending the opt-out, he argues, “would only lead to a further deterioration in confidence in the UK financial services industry.”

The Working Time Directive in brief

The Working Time Directive (WTD) came into force in the UK in 1998, after the UK Government failed to block the proposal in the EU's Council of Ministers. Through subsequent amendments, the Directive now applies to almost all workers in the UK.

The basic provisions in the WTD are:

- A limit of an average of 48 hours a week which a worker can be required to work. At present, workers can choose to work more if they want to – a right which more than 3 million people in the UK currently take advantage of. Should the UK Government lose in the negotiations which began on March 17, this right would be scrapped and working more than 48 hours would be illegal in the UK.
- A limit of an average of 8 hours work in 24 which nightworkers can be required to work.
- Requirement for night workers to receive free health assessments.
- Requirement for 11 hours rest a day.
- Requirement for a day off each week.
- Requirement for an in-work rest break if the working day is longer than 6 hours.
- 4 weeks paid leave per year.⁴

⁴ BERR's website, see <http://www.berr.gov.uk/whatwedo/employment/employment-legislation/working-time-regs/index.html>

2. THE EVIDENCE: 10 VOICES ON WHY A 48-HOUR WEEK IS UNWORKABLE



Mary Piper, NHS Nurse, London

“It is common sense that there will be nurse shortages once all the nurses have worked their maximum permitted number of hours”

“Very often clients need or want a nurse to live in, to be on-call. It would not be practical to chop and change nurses after 48 hours. Not only is this not practical, but it’s also upsetting for the client to have to have four nurses a week.

As for looking after clients in their own home, this is presently done on a 12-hour shift with the same day-nurse and the same night-nurse. This could be for any reason but my experience with Alzheimer's sufferers and those with terminal illness is that they and their families want the continuity of the same nurse. Also, the nurse can see changes or deteriorations in the client having been away only 12 hours between shifts. Many patients/clients who are confused or frightened want the reassurance of a friendly regular nurse, instead of having to explain how to work equipment, or explain problems or particular family relationships to a new nurse.

If hours are restricted, who will look after these people and, indeed, how will the hospices/hospitals/nursing homes cope if nurses are forbidden from working so many hours? It is common sense that there will be nurse shortages once all the nurses have worked their maximum permitted number of hours.

Whether it’s for agency/bank/regular nurses, the opt-out of the Working Time Directive is voluntary. No-one forces nurses to work more than contracted hours.”



Alan Gallagher, Hotel Supervisor/Night Porter, Fort William

“I believe that the lack of flexibility created by a ban on working more than 48 hours in a week will reduce my ability to be an effective member of the team at my hotel”

“I am shocked that any government body thinks reducing UK working times to 48 hours or less is a feasible option. Legislation in place not only protects me from this already, but allows me the choice to opt out of this so that, if I wish, I am able to work longer hours.

My personal circumstances are a prime example of how this legislation could potentially ruin not only the business I work for, but the career path I have chosen to follow.

Working in the hospitality industry means I am required to be as flexible as possible in my work, often working long hours in the height of the season, and less through quiet times. At the moment I am perfectly aware of legislation, as are all of my colleagues, which allows us to opt in and out of the 48 hour week, in effect protecting our rights if we choose to use this.

The lack of flexibility created by a ban on working more than 48 hours a week will reduce my ability to be an effective member of the team at my hotel. It will prevent me from completing general tasks as required, which will lead to rising staff costs. There will be additional paperwork to police this legislation – in effect creating more of a workload and reducing the capacity of the business to provide an effective service as we currently do.

My personal circumstances at the moment would change dramatically if I was not allowed to work more than 48 hours a week. An example is reduction in the annual wage I am able to earn, meaning that I would have to seek employment elsewhere to survive. Also, my ability to be flexible for my employer, and work as and when required would be severely limited – creating logistical issues within the business which would mean that not only my job, but the business I work for could potentially be severely damaged. We wouldn't necessarily be able to remain open for extended periods, there could be a fall in productivity during peak seasons, recruitment and training costs would rise, and of course it would be difficult to retain staff who are used to being able to increase their monthly wage if they so choose.

Personally, I work two separate jobs within my employment which would be severely affected by the new legislation. I would have to quit one of my jobs which would affect me financially.

My concern is that employees in the UK are having their right to work in a fashion they choose taken away from them. At the moment the system we are using is clear and simple, allowing each individual choose to work either more or less hours around their standard contract. Many people use the right to not work over 48 hours, whilst others like myself work longer without issue. Other health and safety legislation in place ensures that the working population is protected by applying adequate breaks when they choose to do this.

I feel that in losing my right as someone of working age to be able to choose a job or even two jobs, where I can work as much or as little as I need, I would be penalised by this new directive. My ability to work means that I do not have to rely on government benefits such as tax credits to survive. I am also able to better my circumstances by increasing my income as I wish.

As a member of the management team at my hotel I also feel that the issues created by this directive would impede the business. It would be very difficult to police the hours a member of staff works and I feel that many businesses in similar circumstances would actually have to employ people on a 'black market' basis to survive, meaning in effect illegal working with less rights for the working population as a whole."



**James Sloane, Foreman/Steel Erector, John Reid & Sons,
Dorset**

“If we were to have restrictions on our working hours it could mean some of us losing our jobs”

“In December last year we learned that the European Union wanted to restrict the amount of hours we work, which I and my colleagues fear would be extremely damaging to us and our families.

My team is made up of 9 other erectors, all of whom have helped me compile this letter so that we may be given the opportunity to express our concerns as to what this would mean for us, our working life and our families.

I have two children and a wife, many of my work mates also have families and in order to provide for them we have chosen to become steel erectors and cladders. Our job is quite physical and we have to work at heights, so health and safety is always a number one priority. We have had to undergo lots of training and pass lots of exams in order to gain the appropriate qualifications in our trade. We are proud of what we do and we are proud of the buildings we erect.

Unlike some people, we have to be prepared to work anywhere in the country and in some cases overseas and it is this element of our type of work that enables us to earn extra money for our families.

If we were to have restrictions on our working hours it would significantly reduce our earning potential and also probably damage our company which could mean some of us losing our jobs. As you can imagine this would be disastrous for our families and especially our children who we are so proud of and for whom we want to provide the best education and start in life as possible.

Because of our type of work and our need to be away from home for long periods of time and because we have a family to raise we rely heavily upon our wives and partners to look after our children. This restricts their ability to work – so we are the major breadwinner and provider.

All sorts of things affect our working week – sometimes we get delays that we have to overcome by working longer, sometimes we can sit in our van or a cabin for days due to inclement weather waiting for it to improve and of course we have to work longer to be able to try and recover some of the lost time.

We are not overworked but well rested. Our normal working day will see us start at 7:30am and we will normally work until 10am then have a half hour break. We will then work again until about 1pm when we will break again for up to an hour. Then if daylight allows and the weather is good we will work straight through until 6:30pm, giving us an 11 hour day. When we have really good weather and are working away from home we

do not want to be sitting in our accommodation but to be taking advantage of the good weather, and may work as late as 7 or 7:30pm on occasions, but we will of course have another break for half an hour in the afternoon should we decide to do this. The choice is ours.

When we go away from home we tend to leave on Monday morning and may spend that day travelling depending how far away from our home the job is. We will stay away for the remainder of that week, the weekend, returning home on the Friday of the following week; in that two week period we can average 11 hours a day. To reduce this would have a significant impact on our earnings and would leave us sitting in rented accommodation or caravans twiddling our thumbs and wondering what to do; it would be soul-destroying for us.

The same could be said when we work reasonably locally, again we like to get the extra hours in when the work is available and we tend to go in on Saturday and rest ourselves on Sunday. We are all highly motivated and well paid for the work. Should the European Union decide to remove our choice to be able to decide what we ourselves want to do, it will add to the stresses of family life and inevitability result in us all becoming poorer and probably looking for another type of job.

We hope that our politicians understand our plight and that they ensure that our right to choose what we want to do remains.”

On behalf of Nicholas Bartlett, Kevin Martin, Tommy Keenan, Rory Keeping, Darel Faletto, Joseph Spearpoint, Gavin Foxwell and Rhys Swindell.



David Dalziel, Secretary, Chief Fire Officers Association Scotland

“The potential loss of the individual opt-out in the UK would have catastrophic effects”

“The decision in Europe in December 2008 to end the individual opt-out in Member states within 36 months has raised significant concerns around the UK’s ability to maintain a viable fire and rescue service.

The potential loss of the individual opt-out in the UK would have catastrophic effects. 91% of the UK landmass is protected by firefighters on the retained duty system (RDS). These men and women provide the national resilience and emergency response to natural and man made disaster, major incidents and other emergencies crewing 2 out of every 3 fire stations in the country.

They hold other jobs in their local communities and also provide around 120 hours availability every week of the year to deliver a local fire and rescue service. Any adverse impact on that would expose this country to an unacceptable level of risk, remove

effective emergency cover from remote, rural and island communities and cause an exponential rise in public expenditure to provide wholetime firefighter cover.

Figures from the Chartered Institute of Public Finance show that operating a fire crew with wholetime crews is 10 times more expensive than RDS staffing.

Removal of the opt-out will have an adverse impact on our ability to provide senior officer cover for the most serious of incidents and therefore potentially put firefighters' lives at risk due to reduction in operational command and control capability.

Judgments in the European Courts and guidance from the Health and Safety Executive indicate that fire and rescue services cannot depend on any derogation or exclusion under the current provisions for 'Civil Protection' other than in a very restricted way. Indeed some services have already started to look at the adverse impact of something that may confront us in a relatively short period of time.

I'm delighted at the support we've had from the Scottish Fire Conveners Forum, the Community Safety Minister and the Convention of Scottish Local Authorities as well as a significant number of Scottish MPs, MSPs and some MEPs. Both Aberdeen City and Aberdeenshire Councils supported emergency motions to lobby in defence of retention of the individual opt-out due to the impact on delivering local services.

As Secretary of the Chief Fire Officers Association Scotland and a Chief Fire Officer heavily dependant on RDS cover in the North East of Scotland I would urge the UK government to resist any change to the individual opt-out that would threaten public safety and the future of our RDS firefighters in the UK."

Barry Trevers, Senior Rigger, Cable & Wireless, Suffolk

"The impact of a 48 hour directive would be catastrophic in the way our work is implemented."

"The impact of a 48 hour directive would be catastrophic in the way our work is implemented. C&W operate an efficient yet small antennae systems department. It relies on absolute flexibility and completely voluntary out of normal working hours work patterns.

Our customers, the majority of which are incidentally major FTSE players, demand minimum down time for work on their communications systems, and usually out of 'normal business hours', i.e. weekends, evenings, etc.

With a rigidly enforced maximum 48 hour week ruling, we could not continue to operate a business model anywhere close to its current level of efficiency.

I also believe I have the right to choose to work as hard as I want to."



**Steven Duncan, Human Resources Consultant,
Macnaughton McGregor, Gosforth**

“For those on low wages working in unskilled or manual jobs the opportunity to boost their wage packets through overtime is paramount”

“Where business has to rely on staff working longer than 48 hours a week (for example, the construction industry, manned security guarding and the hospitality trades where putting in long hours is normal practice) changing the law will have a severe impact on the staff, wages and morale. Currently, if an employee earning a salary close to the minimum wage of £5.73 per hour chooses to work extra hours to boost his or her earnings then under existing legislation they can do so.

Many companies take the view that it is more cost effective to employ a core number of staff and to balance out the working week’s peaks and troughs by asking people to be flexible when it comes to overtime or reducing their hours. This ready supply of additional hours can be turned on and off like a tap and makes the company far more responsive to customer demands and short notice requirements, as well as avoiding costly training time for new employees.

Removing this ability to offer overtime to staff above a threshold – proposed to be 48 hours a week in the UK but which, in reality, is closer to 35 to 38 hours across the rest of Europe – will reduce or eliminate this as an effective strategy for competitive advantage and responsiveness for businesses.

It can only herald a reduction in customer service levels and stymieing a company’s ability to add much needed value in an increasingly tough and very competitive global market place.

The only way to respond to short notice increases in demand will be to bring in additional labour (or temporary staff), who will be unfamiliar with the company’s workings and will take days, if not weeks, to get up to speed and become productive. This is currently the method in European manufacturing where weekend overtime is a rare feature and peaks in demand take weeks to produce.

When prestigious national projects like the rebuilding of Wembley Stadium or the new London 2012 Olympic Stadium fall behind schedule they will likely drop further and further behind and could result in not only embarrassing delays but prohibitive penalties being invoked.

For those on low wages working in unskilled or manual jobs like agriculture, cleaning or labouring, the opportunity to boost their wage packets through overtime is paramount and, if this is denied, may cause many to look elsewhere for work at a higher rate of pay. This will leave behind a jobs’ vacuum that will be filled by migrant workers from overseas countries prepared to fulfill these roles.

If Britain is forced to adopt the full WTD, will the overnight removal of the ingrained long hours work culture act as a wake-up call that will encourage businesses to look at smarter ways of working? Or is it another nail in the coffin for British competitiveness and our position as a leading nation?

Surely, we don't need – or want – a return of the Luddites, where new working practices and thinking are scorned and business's ability to be flexible, responsive and efficient stymied?"

Karl Watson, Nursing Assistant, Wolverhampton

"The country is in deep trouble as it is, people are struggling to make ends meet; please do not take away our other income"

"My working week on full time hours is 37.5 hours. If I lost the right to work more than this I would lose everything I own: house and car being the big things.

My wages do not cover all of my outgoings. I take home after tax etc around £850 per month. I top this up with working extra shifts when available. Not only for the trust I work for but for another trust. I do try to keep 2 days off per week as I do need my rest, but work the long days on the others. I have 3 children under the age of 11 and yes it is hard, but to lose our home would be much more so.

The country is in deep trouble as it is, people are struggling to make ends meet; please do not take away our other income. The extra hours help lots of people. Not just myself, but hundreds if not thousands of people."



Ruth Pott, Director of Employment Affairs, Road Haulage Association,

"Against a background of long established health and safety law and employment protection in the UK, and indeed the rest of Europe, the RHA is not persuaded of the case in favour of revocation of the opt-out"

"While the negotiations continue in earnest at a European level about the future of the opt-out from the Working Time Directive, extensive research undertaken both in the US and the UK finds evidence is not conclusive with regard to the impact of long hours on safety and accidents or in respect of the performance effectiveness of working long hours. Research actually finds that individual motivation and attitude play a significant - role in well-being, and equally importantly, there is no evidence that work itself is bad for

individuals. For most, it is acknowledged to be a positive contributor to health and well-being.

In 2003, the CIPD (Chartered Institute for Personnel and Development) found that two out of four workers they interviewed in their research said that working long hours was a matter of choice. In 2004 the DTI found only 12% of workers indicated they would be happy to reduce their hours if this meant a loss in earnings, thus an overwhelming 88% would not want to have their hours curtailed if this meant a loss in earnings.

Removal of the opt-out takes away choice for individuals and flexibility for individuals and employers alike. If the opt-out is revoked, will individual workers be prosecuted if they take a second job to make up the shortfall in their earnings?

The recently published review of the Road Transport (Working Time) Regulations 2005, by the Department of Transport, found no evidence of any fundamental problems with the Regulations themselves or any major problems with the associated guidance, despite claims by the unions that there were widespread abuses of the regulations. Based on this, the regulations were not amended.

The RHA concludes from its now very extensive review of the significant research publications from across the world, that there is no evidence to suggest there is a problem that needs addressing. Against a background of long established health and safety law and employment protection in the UK, and indeed the rest of Europe, further supplemented by the provisions of the WTD with the individual opt-out, and the rigidly enforced transport laws for road, air and railway workers, the RHA is not persuaded of the case in favour of revocation of the opt-out.

The belief of the RHA that there is not a significant problem in the UK is borne out by the absence of working time prosecutions by HSE and local authorities, the lack of employment tribunal applications for dismissals or suffering detriment for asserting the safety rights of the WTD, the absence of such queries to ACAS enquiry points and the absence of any conclusive evidence to the contrary, including from the TUC. The RHA calls on the European Parliament and the Council of Ministers to retain the opt-out for European Workers.”

Steve Cooper, Forklift Truck Driver, Penrith, Cumbria

“I'm a forklift truck driver for a firm making animal feed. I average 57 hours per week. I'm contracted to do 47 hours per week but do 10 hours 5 days a week and 7 on the sixth day. Being restricted to 48 hours would cost me roughly £3,000 a year, leaving me on £15,000 a year, which I could not pay my mortgage and bills with.”

Peter Shutt, Lawyer, London

“The increasingly globalised nature of high finance requires UK-based legal firms to provide their services around the clock”

“Whilst it is true that many workers in the UK require a degree of government protection to prevent being forced to work long hours against their will, removing the UK derogation from the WTD would constitute a worrying new development in EU law for UK-based commercial lawyers, for a number of reasons.

The relatively high barriers-to-entry in the legal sector ensure that the average lawyer will be well educated, driven and highly motivated, having made an informed choice to enter their chosen career. These same barriers ensure that one cannot embark upon a legal career without going into it with eyes wide open, being acutely aware of the demands that an employer will place on one’s time and of the challenging nature of the work involved from the outset. Such employees do not require extra protection in the form of a cap on the hours they can work, having willingly entered the Faustian pact where long hours are rewarded with the carrot of above-average remuneration, and often with eventual partnership.

Even so, safeguards do exist, with many firms operating schemes that allow staff to buy extra days of holiday in return for appropriate salary reductions. Health and safety fears are further allayed by the fact that the majority of law firms provide additional staff benefits such as gym membership, on-site private healthcare, and a free taxi back home if working late is occasionally required.

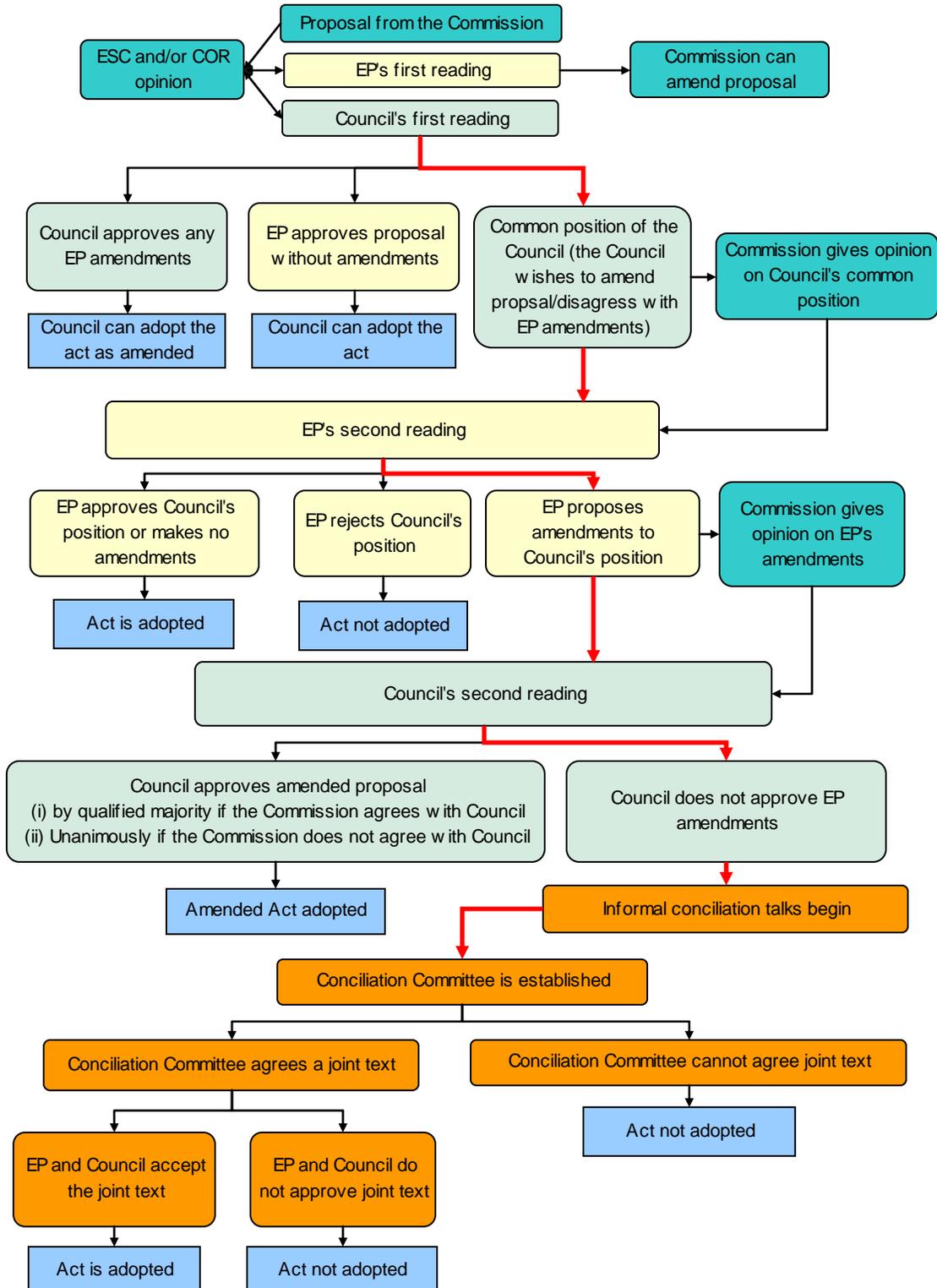
In addition to restricting the careers of individuals, the ramifications of the removal of a UK worker’s right to derogate will also be felt on a national level.

The increasingly globalised nature of high finance requires UK-based legal firms to provide their services around the clock, as deals become more time-sensitive and can span multiple continents. Fundamental to the success of a City law firm is the tenet that the client is king, and rightly so – the clients pay the bills, and a law firm needs to keep its clients happy for the sake of preserving its ongoing business relationships. Restricting UK lawyers’ working hours would not only erode the competitive edge of individual firms, but would erode the standing of London as the leading provider of global financial services as a whole. Firms finding themselves unable to respond to client needs would experience a rapid exodus of business to law firms in jurisdictions where employees are not time-restricted.

In the current business environment, such a move would only lead to a further deterioration in confidence in the UK financial services industry. In conclusion, the legitimate abrogation of the WTD must continue, at least as far as the lawyers are concerned – the opt-out should be made a permanent general rule.”

3. THE NEGOTIATIONS: WHAT HAPPENS NEXT?

In December 2008, the European Parliament voted to end the UK's opt-out from the EU's 48-hour week. However, because the Working Time Directive is subject to what is called 'co-decision', the European Parliament and the Council of Ministers have to agree on the proposal before it can become law.



The bold line in the chart indicates what has happened so far in the negotiations on the proposal that would end the UK's opt-out from the maximum 48 hour working week.

When the Council and the EP are unable to agree on each other's proposals after two readings, they move into what is called the 'conciliation' stage.

During the EP's second reading of the WTD, the EP tried to amend a Council proposal which dealt with the opt-out as well as the issues of on-call time and compensatory rest periods, which are also governed by the WTD. The Council refused to accept these amendments (see section 5).

The first official step in such cases is to establish a Conciliation Committee, comprised of representatives from the Commission, Council and Parliament, within six to eight weeks of the Council's final reading. The Conciliation Committee is set up with a view to reaching agreement on a text acceptable to both the EP and the Council.

However, in practice, informal negotiations, known as informal 'trialogues', often begin as soon as it is clear that the Council will not accept the EP's amendments.

In this case the Conciliation Committee met on 17 March, just eight days after the Council's official rejection of the EP's amendments. The reasons for such rapid progress are probably due to the fact that it has been clear for some time that both sides are at loggerheads, so informal talks will have started earlier than usual. In addition, MEPs are keen to pass as much legislation as possible before the EP elections in June.⁵

The informal 'trialogues'

Described by the Commission as "the true negotiating forum"⁶, informal dialogues between the EP and the Council, with the Commission acting as a go-between, are aimed at finding possible compromises ahead of the formal conciliation talks. In most cases these informal dialogues result in a compromise, or 'joint text', which is submitted to the Conciliation Committee for formal approval.

The talks are conducted behind closed doors and involve only a small number of participants. This makes it very hard for the media, national politicians and the public to get insight into what's actually happening.

The secrecy and the small number of representatives involved also increase the risk of a handful of MEPs 'hijacking' the negotiations. In the dialogue talks on the WTD, for instance, the European Parliament is represented by three Socialist MEPs who are all in favour of ending the opt-out. These are Mechtild Rothe, the Chairperson of the EP's delegation to the Conciliation Committee; Alejandro Cercas, the EP's Rapporteur and Jan Andersson, Chair of the Committee on Employment and Social Affairs.

In addition, it is common practice that when the delegation is made up of MEPs from the same political group in the EP, a fourth MEP from a different group is selected as well. In this case that MEP is José Silva Peneda, Shadow Rapporteur and member of the

⁵ *EUobserver*, "Race to get end-of-term legislation through EU parliament", 13 March 2009

⁶ See, http://ec.europa.eu/codecision/stepbystep/text/index5_en.htm

Conservative group in the EP. However, Peneda is also in favour of abolishing the individual opt-out.⁷

The Council is represented by the holder of the EU Presidency, in this case the Czech Republic, with the support of administrative and legal teams from the Council's Secretariat.

The Conciliation Committee

The formal Conciliation Committee is made up of delegations from the Council – a representative from each of the 27 member states. The EP is represented by an equal number of MEPs. The three Vice-Presidents of the EP are permanent members of the Committee, co-chairing it in turns, and the rest are MEPs appointed by the political groups, in proportion to the number of seats held in the EP.

The UK MEPs on the WTD Conciliation Committee are: Conservative MEP Philip Bushill-Matthews, Liberal Democrat MEP Liz Lynne, and Labour MEP Stephen Hughes.

The MEPs selected for the Conciliation Committee tend to sit on the relevant EP Committee, in this case the Employment and Social Affairs Committee.

The Conciliation Committee met to discuss the WTD for the first time on 17 March. Given the secrecy surrounding the informal talks that led up to this stage it was impossible to predict what would happen from this point.

The Committee has a time limit of six weeks, which can be extended to eight, in which to agree on a 'joint text'. In the scenario that the two sides are unable to agree on a joint text, the legislation will be dropped.

If a joint text is agreed, then the Council and the EP can either approve or reject it, the Council by qualified majority and the EP by simple majority. The approval of the joint text by the Council is effectively a formality, since all the member states are represented by the Council at conciliation. However, the EP has to put the text to a vote of all 785 MEPs, who may or may not accept it.

In some cases the Conciliation Committee has been able to approve a joint text at its first meeting. However, on other occasions several meetings of the Committee have been required, often preceded by more trilogue talks. Given the complexities of the issues surrounding the WTD, and the contrasting positions of both sides, the outcome of the negotiations are unpredictable. The two possible scenarios for the ongoing talks are:

- 1) The Council and the EP will be so far apart that they both accept that they are unable to agree a joint text and the proposals will fall.
- 2) A compromise could be reached that allows both sides to resolve the issue and the amended legislation will be passed.

⁷ See, <http://www.openeurope.org.uk/research/meps.doc>

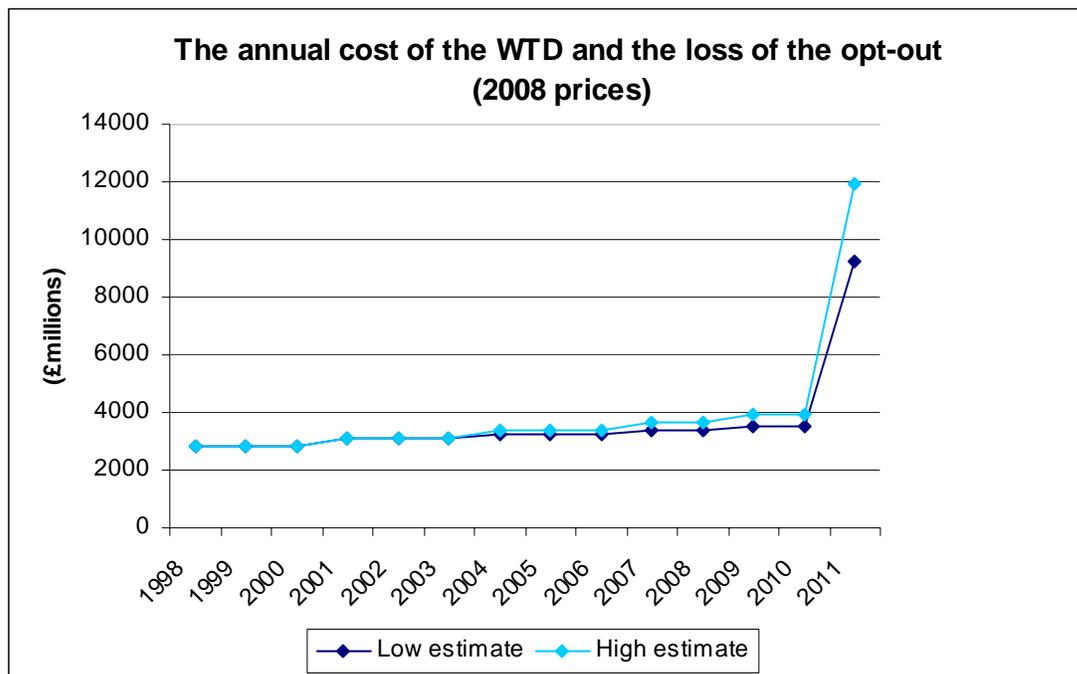
4. WHAT WILL LOSING THE OPT-OUT COST THE UK ECONOMY?

The WTD is a hugely costly law. Through a series of amendments and interpretations by the European Court of Justice, the cost of the Directive has risen steadily year on year since its introduction in 1998. (See section 5)

Based on the UK Government's own assessments we put the annual cost of the WTD between £3.5 billion and £3.9 billion by August 2009 – when the 48 hour working week limit for junior doctors will come into force.⁸

This is already a massive cost, given that it arises from one single Directive. However, should the UK also lose its opt-out from the 48-hour week, the annual cost of this Directive could rise to between £9.2 billion and £11.9 billion by 2011 – assuming that between 2.3 and 3.2 million people work more than 48 hour a week.⁹

As illustrated by our 10 case studies above, this cost will be spread right across the economy, and will be borne by businesses, taxpayers, consumers and the public sector – including hospitals, care homes and rescue services.



The table below compares the individual cost of various elements of the WTD – clearly showing the huge cost of losing the opt-out. (See section 5 for details of what the various elements are)

⁸ All estimates have been adjusted to 2008 price levels, using the Treasury's deflator series.

⁹ Our estimates of the cost of losing the opt-out are extrapolated from the 2005 Regulatory Impact Assessment for the Road Transport Directive. For details see Open Europe, "The Potential end of the UK's opt-out from the EU working time directive", December 2008, <http://www.openeurope.org.uk/research/wtdoptout.pdf>

These are not exhaustive and do not cover all the costs associated with the WTD. For example, the cost for care homes, rescue services and nurses, arising from the SiMAP and Jaeger rulings at the European Court of Justice are not included. Neither is the cost of the 2009 ruling against the UK Government on holiday pay for people on sick leave, nor the 2006 ruling against the UK Government on rest entitlements. In addition, the three separate working time directives regulating the transport, aviation and maritime sectors are not included.

The cost of the WTD¹⁰			
	Implementation year	Annual cost, £million (2008 prices)	
		Low estimate	High estimate
WTD	1998	2821	2821
HAD	2001	212	212
Bectu	2001	36	36
Junior Doctors, 58 hours	2004	140	287
Junior Doctors, 56 hours	2007	140	287
Junior Doctors, 48 hours	2009	140	287
Losing the opt-out	2011/2012	5740	7990

¹⁰ For the Government's latest cost estimate of the WTD, see <http://www.berr.gov.uk/files/file11496.pdf> ; for the cost of the HAD, see <http://www.berr.gov.uk/files/file16179.pdf> ; for the cost of the Bectu ruling, see <http://www.berr.gov.uk/files/file32480.pdf>. The cost of capping the working hours for junior doctors comes from the then Employment Minister John Hutton who in 2004 estimated the annual cost to be between £380 million and £780 million, see Hansard 24 March 2004: Column Number: 19, <http://www.publications.parliament.uk/pa/cm200304/cmstand/euroc/st040324/40324s05.htm>. We have divided that cost between 2004, 2007 and 2009, when the working week for junior doctors was capped at 58, 56 and 48 hours respectively.

5. BACKGROUND: THE HISTORY OF THE WTD

July 1990

The Commission tables the proposal for the Working Time Directive as a 'health and safety' measure, amid UK opposition¹¹

The proposal is introduced under the EU's social legislation, but is eventually tabled by the European Commission under the health and safety articles of the Treaty of Rome (then Article 118a).¹²

Making it a matter of health and safety means that the proposal is subject to majority voting, effectively meaning that the UK cannot block it. This is perceived as a way for the Commission and the other member states to circumvent British opposition. Any other description would have given Britain a veto, because a unanimous vote is then required. The UK had opted out of social legislation under the Maastricht Treaty.

The UK Government strongly opposes the proposal and continues to fight it at various Council meetings. In 1992, John Major says, "I want it to be understood throughout the Community that unnecessary interference with working practices is bad for business. These measures in the proposed working time directive would hurt British industry and destroy jobs. They are not for us."¹³

November 1993

Britain loses – the Working Time Directive is agreed

The UK is outvoted 11 to 1 in Council negotiations and the proposal is adopted.¹⁴ The Commission states that Directive was introduced as a "practical contribution towards creating the social dimension of the internal market".¹⁵

The Directive obliges each member state to give:

- A maximum working week of 48 hours
- A rest period of 11 consecutive hours a day
- A rest break when the day is longer than six hours
- A minimum of one rest day per week
- The statutory right to four weeks holiday
- Night working must not average out at more than eight hours at a stretch
- Workers will be entitled to a free health check-up before being employed on night work and at regular intervals thereafter
- By collective agreement the 48-hour a week limit may be calculated by reference to a period of up to 52 weeks.

¹¹ See COM/1990/317/FINAL

¹² Article 118A states: 'Member states shall pay particular attention to encouraging improvements, especially in the working environment, as regards the health and safety of workers and shall set as their objective the harmonisation of conditions in this area, while maintaining improvements made.'

¹³ *The Independent*, "Major to oppose EC over limit on working week", 29 April 1992

¹⁴ *Press Association*, "Government to challenge EC working hours limit", 23 November 1993.

¹⁵ See Directive 93/104/EC, http://eur-lex.europa.eu/smartapi/cgi/sga_doc?smartapi!celexapi!prod!CELEXnumdoc&lg=en&numdoc=31993L0104&model=guichett

The Directive does not apply to anyone who is self-employed or to persons with "autonomous decision-making powers", family workers or workers officiating at religious ceremonies in churches and religious communities.¹⁶

Following the vote, the UK Government threatens to challenge the Directive through the ECJ. Then Employment Secretary David Hunt says, "[this] is not something I am prepared to sign up to"¹⁷, adding:

"This working time directive is an abuse of the Treaty of Rome because to try to regulate the work time of people on phoney health and safety grounds is an abuse...we challenge its validity because we say the commission has no jurisdiction in this matter. It cannot be said by any stretch of the imagination that this is a matter of health and safety."¹⁸

March 1994

UK Government sues the Commission over the legal base of the WTD

Employment Secretary David Hunt announces that he will take the Commission to the European Court of Justice in an attempt to change to legal base of the WTD, from health and safety to the so-called Social Chapter. He says:

"It is a flagrant abuse of Community rules. It has been brought forward as such simply to allow majority voting - a ploy to smuggle through part of the Social Chapter by the back door. The UK strongly opposes any attempt to tell people that they can no longer work the hours they want."¹⁹

November 1996

European Court of Justice rules against the UK on the legal base of the WTD

The ECJ rules against the UK Government on all points, except for the provision which requires Sundays to be included in the weekly rest period. Following the ruling, Prime Minister John Major declares, "I will not accept what has been determined by the courts today. When we reach the end of the Inter-governmental Conference, I shall demand that change or there will be no end of the Inter-governmental Conference!"²⁰

Former Conservative Cabinet Minister John Redwood adds: "I don't think we can carry on like this, with the Government constantly losing cases in the European Court, seeing that they go against national interest, complaining about the judgment but not doing anything about the underlying problem which is the power of the Court."²¹

October 1998

The Working Time Directive is implemented in the UK

¹⁶ See <http://www.publications.parliament.uk/pa/ld200304/ldselect/ldcom/67/6704.htm#a1>

¹⁷ *Press Association*, "Government to challenge EC working hours limit", 23 November 1993.

¹⁸ *The Scotsman*, "Britain plans court challenge over limit on working week", 2 June 1993.

¹⁹ *Press Association*, "Britain to sue Commission over working hours", 7 March 1994.

²⁰ *Press Association*, "Battle royal – again – over euro ruling". 12 November 1996.

²¹ *Press Association*, "Battle royal – again – over euro ruling". 12 November 1996.

Tony Blair's Labour Government transposes the Directive into UK law via the Working Time Regulations 1998 – which include the right for individuals to voluntarily opt out from the 48-hour maximum working week.²²

In 1999 the Working Time Regulations are amended in order to bring them into line with the WTD which requires employers to keep records of all workers who have voluntarily opted out.²³

A few different Impact Assessments were produced for the WTD – the latest one put the estimated annual cost to the UK economy at £2.42 billion per annum based on 2001/02 data.²⁴

October 2000

The SiMAP ruling: Causes “particular difficulties” for the UK

The European Court of Justice rules that time spent resident on call in a hospital or other place of work should count as working time, even if the worker is asleep for some of that on-call time.²⁵ The SiMAP judgment comes about as a consequence of the unclear wording of the definition of on-call time in the original Directive.

The ruling is greeted with alarm in the UK and across Europe, and takes public services by surprise. In the UK it is seen as particularly problematic for junior doctors.

The then Health Minister John Hutton says “it was certainly not within the intentions of the United Kingdom Government when we signed up for the Directive that time spent asleep would somehow magically count as time spent at work”²⁶.

The House of Lords Scrutiny Committee concludes that the SiMAP ruling would cause “particular difficulties” for the United Kingdom because of:

- * the relative shortage of doctors in the United Kingdom in comparison with other Member States,
- * the striking difference in the ratio of junior to senior doctors in the United Kingdom of 1.4 to one, compared with the EU average of 4 seniors to each junior doctor;
- * the long-standing British practice of delivering at least 50 per cent of hospital service through doctors in training, and
- * the British tradition of dispersing doctors in training to virtually every hospital, rather than concentrating them in fewer centres as in most other Member States.²⁷

June 2001

The ECJ rules against the UK on annual leave provisions

In the Bectu case, the ECJ rules that the UK is in violation of the WTD's provision on annual leave.²⁸ The UK had interpreted the WTD to mean that a worker was entitled to

²² See <http://www.opsi.gov.uk/si/si1998/19981833.htm>

²³ See <http://www.publications.parliament.uk/pa/ld200304/ldselect/lddeucom/67/6704.htm#a1>

²⁴ The figure subtracts the cost of the HAD, see <http://www.berr.gov.uk/files/file11496.pdf>

²⁵ Case C-303/98 see, <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:61998J0303:EN:HTML>

²⁶ See <http://www.publications.parliament.uk/pa/ld200304/ldselect/lddeucom/67/6706.htm>

²⁷ See <http://www.publications.parliament.uk/pa/ld200304/ldselect/lddeucom/67/6706.htm#n50>

four weeks of paid leave, on the condition that he had been continuously employed for 13 weeks by the same employer.²⁹ The ECJ rules that such a criteria is illegal.

The ruling is seen as a heavy blow to businesses employing seasonal labour.³⁰ An Impact Assessment for the Government produced in 2001 puts the additional cost of this amendment at £29.9 million a year.³¹

August 2001

Horizontal Amendment Directive: The scope of the WTD extended further

The Horizontal Amendment Directive (HAD) extends the WTD further to sectors previously excluded – including road, rail, air, sea, and inland waterways transport, seafishing, offshore work and the activities of junior doctors.

Three additional sector-specific Directives regulating working time are subsequently adopted: the Road Transport Directive (RTD); the Aviation Directive and the Seafarers' Directive.

The Government's Impact Assessment estimates that extending the scope of the HAD alone will add another £182 million a year to the costs of complying with the WTD – 40 per cent of which would fall on small firms.³²

April 2003

The Jaeger ruling: "Tantamount to losing between 4,300 and 9,900 junior doctors"

The European Court of Justice makes an arguably even more disastrous ruling than SiMAP. In Jaeger, the ECJ rules that the mandatory compensatory rest entailed in the WTD has to be taken immediately rather than within a "reasonable time" if the minimum rest period has been interrupted by an emergency.³³ In addition, the ECJ rules that periods when the doctor is on-call but not working should not be treated as rest periods.

In effect, this means that in cases where a doctor is called in to hospital after only 8 hours of rest, he or she should cancel their morning clinic to take their outstanding three hours of rest. It causes huge problems for the rota system at British hospitals.³⁴ The NHS Confederation says: "Jaeger makes no sense at all in terms of how you run NHS organisations".³⁵

And John Hutton says:

²⁸ Case C-173/99, see <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:61999J0173:EN:HTML>

²⁹ *The Lawyer*, "Govt working time plans under fire", 9 July 2001

³⁰ *Farmers Guardian*, "Paid leave for seasonal workers", 19 October 2001.

³¹ BEERR, "2001 Compendium of Regulatory Impact Assessments", July 2006, see <http://www.berr.gov.uk/files/file32480.pdf>

³² The Impact Assessment for the Horizontal Amendment Directive, estimated that the HAD accounted for 7 percent of the total cost of the WTD. Taking the estimated cost of the WTD in the DTI's Employment Research series, 2.6 billion, gives an annual cost of the HAD of £182 million, see <http://www.berr.gov.uk/files/file16179.pdf>

³³ Case C-151/02, see <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:62002J0151:EN:HTML>

³⁴ See <http://www.publications.parliament.uk/pa/ld200304/ldselect/lddeucom/67/6704.htm#a1>

³⁵ See <http://www.publications.parliament.uk/pa/ld200304/ldselect/lddeucom/67/6706.htm>

"To require compensatory rest to be taken immediately would potentially have a massively destructive effect across the NHS and might mean that doctors could not work the following shift on rota that they were required to do. This would have knock-on consequences right across the hospital. At the end of the day, the only people who would be negatively affected would be the patients and that is a ridiculous result".³⁶

The British Medical Association estimates that the effect of the ruling would be tantamount to losing between 4,300 and 9,900 junior doctors by 2009 when the full 48 hour limit for junior doctors comes into effect (see below). A House of Lords Committee calls the ruling "perverse and wholly impractical to implement" and says that it would be "very difficult for some hospitals to provide patient care while respecting the Directive as the ECJ has interpreted it."³⁷

Both the Jaeger and SiMAP rulings also cause problems for the private and local authority care sectors – particularly smaller ones - as well as the emergency services and offshore workers.

January 2004

The Commission publishes proposed revision of the WTD

The Commission proposes an amended version of the WTD, as part of the review of the opt-out and in an effort to find a solution to the SiMAP and Jaeger rulings. The proposal states:

- Opt-outs from the 48 hour week can only be agreed to by individuals if unions allow it.
- An employer cannot ask for a new employee's consent to an opt-out from the 48-hour week at the same time as a contract is signed, in order to reduce the pressure on the employee to sign.
- Employees can withdraw their opt-out at any time.
- The opt-out will only be valid for a year and must then be renewed.
- If an opt-out is signed, employers have to keep records of the hours actually worked and be prepared to make them available to the authorities.³⁸

In addition, it is proposed that:

- The maximum working week will be 65 hours (as opposed to 78 in the UK).
- If unions agree, it will be possible for the average working week to be calculated on the basis of a year-long reference period, rather than four months. One of the main objectives behind this proposal was to accommodate for sectors with big seasonal variations in working hours.
- Time spent on-call but not actually worked will not be counted as working time, unless member states' laws or collective agreements state otherwise. This would

³⁶ See <http://www.publications.parliament.uk/pa/ld200304/ldselect/lducom/67/6706.htm>

³⁷ See <http://www.publications.parliament.uk/pa/ld200304/ldselect/lducom/67/6706.htm#n50>

³⁸ World Market Research Centre, "EU to Amend Working Time Directive", 23 September 2004

reverse the SiMAP ruling which stated that in the absence of a better definition all time on-call had to be counted as working time.

- Compensatory rest periods for extra hours worked will have to be provided within 72 hours. This would have reversed Jaeger, which ruled that on the basis of the vagueness of the existing directive, compensatory rest must be granted immediately following the extra hours worked.

August 2004

Junior doctors come within the scope of the WTD – limiting working hours to 58 hours

Under the deal, the UK agrees to reduce the maximum working week for junior doctors to 58 hours in 2004, to 56 hours in 2007 and finally 48 hours in 2009.

In combination with the SiMAP and Jaeger rulings, capping the working week at 58 hours for junior doctors causes massive problems for the NHS. Then Health Minister John Hutton tells a Lords Committee:

"we have been making very good progress in reducing the number of hours that junior doctors work every week in the NHS. Had it not been for the SiMAP and Jaeger rulings I do not think that we would have had a problem in the NHS in dealing with the Directive"³⁹

The Government claims in 2006 that the cost of extending the WTD to junior doctors "could not be separated from the overall cost of the national health service growth and modernisation".⁴⁰ However in 2004, John Hutton had admitted that the additional annual cost to the NHS "in relation to doctors would be between £380 million and £780 million."⁴¹

March 2006

The ECJ rules against the UK on "rolled up holiday pay"

The ECJ rules that British firms that pay workers in place of their holiday entitlements – so-called rolled up holiday pay – are violating the WTD, even when vacation days are carried over to the following year.⁴² The ECJ rules that, although the European Working Time Directive does not specify when holiday must be paid, rolled-up holiday pay could mean that workers are paid instead of taking their leave – which the Directive prohibits.

September 2006

The ECJ rules against the UK on rest entitlement

³⁹ See <http://www.publications.parliament.uk/pa/ld200304/ldselect/ldcom/67/6706.htm>

⁴⁰ Hansard 7 Feb 2006 : Column 1184W, see <http://www.parliament.the-stationery-office.co.uk/pa/cm200506/cmhansrd/vo060207/text/60207w38.htm>

⁴¹ Hansard 24 March 2004: Column Number: 19, see

<http://www.publications.parliament.uk/pa/cm200304/cmstand/euroc/st040324/40324s05.htm>

⁴² Joined Cases C-131/04 and C-257/04, see <http://www.emplaw.co.uk/researchfree-redirector.aspx?StartPage=data%2f0403271.htm>

The ECJ rules that DTI guidance on rest entitlement is incompatible with the WTD, since it does not oblige employers to ensure workers take daily and weekly rest breaks.⁴³ The Commission had claimed that the “guidelines endorse and encourage a practice of non-compliance.”

August 2007

Junior doctors’ working hours are capped at 56 hours

June 2008

**The Council reaches “common position” on the revision of the WTD;
The UK Government claims the opt-out is safe after accepting less flexible rules for temp workers**

The Council of Ministers agrees a compromise, spelling out ways to deal with the SiMAP and Jaeger rulings – which several member states were desperate to overturn – while also agreeing to retain the opt-out from the 48 hour working week.⁴⁴ By now, 15 member states are making use of the individual opt-out.

The Government had earlier accepted the Temporary Agency Workers Directive – which it had consistently blocked since 2002 amid fears of job losses and hampered growth – in return for a supposed guarantee that the opt-out would remain in place in future.

Then Business Secretary John Hutton insisted that:

"This is a very good deal for the UK... Flexibility has been critical to our ability to create an extra three million jobs over the past decade. That flexibility has been preserved by ensuring workers can continue to have choice over their working hours in future years. This agreement means that people remain free to earn overtime and businesses can cope during busy times."⁴⁵

However, Employment Minister Pat McFadden tells a Lords committee: “we never particularly wanted these two Directives to be taken as a package... but most Member States wanted it and decided that way.”⁴⁶

Following the June agreement, McFadden plays down fears that the British working time opt-out is under threat. "I don't think it will reappear," he tells journalists.⁴⁷

In summary, the Council agrees:

⁴³ Case C-484/04, see

<http://eurlex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:62004J0484:EN:HTML>

⁴⁴ See

[http://www.europarl.europa.eu/meetdocs/2004_2009/documents/com/com_com\(2008\)0568_/COM_COM\(2008\)0568_en.pdf](http://www.europarl.europa.eu/meetdocs/2004_2009/documents/com/com_com(2008)0568_/COM_COM(2008)0568_en.pdf)

⁴⁵ BERR, 10 June, 2008,

<http://nds.coi.gov.uk/environment/fullDetail.asp?ReleaseID=370054&NewsAreaID=2&NavigatedFromDepartment=True>

⁴⁶ House of Lords EU Committee, 21 October 2008,

<http://www.publications.parliament.uk/pa/ld200708/ldselect/ldecom/170/170.pdf>

⁴⁷ http://blogs.telegraph.co.uk/richard_tyler/blog/2008/06/11/britains_victory_in_48_hour_week_optout

- That the working week in the EU should continue to be limited to a maximum of 48 hours, except where an individual worker chooses to opt out. In other words, the UK's opt-out should remain.
- A new cap for workers who opt out. No more than 60 hours on average a week when calculated over a period of three months or 65 hours where there is no collective agreement and "when the inactive period of on-call time is considered as working time." This should be compared to the present limit of 78 hours in the UK.
- Tougher conditions for using the opt-out, including employers not being allowed to have an employee sign an opt-out for the first month of employment (workers on short-term contracts would be excluded from this). New requirement for employers for keeping records on working hours of opted-out workers.
- That member states would be given the possibility to extend the reference period for calculating the 48-hour maximum working week from 4 months to a year when a collective agreement is in place.
- That on-call time will be split into active and inactive on-call time. Active on-call time to be counted as working time. However, inactive on-call time can be counted as working time if national laws or social partners agree. Compensatory rest periods to take place within a "reasonable time period" following the end of the shift. These two provisions would have solved the most pressing problems thrown up by the SiMAP and Jaeger rulings.

December 2008

The European Parliament opposes the Council and votes to scrap the opt-out

The European Parliament takes a position that is "diametrically opposed" to that of the Council – in its own words.⁴⁸ The EP votes in favour of a proposal which would see:

- The end of the opt-out by 2011: the EP proposes an amendment stipulating that the "non-participation clause" (opt-out) should lapse three years after the reformed directive enters into force.⁴⁹
- On-call time considered working time: Amazingly, the EP votes against the proposed changes to the definition of on-call time – the very reason the Commission revised the proposal in the first place. The EP insists that the full period of on-call time, including the inactive period, should be counted as working time.
- Compensatory rest periods: The EP also resists the Council's common position that it is for the member states to determine what constitutes a "reasonable period" within which such compensatory rest should be granted. The EP decided that such compensatory rest periods should be granted at the end of the working period.⁵⁰

⁴⁸ *Agence Europe*, 7 November, 2008.

⁴⁹ Press release from the European Parliament, 17 December, 2008, http://www.europarl.europa.eu/news/expert/infopress_page/048-44550-350-12-51-908-20081215IPR44549-15-12-2008-2008-true/default_en.htm

⁵⁰ *Euractiv*, 6 November, 2008. <http://www.euractiv.com/en/socialeurope/business-furious-meps-scrap-working-time-optouts/article-176998?Ref=RSS>

January 2009

The ECJ rules against the UK on sick leave holiday pay

The ECJ rules that employees on long term sick leave must remain entitled to annual statutory holiday pay upon their return to work.⁵¹ This means that staff can take their annual holiday built up while at home as soon as they return to work. Meanwhile, workers who are sacked or leave their job while off ill must be compensated for holidays not taken.

Crucially, the ECJ's decision indicates that this will apply to holiday entitlements from previous years. The verdict only applies to the 20 days statutory annual leave required by EU law but someone off sick for two years becomes automatically entitled to 40 days holiday, plus public holidays.

Fraser Younson, head of the employment group at the law firm Berwin Leighton Paisner warns: "This is a cost which many employers, especially smaller firms, can't afford, particularly in the economic climate."⁵²

March 2009

Formal "conciliation" talks begin between the EP and the Council

August 2009

Junior doctors working hours capped at 48 hours

In January 2009, the NHS admits that it will not be able to comply with the 48 hour limit by August 2009, and the UK Government asks the Commission for a derogation of up to 52 hours work per week for a limited time.⁵³

John Black, President of the Royal College of Surgeons warns:

"On the one hand, the immediate effects on patient care in the NHS are potentially disastrous. There are simply not the surgeons in the UK to fill the gaps when every doctor's hours are cut to a 48 hour per week maximum. On the other, trainees are telling the college they cannot gain enough experience to progress on the shortened hours.

The choice for the nation is clear – do we want patients of the future to be treated by a group of highly skilled and experienced surgeons; or be passed around a wider group of lower skilled surgeons with less experience?"⁵⁴

⁵¹ Joined Cases C-350/06 and C-520/06, see <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:62006J0350:EN:HTML>

⁵² BBC, "Sick leave staff win holiday case", 20 January 2009

⁵³ *Telegraph*, "Cuts to trainee surgeons' hours threaten patient safety: Royal College of Surgeons", 23 January 2009

⁵⁴ *Telegraph*, "Cuts to trainee surgeons' hours threaten patient safety: Royal College of Surgeons", 23 January 2009