The Autocratically Flexible Workplace

A History of Overtime Regulation in the United States

Marc Linder

Fǎnpìhuà Press
Iowa City
2002

Digitized by Google
Original from UNIVERSITY OF MICHIGAN
Generated for guest (University of Iowa) on 2012-04-18 14:19 GMT / http://hdl.handle.net/2027/mdp.39015066123715
Creative Commons Attribution-NonCommercial-NoDerivatives / http://www.hathitrust.org/access_use#cc-by-nc-nd

HD
5111
.U5
L56
2002

Copyright © 2002 by Marc Linder
All rights reserved
Printed in the United States of America

Cover illustration: Ralph Reichhold, "The Great Puzzle!" *The Pittsburgh Press*, Dec. 16, 1937, at 16, cols. 4-7, with permission of the *Pittsburgh Press-Gazette*. The cartoons by Ralph Reichhold, "Out of Order!" and "Just About Washed Up!" appeared in *The Pittsburgh Press* on Dec. 1, 1937, at 14, col. 4-7 and Dec. 6, 1937, at 14, col. 4-7, and are reprinted between pages 150 and 151 with permission of the *Pittsburgh Post-Gazette*.

Suggested Library of Congress Cataloging
Linder, Marc, 1946—
The Autocratically flexible workplace:
A History of overtime regulation in the
United States/by Marc Linder.
viii, 532; 23 cm.
Includes bibliographical references and index
ISBN 0-9673899-9-2
1. Overtime--United States. 2. Hours of labor--laws and legislation--United States--history. 3. United States. Fair Labor Standards Act of 1938.
HD5111.U5 L56 2002
331.2572—dc21 Library of Congress Preassigned Control Number: 2002105994

Generated for guest (University of Iowa) on 2012-04-18 14:19 GMT / http://hdl.handle.net/2027/mdp.39015066123715
Creative Commons Attribution-NonCommercial-NoDerivatives / http://www.hathitrust.org/access_use#cc-by-nc-nd

Digitized by Google
Original from
UNIVERSITY OF MICHIGAN

Part VI

Foreign Exemplars of "Flexibility"

We haven't seen labour legislation in the province of Ontario talk about 60 hours since the master and servant legislation of 1884 to 1944.... I've got to tell you, I'm surprised you didn't name Bill 147 the Master and Servant Act, because that's the kind of world it creates.[1]

[1]Ontario Legislative Assembly, *Debates*, 37th Parl., Sess. 1 (Dec. 19, 2000), on http://www.ontla.on.ca/hansard/house_debates/37_parl/session1/1121b.htm (no pagination) (David Christopherson, Member of Provincial Parliament and labor spokesperson, New Democratic Party).

Digitized by Google
Original from UNIVERSITY OF MICHIGAN
Generated for guest (University of Iowa) on 2012-04-18 14:21 GMT / http://hdl.handle.net/2027/mdp.39015066123715
Creative Commons Attribution-NonCommercial-NoDerivatives / http://www.hathitrust.org/access_use#cc-by-nc-nd

Generated for guest (University of Iowa) on 2012-04-18 14:21 GMT / http://hdl.handle.net/2027/mdp.39015066123715
Creative Commons Attribution-NonCommercial-NoDerivatives / http://www.hathitrust.org/access_use#cc-by-nc-nd

Digitized by Google

Original from
UNIVERSITY OF MICHIGAN

16

The European Union: Unemployment, Shorter Hours, and More Overtime Work

Given the varied demands to schedule production efficiently in an uncertain world, there is now a growing recognition among Europeans that legal statutes may provide very blunt and inflexible measures....[1]

There is no common concept of the notion of overtime. In recent years, particularly with the increased use of flexible working time arrangements, the notion of overtime has become blurred.[2]

Because weekly working hours have been reduced in many European countries in the wake of the huge rise in unemployment since the 1970s,[3] European workers are entitled to much longer annual paid vacations,[4] and the United States is the only country in which the downward trend in average annual hours worked was reversed in the early1980s, U.S. workers at the turn of the millennium were working the greatest number of hours annually in the advanced industrial world—some 200 to 600 hours more than their counterparts in Western Europe and even 130 more than Japanese workers, whose annual hours fell by almost 200 during the 1990s. Thus while workers in the United States worked on average 1,979 hours in 2000, Norwegians worked only 1,376 hours.[5] Although a real gap remains even if the focus is limited to full-time workers, a significant portion of the difference is a statistical result of the large increase in the part-time em-

---

[1]Klaus Weiermair, *Hours of Work and Overtime: The European Experience (A Report Prepared for the Ontario Task Force on Hours of Work and Overtime)* 42 (Sept. 1987).

[2]H. Zeijen, "The Regulation of Individual Employment Relationships," in 1 *The Regulation of Working Conditions in the Member States of the European Community: Comparative Labour Law of the Member States*, in *Social Europe*, Supplement 4/92, at 4-67 at 43 (1992).

[3]Gerhard Bosch, "Working Time Reductions, Employment Consequences and Lessons from Europe: Defusing a Quasi-Religious Controversy," in *Working Time: International Trends, Theory and Policy Perspectives* 177-95 at 179 (Lonnie Golden and Deborah Figart eds. 2000).

[4]Zeijen, "The Regulation of Individual Employment Relationships" tab. 6 at 50.

[5]International Labour Office, *Key Indicators of the Labour Market 2001-2002*, tab. 6b (2002), on http.://www.ilo.org/public/english/employment/strat.kilm/table/htm; International Labour Office, *Key Indicators of the Labour Market 1999*, tab. 6b at 164-67 (1999); *Employment Outlook*, July 1998, chart 5.1 at 155, tab. 5.1 at 156.

Digitized by Google
Original from UNIVERSITY OF MICHIGAN
Generated for guest (University of Iowa) on 2012-04-18 14:21 GMT / http://hdl.handle.net/2027/mdp.39015066123715
Creative Commons Attribution-NonCommercial-NoDerivatives / http://www.hathitrust.org/access_use#cc-by-nc-nd

ployment of women in Europe.[6] Similarly, the trajectories of the regulation of overtime work in the United States and Europe, have not in recent years diverged quite so sharply as working-time curves.

Employers everywhere prize the multidimensional flexibility that overtime work permits, but workers in Europe have been somewhat more successful than their counterparts in the United States—which is "unusual" for its "willingness...to allow employers complete latitude in lengthening the workweek"[7]—in preventing employers from imposing it. For most of the twentieth century, legislation and collective bargaining agreements in many European countries capped the number of hours and/or overtime hours that an individual employee was permitted to work during a given period (day, week, month, or year). By the end of World War I, Czechoslovakia, Finland, Greece, Great Britain, Norway, and Switzerland had instituted such statutory overtime caps, while Czechoslovakia, Finland, the Netherlands, Poland, and Switzerland required employers to secure permits from state authorities.[8] The Netherlands, for example, began requiring employers in 1919 to obtain the labor inspectorate's permission to work overtime.[9] This policy was strengthened after World War II when rigid controls became part of a centralized wage policy; the labor inspectorate issued permits only for short periods and "only if there is a convincing reason why overtime cannot be avoided."[10]

Nevertheless, although an International Labour Office (ILO) report in the 1970s asserted that annual statutory limits on overtime work in Finland, Norway, Spain, and Switzerland ranging from 60 to 220 hours made "extensive and continuous recourse to [overtime] impossible,"[11] the upper range corresponded

---

[6]Steffen Lehndorff, "Working Time Reduction in the European Union: A Diversity of Trends and Approaches," in *Working Time: International Trends, Theory and Policy Perspectives* 38-56.

[7]Daniel Hammermesh, "Overtime Laws and the Margins of Work Timing" 20 (Nov. 2001), on http://www.eco.utexas.edu/faculty/Hammermesh/ listpapers/html.

[8]League of Nations, *Report on the Eight-Hours Day or the Forty-Eight Hours Week* 40-47 (1919). By referendum Switzerland eliminated the requirement of government authorization in 1999. "Flexible Working-Time Regulations," *European Industrial Relations Rev.*, No. 300:12 (Jan. 1999).

[9]Arbeidswet von den 1sten November 1919, §§ 29-30.

[10][U.K.] National Board for Prices and Incomes, *Hours of Work, Overtime and Shiftworking* 44 (Report No. 161, Cmnd. 4554, 1970).

[11]Archibald Evans, *Hours of Work in Industrialised Countries* 103-104 (ILO 1975). The annual ceiling in Finland is now 250 hours. Commission of the European Communities, *Report from the Commission: State of Implementation of Council Directive 93/104/EC of 23 November 1993 Concerning certain aspects of the organisation of working time ('Working Time Directive')* 17 (COM(2000) 787 final, Dec. 1, 2000). By referendum Switzerland reduced its annual overtime ceiling from 260 to 170 hours in 1999. "Flexible Working-Time Regulations."

Digitized by Google Original from UNIVERSITY OF MICHIGAN

Generated for guest (University of Iowa) on 2012-04-18 14:21 GMT / http://hdl.handle.net/2027/mdp.39015066123715
Creative Commons Attribution-NonCommercial-NoDerivatives / http://www.hathitrust.org/access_use#cc-by-nc-nd

to more than four hours of overtime per week all year round. And even these generous limits were and are often exceeded. In Finland, for example, it was reported in 2001 that 10 percent of employers, not satisfied with the annual ceiling of 250 hours (which local negotiations can raise to 330), unlawfully worked employees additional hours.[12]

Some European national laws fix both annual and daily, weekly, or monthly overtime limits: "In this way, individual workers are not able to work overtime on a regular basis." A few set only an annual limit, thus granting employers "maximum flexibility in the performance of overtime...."[13] One such country is Sweden, under whose 1982 Working Time Law firms are permitted to employ workers up to 50 hours of overtime per month with an annual ceiling of 200 hours. In addition to a separate provision for two days of emergency or disaster overtime, Swedish law permits labor unions to agree to extra overtime and, in the absence of such agreement, the state Labor Market Administration can authorize 150 hours annually of extra overtime.[14] In contrast, Austria's Working Time Law permits, in cases of "increased need for labor," five hours of overtime per week in addition to 60 overtime hours within a calendar year, resulting in an annual total of 320 hours.[15] In some countries, such as Portugal—where overtime work is limited to 200 hours per year—overtime is paid on a progressive scale with the penalty rate increasing with the number of daily overtime hours.[16] The former socialist countries, including the Soviet Union and the German Democratic Republic, created the strictest regimes, which prohibited economic overtime and permitted only emergency overtime.[17]

In contrast, in the United Kingdom, which, until recently, had been the only country in Western Europe (other than Denmark) with "no legislative hindrances

---

[12]"Overtime Limits Being Exceeded," *European Industrial Relations Rev.*, No. 333:4 (Oct. 2001).

[13]International Labour Office, *Conditions of Work Digest*, vol. 14: *Working Time Around the World* 291 (1995). Worldwide, of the 41 countries that set annual overtime limits, only four (Poland, Spain, Sweden, and Guinea) did not also set limits for shorter periods.

[14]Arbetstidslag, 1982, §§ 8-9; *EU & International Employment Law: Sweden* 26-27 (Vanessa Edmunds et al. eds. 2001).

[15]Bundesgesetz vom 11. Dezember 1969 über die Regelung der Arbeitszeit (Arbeitszeitgesetz) § 7(1).

[16]J. Rojot and R. Blanpain, "General Report" in *Legal and Contractual Limitations to Working Time in the European Union* 3-119, at 49 (2d ed. 1997); M. Pinto, P. Furtado Martins, and A. Boavida, "Portugal," in *id.* at 555-602, at 566-67, 592-96; *EU & International Employment Law: Portugal* 25. In Portugal the premium rises from 50 to 75 percent after the first hour. Other countries with similar regimes are Australia, Finland, and France. *Employment Outlook*, July 1998, tab. 5.10 at 168.

[17]Arbeitsgesetzbuch der Deutschen Demokratischen Republik vom 16. Juni 1977, §§ 172-79, Gesetzblatt der DDR, Teil 1, 185, 210-11.

Digitized by Google Original from UNIVERSITY OF MICHIGAN

Generated for guest (University of Iowa) on 2012-04-18 14:21 GMT / http://hdl.handle.net/2027/mdp.39015066123715
Creative Commons Attribution-NonCommercial-NoDerivatives / http://www.hathitrust.org/access_use#cc-by-nc-nd

to overtime for men," and has also witnessed a decline in the strength of its unions, overtime work had, according to an ILO publication, become so "popular with the workers" that employers feared that if they failed to offer enough, many of their workers would move to firms that did. Consequently, "many firms in their advertisements for workers, emphasise the weekly earnings secured with customary overtime...."[18] The founding conference of the Independent Labour Party in 1893 may have formulated the abolition of overtime as the very first element of its party program,[19] but at the end of the 1960s, the Royal Commission on Trade Unions and Employers' Associations, seeking an explanation as to why male workers were still working 46-47 hour weeks when the standard collectively-bargained workweek had fallen to 40, concluded that "overtime is widely used in Britain to give adult males levels of pay which they and those who arrange the overtime regard as acceptable."[20]

To be sure, the alleged popularity of overtime in Britain is largely a function of low wages—with the highest incidence of overtime found in the lowest-paid industries and occupation[21]—as overtime pay remains "a major factor in family budgets," just as real-wage losses in the United States since the 1970s have been found to explain the lack of pressure by workers to reduce the workweek.[22] These interrelationships replicate the causality that Marx, building on the factory inspectors' reports from the 1840s to the 1860s, uncovered: "the low price of labor during the so-called normal working time forces the better-paid overtime on the worker if he at all wants to wangle a sufficient wage." Britain's failure to

---

[18]Evans, *Hours of Work in Industrialised Countries* at 106, 100. For an ethnography of British industrial overtimers, see Ferdynand Zweig, *The Worker in an Affluent Society: Family Life and Industry* 70-76 (1961). See also "The Canker of Overtime," (London) *Times*, Oct. 26, 1954, at 9, col. 6-7; Alastair Evans and Stephen Palmer, *Negotiating Shorter Working Hours* 67-91 (1985). Rex Winsbury, "The Strange Scandal of Overtime," *Management Today*, Apr. 1966, at 99-103, 168, asserted that workers on the shop floor were largely responsible for setting off a uncontrollable process resulting in a great volume of overtime in Britain. By virtue of their control over the pace of their work they were able to slow down work during regular hours, thus necessitating overtime; because they were so unproductive, their low wages also required them to work overtime. He also claimed that workplace culture was more attractive to many workers than being at home.

[19]Independent Labour Party, *Report of the First General Conference* 10 (1893); David Howell, *British Workers and the Independent Labour Party, 1888-1906*, at 297-98 (1983).

[20]Royal Commission on Trade Unions and Employers' Associations, 1965-1968, *Report* ¶92 at 24 (Parliamentary Papers, vol. 17, 1967-8; Cmnd. 3623, 1968).

[21]E. G. Whybrew, *Overtime Working in Britain: A Study of Its Origins, Functions and Methods of Control* 60-63 (Royal Commission on Trade Unions and Employers' Associations, Research Papers 9, 1968); H. Clegg, *The System of Industrial Relations in Great Britain* 183-84 (1973 [1972]).

[22]Jill Rubery, Simon Deakin, and Sara Horrel, "United Kingdom," in *Times Are Changing: Working Time in 14 Industrialised Countries* 261-87 at 280 (Gerhard Bosch et al. eds., 1994) (quote); Gerhard Bosch, Peter Dawkins, and François Michon, "Working Time in 14 Industrialised Countries: An Overview," in *Times Are Changing* 1-45 at 38.

Digitized by Google Original from UNIVERSITY OF MICHIGAN

Generated for guest (University of Iowa) on 2012-04-18 14:21 GMT / http://hdl.handle.net/2027/mdp.39015066123715
Creative Commons Attribution-NonCommercial-NoDerivatives / http://www.hathitrust.org/access_use#cc-by-nc-nd

legislate on behalf of adult men (and enactment of the FLSA's free-market penalty/premium-overtime provision as opposed to a maximum-hours law) undermined the applicability to Britain and the United States of Marx's conclusion that state limitation of the working day "put an end to such fun."[23] Judge-made law provided British workers with very meager protection against overwork,[24] but one case in the early 1990s—which commentators view as creating "the new contractual approach"[25]—did find that a hospital was under a duty not to injure a resident physician's health by working him excessively long hours beyond his normal workweek.[26]

Because the Danish model of labor relations is centered on collective agreements between "the social partners" and not on legislation, Denmark, too, has lacked state regulation of overtime work.[27] Most collective agreements deal with the question and the vast majority of workers are union members and/or are covered by collective agreement (but a greater proportion of those who are not work overtime); unless a contract specifies otherwise, employees are obligated to work overtime if the employer requests it. If an agreement fails to specify limitations, employees are obligated to work according to the employer's directions, but case law holds employers in breach if they systematically use overtime; as a result, employers are not permitted to base their production plans on overtime. Provisions in many agreements entitling workers to 24 to 48 hours' notice merely entitle them to a bonus if employers fail to furnish proper notice. The overtime premium ranges from 50 to 100 percent, but many employers fail to pay anything

---

[23]Karl Marx, *Das Kapital: Kritik der politischen Ökonomie*, vol. 1, in Karl Marx [and] Friedrich Engels, *Werke,* 23:569-70 (1962 [1867]).

[24]Rojot and Blanpain "General Report" at 47.

[25]*Working Time: The Law and Practice* 51(John McMullen and Martin Brewer eds. 2001).

[26]Johnstone v. Bloomsbury Health Authority, [1991] ICR 269 (C.A.).

[27]Kåre Petersen, "Do Collective Agreements Ensure Full Coverage and Compliance with EU Directives?" on http://217.141.24.196/1997/10/feature/DK9710133F.html; Jørgen Steen Madsen, "Danish Model Maintained by Implementation of EU Directives Through Collective Agreements" on http://217.141.24.196/2001/01/feature/DK0001164F.html. An older temporary overtime law was generous to employers. Lov om Forbud mod Overarbejde, Act of May 7, 1937, in ILO, Legislative Series, 1937—Den. 3. Indirectly and marginally the Law on the Work Environment, first enacted in 1975, regulates working hours by virtue of its requirement of at least 11 (reducible on shift work to eight) consecutive hours of daily rest. Bekendtgørelse af lov om arbejdsmiljø LBK nr 784 af 11/10/1999, § 50. Because the Danish government, unions, and employers association took the position that collective agreements insured compliance with the EU's 1993 Working Time Directive, Denmark did not enact implementing legislation; only after the European Commission threatened to take Denmark to the European Court of Justice over the question did Denmark in December 2001 finally agree to enact such legislation. Carsten Jørgensen, "Social Partners Agree to Complete Implementation of EU Working Time Directive Through Subsidiary Legislation" on http://217.141.24.196/2001/12/Feature/DK0112158F.html.

Digitized by Google Original from UNIVERSITY OF MICHIGAN

Generated for guest (University of Iowa) on 2012-04-18 14:21 GMT / http://hdl.handle.net/2027/mdp.39015066123715
Creative Commons Attribution-NonCommercial-NoDerivatives / http://www.hathitrust.org/access_use#cc-by-nc-nd

at all for overtime work.[28] In April 1981 the Danish government introduced a bill in parliament to limit overtime to 100 annual hours per worker, but, despite a provision for modification by collective bargaining agreements, the employers association thwarted enactment.[29]

The adoption by the Council of the European Union of its Working Time Directive on November 23, 1993 (with which member states were given three years to comply, although the United Kingdom, which opposed and challenged the Directive, did not issue implementing regulations until 1998) modified the legal regulation of overtime throughout the EU,[30] but especially in Britain, where the average workweek was longest,[31] the incidence of overtime work highest, and the Conservative government's opposition to state intervention most intense. (Unlike a regulation, which is "binding in its entirety and directly applicable in all Member States," a directive, under the Treaty Establishing the European Economic Community, "shall be binding, as to the result to be achieved, upon each Member State to which it is addressed, but shall leave to the national authorities the choice of form and methods.")[32]

The timidity of the EU's initial foray into supra-national regulation of working time was visible from the outset. In the Council's Recommendation to the member states in 1975 that they attain the principle of the 40-hour week by the end of 1978 by legislation or labor-management collective agreements, the "normal working week" was defined as "the period to which provisions for overtime do not apply."[33] The EU's interest in the "Reduction and Reorganization of Working Time" was and remains in part a response to the massive and unprecedented increase in unemployment that has overwhelmed the individual national governments since the 1970s. As the Commission of the European Communities declared in a memorandum on working time at the end of 1982: "Unemployment is the most pervasive problem currently facing the economies of the Communi-

---

[28]P. Jacobsen, "Denmark," in *Legal and Contractual Limitation to Working Time in the European Union* 239-75 at 254; Steen Scheuer, "The Impact of Collective Agreements on Working Time in Denmark," *British Journal of Industrial Relations* 37(3):465-81 (Sept. 1999).

[29]*Betænkning om begrænsning af overarbejde og om afspadsering fra udvalget af 1977 om fordeling af arbejdet* (Betænkning No. 865, 1979); R. A. Hart, *Shorter Working Time: A Dilemma for Collective Bargaining* 47-50, 52-53 (OECD 1984).

[30]Claire Rankin, Annelise Phillips, and Martin Warren, *The Working Time Regulations 1998: A Practical Guide* 13-30 (1999).

[31]Michael Grisenthwaite and Carole Grant-Garwood, *Tolley's Practical Guide to the Working Times Directive and Regulations* 22-23 (1998); http://www.tuc.org.uk/law/tuc-2147-f0.cfm (Trades Union Congress press release, Aug. 20, 1999).

[32]Treaty Establishing the European Economic Community, Art. 189.

[33]Recommendation of the Council of 22 July 1975 on the Principle of the 40-Hour Week and the Principle of Four Weeks' Annual Paid Holiday, in *Official Journal of the European Communities* No L 199/32 (July 30, 1975).

Digitized by Google Original from UNIVERSITY OF MICHIGAN

Generated for guest (University of Iowa) on 2012-04-18 14:21 GMT / http://hdl.handle.net/2027/mdp.39015066123715
Creative Commons Attribution-NonCommercial-NoDerivatives / http://www.hathitrust.org/access_use#cc-by-nc-nd

ty.... In 1970 the overall unemployment rate in the Community was 2% and it had risen to 6.2% by 1980. Now, towards the end of 1982, it is already over 10%, meaning that more than 11 million people are unemployed." The Commission then went on to draw the connection to shorter hours:

> In the light of this bleak medium-term outlook, there has been increasing interest (which is shared by the Commission) in the possibilities for offering employment to a larger number of people which may be created by various ways of reorganising working time, including in particular reducing the working time of individual employees. Apart from the hardships which unemployment brings to those out of work, the risk it poses to the social fabric and its democratic institutions is real. Among other policy responses to the unemployment problem, the Commission believes that there is an urgent need for a new approach to the question of reducing and reorganising working time which recognises the positive contribution it can make.[34]

Shortly thereafter a commentary in a Commission periodical, calling the level of unemployment "completely untenable in the long run," reinforced the message: "From what we know at present...there is no alternative to a radical reduction in working time."[35]

Three years earlier, in its Resolution of December 18, 1979, the Council of the European Communities, predicting an exacerbation of employment problems in the decade ahead, had declared that "measures to adapt working time might be integrated...as ancillary measures in support of policies to improve the employment situation."[36] Of especial relevance here were the guidelines concerning systematic overtime that the Council included in its Resolution. It considered that "limits should be applied to the systematic use of overtime, due account being taken of the necessary flexibility in the production process of the undertaking and of the situation on the labour market." In light of the member states' different situations, it recommended, alluding presumably to national labor market structures that enabled some low-wage workers to subsist only by virtue of working significant amounts of overtime, "gradual implementation of this principle...taking into account the problems which could arise...for low-paid workers." Finally, it suggested the partial adoption of the principle of compensatory time-off as "one appropriate method of achieving such limitation" of systematic overtime.[37]

---

[34]Commission of the European Communities, *Memorandum on the Reduction and Reorganisation of Working Time* 1 (COM (82) 809 final, 1982).

[35]Klaus Kaeding, "Reduction in Working Time in Europe," *Social Europe*, Special Issue 1983, at 19-21 at 19.

[36]Council Resolution of 18 December 1979 on the Adaptation of Working Time, in *Official Journal of the European Communities* No. C 2/1 (Jan. 4, 1980).

[37]Council Resolution of 18 December 1979 on the Adaptation of Working Time, in *Official Journal of the European Communities* No. C 2/2.

Digitized by Google Original from UNIVERSITY OF MICHIGAN

Generated for guest (University of Iowa) on 2012-04-18 14:21 GMT / http://hdl.handle.net/2027/mdp.39015066123715
Creative Commons Attribution-NonCommercial-NoDerivatives / http://www.hathitrust.org/access_use#cc-by-nc-nd

In a similar vein, in 1983 the Commission submitted to the Council a draft recommendation declaring that the reduction and reorganization of working time could continue to contribute to improved living and working conditions, especially for people performing burdensome or hazardous work, but it could do so fully only if "accompanied by an appropriate limitation of systematic overtime." Moreover, the draft emphasized that the "recognized need for flexibility in certain types of production processes...is no justification for systematic overtime." However, the limits of the Commission's own interventionism were visible in its concession that: "Consideration should be given to measures to protect the interests of the low paid for whom systematic paid overtime has in fact become part of normal income."[38] Because Prime Minister Margaret Thatcher's Conservative Government deemed the draft recommendation incompatible with its deregulatory program, the United Kingdom vetoed it in 1984, thereby delaying the issuance of a Directive by a decade.[39] During that period there was considerable disagreement among the European Parliament, the Commission, and the Council[40] and further propitiation of the United Kingdom. For example, in spite of all the aforementioned discussion of the need to limit systematic overtime, the Commission ultimately concluded that the subject was "best dealt with by the two sides of industry and by national provisions."[41]

The Single European Act of 1986 created a turning point in the formulation of European Community policy on working time. It added Article 118a to the Treaty Establishing the European Economic Community, which provided that "Member States shall pay particular attention to encouraging improvements, especially in the working environment, as regards the health and safety of workers," and directed the Council to achieve this objective "by means of directives, minimum requirements for gradual implementation" under a qualified majority procedure.[42] This process made it "possible to resurrect"[43] the earlier movement for working time regulation under the rubric of health and safety issues, thus circumventing the requirement of unanimity in the Council and the United King-

---

[38]Draft Council Recommendation on the Reduction and Reorganization of Working Time (Submitted by the Commission to the Council on 23 September 1983), COM(83) 543 final, in *Official Journal of the European Communities* No C 290/4, 6 (Oct. 26, 1983).

[39]*Working Time: The Law and Practice* at 3.

[40]Amendment to the Proposal for a Council Directive Concerning Certain Aspects of the Organisation of Working Time (COM(91) 130 final, Apr. 23, 1991).

[41]Proposal for a Council Directive Concerning Certain Aspects of the Organisation of Working Time 3 (COM(90) 317 final, Sept. 20, 1990).

[42]Single European Act, Art. 21, in *Official Journal of the European Communities* No L 169/1-29 at 9 (June 29, 1987). Under the qualified majority procedure the votes of the member states with the largest populations are weighted more heavily.

[43]Erika Szyszczak, *EC Labour Law* 142 (2000).

Digitized by Google Original from UNIVERSITY OF MICHIGAN

Generated for guest (University of Iowa) on 2012-04-18 14:21 GMT / http://hdl.handle.net/2027/mdp.39015066123715
Creative Commons Attribution-NonCommercial-NoDerivatives / http://www.hathitrust.org/access_use#cc-by-nc-nd

dom's veto.[44]

The adoption in 1989 of a Community Charter of the Fundamental Social Rights of Workers marked a further step in the direction of supra-national regulation of working hours. The Commission's first draft of May 30, 1989 declared that the "development of a single European labour market must lead to an improvement in the living and working conditions of workers in the European Community, this process resulting from an approximation of these conditions.... This approximation relates first and foremost to the organization and flexibility of working time, particularly by establishing a maximum duration of working time per week."[45] The Commission's next draft of October 2, 1989 added that this process would also concern "systematic overtime."[46] The Action Programme relating to the Charter that the Commission issued on November 29, 1989 reiterated that with regard to the maximum duration of work and systematic overtime it was "important that certain minimum requirements be laid down at Community level" in order to ensure that firms' competitive practices "not have an adverse effect on the wellbeing and health of workers."[47] Nevertheless, the Community Charter of the Fundamental Social Rights of Workers that the heads of government of the European Community's member states making up the European Council adopted on December 9, 1989 omitted the reference to systematic overtime.[48] The European Parliament, which "deplore[d] the watering down of many points in the amended text," specifically declared that Article 118a "should constitute the natural legal basis for...the...reduction of working hours, in particular as regards maximum working hours...overtime...."[49]

Despite the fact that the Charter was not legally binding and thus constituted merely so-called soft law, its emphasis on the improvement of living and working conditions "enabled the Commission to conceive a directive on working time, not as a job creation measure but a health and safety matter," thus bringing it under Article 118a and the qualified majority procedure.[50]

---

[44]Catherine Barnard, *EC Employment Law* 379 (2d ed. 2000).

[45]Preliminary Draft Community Charter of Fundamental Social Rights (presented by the Commission), COM(89) 248 final, at 8 (May 30, 1989).

[46]Community Charter of Fundamental Social Rights - Draft - (Presented by the Commission), COM(89) 471 final, at 10 (Oct. 2, 1989).

[47]Communication from the Commission Concerning Its Action Programme Relating to the Implementation of the Community Charter of Basic Social Rights for Workers, COM(89) 568 final, at 19, 18 (Nov. 29, 1989).

[48]Community Charter of the Fundamental Social Rights of Workers, Title I, Art. 7, in *Social Europe*, 1/90 at 46-50 at 48.

[49]Resolution on the Community Charter of Fundamental Social Rights, in *Official Journal of the European Communities* No C 323/44-48 at 45, 47 (Dec. 27, 1989).

[50]Barnard, *EC Employment Law* at 403.

Digitized by Google Original from UNIVERSITY OF MICHIGAN

Generated for guest (University of Iowa) on 2012-04-18 14:21 GMT / http://hdl.handle.net/2027/mdp.39015066123715
Creative Commons Attribution-NonCommercial-NoDerivatives / http://www.hathitrust.org/access_use#cc-by-nc-nd

The Proposal for a Council Directive concerning Certain Aspects of the Organisation of Working Time, submitted by the Commission on August 3, 1990, lacked a general maximum hours provision; instead, it merely stated that the "performance of overtime must not interfere with the minimum rest periods" prescribed elsewhere in the Proposal, which amounted to 11 consecutive hours per 24 hours and one day of rest on average every seven-day period calculated over a reference period of a maximum of 14 days.[51] The Council then requested from the Economic and Social Committee (which is composed of "representatives of the various categories of economic and social activity, in particular, representatives of producers, farmers, carriers, workers, dealers, craftsmen, professional occupations and representatives of the general public" appointed by the Council)[52] an Opinion of the Proposal, which the Committee adopted by a 91 to 42 majority on Dec. 13, 1990. Its comment on the overtime provision, which the Committee characterized as permitting overtime, provided that it did not encroach on the minimum rest periods, was simply: "This sweeping overtime provision needs to be reviewed."[53] On February 20, 1991, the largely consultative European Parliament amended the Proposal by adding this recital to the preamble: "Whereas it is recognized that many Community workers are driven to work long hours, mainly in order to achieve a decent level of income, even though the nature and duration of such extra work may have an impact upon their health and safety and that of their fellow workers."[54] However, the Council incorporated no such recognition that low wages drove workers' acquiescence in overtime work in the final Directive. The European Parliament also amended the overtime provision by adding that the performance of overtime "must not lead to the working time exceeding the average 48 hours per week calculated over a reference period of not more than 14 days."[55] Although the Council did adopt the average 48-hour workweek in the final Directive, the reference period was much longer, thus permitting employers to retain extensive control over the organization of working hours.

Based on almost 15 years of preliminary drafts,[56] the Directive, as a result of

---

[51]Proposal for a Council Directive Concerning Certain Aspects of the Organization of Working Time, COM(90) 317 final—SYN 295 (Sept. 21, 1990), Art. 6, 3, and 4, in *Official Journal of the European Communities* No C 254/4 at 5 (Oct. 9, 1990).

[52]Treaty Establishing the European Economic Community, Art. 193.

[53]Opinion on the Proposal for a Council Directive Concerning Certain Aspects of the Organization of Working Time (91/C/60/09), in *Official Journal of the European Communities* No C 60/26, 29 (Mar. 8, 1991).

[54]*Official Journal of the European Communities* No C 72/87.

[55]*Official Journal of the European Communities* No C 72/89. See also Brian Bercusson, *European Labour Law* 317 (1996).

[56]On the legislative history, see James Mackley, "The Making of the Working Time

Digitized by Google Original from UNIVERSITY OF MICHIGAN

Generated for guest (University of Iowa) on 2012-04-18 14:21 GMT / http://hdl.handle.net/2027/mdp.39015066123715
Creative Commons Attribution-NonCommercial-NoDerivatives / http://www.hathitrust.org/access_use#cc-by-nc-nd

efforts by the other member states to meet the demands of the United Kingdom, which opposed it, became, in the words of a semi-official EU document, "a rather tortuous and difficult instrument, not uniformly progressive and containing a lot of exceptions and possibilities for derogations."[57] The Directive was "emasculated" and turned "minimalist" in large part in order to accommodate the U.K. government's strenuous objections to what it viewed as an effort to limit overtime and share work to reduce unemployment—the number of unemployed in the EU peaked at more than 18 million in 1994[58]—masquerading as a safety and health measure (in order to avoid the U.K.'s veto).[59] Indeed, the U.K.'s arguments to that effect in its unsuccessful application to the European Court of Justice requesting that the Directive be annulled either in its entirety or with respect to its maximum hours provision[60] were reminiscent of those advanced by the Dauphin County Court in invalidating the Pennsylvania 44-hour law 60 years earlier.[61]

At the time the Directive was adopted, the various member states' overtime regulatory regimes varied "enormously."[62] According to the Commission, of the member states with relevant legislation in 1992, five imposed annual limits on the number of overtime hours: Greece (150), Spain (80), France (130), Ireland (240), and Portugal (160). In the remaining countries, the permissible limits on overtime hours were set at 65 hours per three months in Belgium; two hours a day on up to 30 days in Germany; two hours a day in Luxembourg; and between 30 minutes and 3.5 hours per day in the Netherlands.[63] The Directive, however, "does not try to reconcile" these varying regimes, "but simply requires overtime to be

---

Directive," in *The Regulation of Working Time in the European Union: Gender Approach* 127-34 (Yota Kravaritou ed. 1999).

[57]R. Blanpain and C. Engels, "European Report," in *Legal and Contractual Limitations to Working Time in the European Union* at 121-61 at 130.

[58]*Economic Outlook*, No. 70, Annex tab. 23 (2001), on http:www.oecd.org.

[59]*Working Time: The Law and Practice* at 1-12 (quotes at 8).

[60]United Kingdom v. Council of the European Union (C-84/94) [1997] IRLR 30.

[61]See above ch. 7. Although the conceptualization of the regulation of working hours as embraced by that of workplace health and safety is unexceptionable, the Council's litigation position denying that the Directive was directed at any other objectives seems disingenuous: "It is true that the incidence of reductions in working time on job creation was an idea which appeared in the seventies, as is apparent in particular from a resolution and a recommendation of the Council.... However, that hypothesis depended on the various economic factors being taken into account, an approach not involved in the Directive." United Kingdom v. Council of the European Union (C-84/94) [1997] IRLR at 37. The European Court of Justice rejected the politically scripted and empirically untenable positions of both litigants, ruling in favor of the Council on the grounds that the Directive pursued "various objectives"; consequently, "contrary to what the United Kingdom seems to suggest, the organisation of working time is not designed *solely and exclusively* as an instrument of employment policy." *Id.* at 47.

[62]Barnard, *EU Employment Law* at 410.

[63]Zeijen, "The Regulation of Individual Employment Relationships" table 4 at 41.

Digitized by Google Original from UNIVERSITY OF MICHIGAN

Generated for guest (University of Iowa) on 2012-04-18 14:21 GMT / http://hdl.handle.net/2027/mdp.39015066123715
Creative Commons Attribution-NonCommercial-NoDerivatives / http://www.hathitrust.org/access_use#cc-by-nc-nd

included in the calculation of the maximum forty-eight-hour week."[64] Since the average workweek in most of the EU countries is considerably lower—in 1994, the year after the Directive was adopted, the average usual workweek of full-time employees in the EU was 40.3 hours, ranging from 38.2 in Belgium to 43.6 in the United Kingdom[65]—the modest provision in the Directive raises, without resolving, "the question of how to reduce the dependency of certain sections of industry and services on systematic overtime."[66]

The Directive's limited contribution to restraining employers' reliance on overtime work has been structurally reinforced by the EU's economic policy focus on enhancing firms' "flexibility" and "competitiveness." Even the Commission, which unsuccessfully urged the Council to deal with systematic overtime, emphasized in its 1989 Action Programme that the "flexibility...of working time enables firms to undertake the internal organization of work and production, which is an important factor in the adaptation of firms to the terms of competition and the improvement of their competitiveness."[67] An increase in plant operating hours and in the proportion of shift-workers has been a goal and consequence of the proliferation of "flexibilization arrangements."[68] In other words, as the Organisation for Economic Co-operation and Development observed, "[f]lexibility is understood from the point of view of the firm, in the sense of working arrangements designed to meet the needs of the business, which allow hours to vary in ways which are not possible through the use of fixed-hours working" and entails "'unsocial hours' working" for workers.[69]

To be sure, employer-oriented flexibility is not without its legal limits. Though not decided under the Working Time Directive, the European Court of Justice, in a minor victory for workers, interpreted the Council Directive on an Employer's Obligation to Inform Employees of the Conditions Applicable to the Contract or Employment Relationship, which states that "[a]n employer shall be obliged to notify an employee...of the essential aspects of the contract or employment relationship,"[70] to include the obligation to inform workers of the employ-

---

[64]Barnard, *EU Employment Law* at 410.

[65]Statistical Office of the European Communities, *Labour Force Survey: Results 1994*, tab. 073 at 168 (1996). The data for 1992 were virtually identical. Statistical Office of the European Communities, *Europe in Figures* 190 (4th ed. 1995).

[66]Barnard, *EU Employment Law* at 410.

[67]Communication from the Commission Concerning Its Action Programme Relating to the Implementation of the Community Charter of Basic Social Rights for Workers, COM(89) 568 final, at 18.

[68]Bosch, "Working Time Reductions, Employment Consequences and Lessons from Europe" at 183.

[69]*Employment Outlook*, June 1998, at 153.

[70]Council Directive 91/533/EEC of 14 October 1991 on an Employer's Obligation to

Digitized by Google Original from UNIVERSITY OF MICHIGAN

Generated for guest (University of Iowa) on 2012-04-18 14:21 GMT / http://hdl.handle.net/2027/mdp.39015066123715
Creative Commons Attribution-NonCommercial-NoDerivatives / http://www.hathitrust.org/access_use#cc-by-nc-nd

er's overtime working arrangements,[71] despite the fact that the minimum requirements prescribed by the Directive failed to mention overtime, but only "the length of the employee's normal working day or week."[72]

The reorientation of EU policy toward flexibility and competitiveness had been prefigured by a similar trend in the labor law of several member states.[73] An outstanding example is Belgium, which amended its basic labor standards law[74] in 1985[75] and 1987,[76] enacting laws "aimed at strengthening Belgium's competitiveness" by allowing "deviation from protective standards" that limited daily and weekly working hours. This transition was made possible by labor unions' having "adopted a more realistic approach to the problems raised by growing international competition and the need to have a more flexible environment for business."[77] As a result, collective bargaining agreements are permitted, for example, to prescribe 12-hour working days, provided that the normal average working time is observed within a reference period extending from three months to a year.[78]

Article 6 of the EU Directive dealing with "maximum weekly working time" provides:

> Member states shall take the measures necessary to ensure that, in keeping with the need to protect the safety and health of workers: 1. the period of weekly working time is limited by means of laws, regulations or administrative provisions or by collective agreements or agreements between the two sides of industry; 2. the average working time for each seven-

---

Inform Employees of the Conditions Applicable to the Contract or Employment Relationship, art. 2(1), in *Official Journal of the European Communities* L 288/32-35 at 33 (Oct. 18, 1991). The Directive requires that the mandatory information be given to the employee in writing no later than two months after employment begins. *Id.* art. 3.

[71]Lange v. Georg Schünemann GmbH [2001] All ER (EC) 481.

[72]Council Directive 91/533/EEC of 14 October 1991 on an Employer's Obligation to Inform Employees of the Conditions Applicable to the Contract or Employment Relationship, art. 2(2)(i) at 33.

[73]For an analysis of the gender consequences of this flexibility, see Ellen Mutari and Deborah Figart, "The Social Implications of European Work Time Policies: Promoting Gender Equity?" in *Working Time: International Trends, Theory and Policy Perspectives* 232-50 (Lonnie Golden and Deborah Figart eds. 2000).

[74]Loi du 16 mars 1971 sur le travail.

[75]Loi du 22 janvier 1985 de redressement contenant des dispositions sociales, art. 76, 80, and 83, in *Pasinomie* 48, 64-66 (1985).

[76]Loi du 17 mars 1987 relative à l'introduction de nouveaux régimes de travail dans les entreprises.

[77]R. Blanpain and C. Engels, "Belgium," in *Legal and Contractual Limitations to Working Time in the European Union* at 205-37 at 209-11, 233.

[78]Loi du 17 mars 1987 relative à l'introduction de nouveaux régimes de travail dans les entreprises, ch. 1, sect 2, art. 2, 3°. See also Zeijen, "The Regulation of Individual Employment Relationships" at 39; R. Blanpain and C. Engels, "Belgium" at 214-17, 227.

Digitized by Google Original from UNIVERSITY OF MICHIGAN

Generated for guest (University of Iowa) on 2012-04-18 14:21 GMT / http://hdl.handle.net/2027/mdp.39015066123715
Creative Commons Attribution-NonCommercial-NoDerivatives / http://www.hathitrust.org/access_use#cc-by-nc-nd

day period, including overtime, does not exceed 48 hours.[79]

To be sure, the title of Article 6 is "rather misleading" because it does not limit any specific workweek to 48 hours, but merely the average workweek.[80] Although the 48-hour maximum still authorizes considerable overtime since the statutory workweek in no member state exceeds 48 hours and average actual weekly hours have been reduced to about 40, codifying the principle that overtime is legally limitable is, nevertheless, important.[81] However, the EU Directive is severely flawed by its partial exclusion of transport workers[82] and above all by the enormous leeway it affords member states and employers to subvert the hours cap. In particular, it authorizes governments to establish a so-called reference period of up to four months during which the average of 48-hour weeks is formed,[83] and to derogate from Article 6 altogether when "the duration of the working time is not measured and/or predetermined or can be determined by the workers themselves, and particularly in the case of...managing executives or other persons with autonomous decision-taking powers...."[84] This four-month reference period grants employers much greater flexibility than even the most capacious recent (unsuccessful) Republican congressional proposals in the United States, which have not even tried to extend the period beyond four weeks, despite the fact that, unlike the European statutes, the FLSA does not impose a maximum

---

[79]Council Directive 93/104/EC of 23 November 1993 Concerning Certain Aspects of the Organisation of Working Time, Art. 6, in *Official Journal of the European Communities* L 307/20.

[80]*Working Time: The Law and Practice* at 81.

[81]Mark Hall, Richard Lister, and Keith Sisson, *The New Law on Working Time: Managing the Implications of the 1998 Working Time Regulations* 81-83 (1998).

[82]Council Directive 93/104/EC of 23 November 1993 Concerning Certain Aspects of the Organisation of Working Time, Art. 1(3), in *Official Journal* L 307/18-24 (Dec. 13, 1993). The Commission was well aware of the public safety dangers associated with fatigue among transportation workers and partially alleviated this exclusion by amending the Directive in 2000. "White Paper on Sectors and Activities Excluded from the Working Time Directive," COM(97) 334 (July 1997); Directive 2000/34/EC of the European Parliament and of the Council of 22 June 2000 Amending Council Directive 93/104/EC, in *Official Journal* L 195/41-45 (Aug. 1, 2000). In 1999, the Council adopted a directive putting into effect a European-wide labor-management agreement that permitted 72-hour workweeks. Council Directive 1999/63/EC of 21 June 1999 concerning the Agreement on the organisation of working time of seafarers concluded by the European Community Shipowners' Association (ECSA) and the Federation of Transport Workers' Unions in the European Union (FST)-Annex: European Agreement on the Organisation of Working Time of Seafarers, in *Official Journal* L 167/33-37 (July 2, 1999).

[83]Council Directive 93/104/EC of 23 November 1993 Concerning Certain Aspects of the Organisation of Working Time, Art. 16 (2), in *Official Journal* L 307/22.

[84]Council Directive 93/104/EC of 23 November 1993 Concerning Certain Aspects of the Organisation of Working Time, Art. 17(1)(a), in *Official Journal* L 307/22.

Digitized by Google Original from UNIVERSITY OF MICHIGAN

Generated for guest (University of Iowa) on 2012-04-18 14:21 GMT / http://hdl.handle.net/2027/mdp.39015066123715
Creative Commons Attribution-NonCommercial-NoDerivatives / http://www.hathitrust.org/access_use#cc-by-nc-nd

workweek, but merely requires overtime premiums.[85] When the United Kingdom, where a "long hours culture" has forged by far the longest workweek in the EU—in 1994 the U.K. was the only EU country in which the modal range of working time for male employees in industry and services exceeded 40 hours, in Britain's case amounting to 50 hours and over[86]—finally promulgated implementing regulations in 1998, it made full use of this provision, granting employers a 17-week reference period within which to meet the 48-hour weekly average.[87]

Even greater laxity has been introduced by the so-called opt-out provision—the scope of which had been insisted on by the U.K. government while the Directive was being negotiated and of which only the United Kingdom has made use—which permits member states not to apply Article 6 for seven years (until 2003), when the Council must reexamine the issue. During this period, member states must, however, "ensure that: no employer requires a worker to work more than 48 hours over a seven-day period, calculated as an average for the reference period [of four months], unless he has first obtained the worker's agreement to perform such work, [and] no worker is subjected to any detriment by his employer because he is not willing to give his agreement to perform such work...."[88] Such language prompted the British Trades Union Congress (TUC) to conclude that "bad employers will try and intimidate their staff."[89] The Working Time Regulations issued by the U.K. Labour Government in 1998 took full advantage of this opt-out provision, providing that the hours limitation "shall not apply in relation to a worker who has agreed with his employer in writing that it should not apply in his case"; the employer was then required to maintain records for each such worker including the terms of the opt-out and the number of hours worked.[90] However, the 1999 amendment relieved employers of the obligation to maintain these detailed informational records.[91]

---

[85]See below ch. 18.

[86]In the U.K. the usual weekly hours of 24.5 percent of male workers was 50 or more; in the other EU countries the proportion ranged between 1.2 and 12.3 percent. Jill Rubery, Mark Smith, and Colette Fagan, "National Working-Time Regimes and Equal Opportunities." *Feminist Economics* 4(1):71-101, tab. 2 at 76 (1998). See generally, Trades Union Congress, *Six Days a Week* (Apr. 11, 2000), on http://www.tuc.org.uk/work_life/tuc-465-f0.cfm.

[87]The Working Time Regulations 1998, Statutory Instrument No. 1833, § 4(3).

[88]Council Directive 93/104/EC of 23 November 1993 Concerning Certain Aspects of the Organisation of Working Time, Art. 18(1)(b)(i), in *Official Journal* L 307/22. Among labor law scholars there is uncertainty as to whether this provision is a permanent or temporary derogation subject to review after seven years. Barnard, *EC Employment Law* at 412.

[89]"The 48 hour working week," http://www.tuc.org.uk/rights/wt_48.htm

[90]The Working Time Regulations 1998, Statutory Instrument No. 1833, § 5.

[91]The Working Time Regulations 1999, Statutory Instrument No. 3372, § 3.

Digitized by Google Original from UNIVERSITY OF MICHIGAN

Generated for guest (University of Iowa) on 2012-04-18 14:21 GMT / http://hdl.handle.net/2027/mdp.39015066123715
Creative Commons Attribution-NonCommercial-NoDerivatives / http://www.hathitrust.org/access_use#cc-by-nc-nd

The TUC charged that the other EU member states had been willing to grant this opt-out concession to the U.K.'s Conservative Government only on the condition that employers would be subject to "more onerous record keeping requirements."[92] The lifting of these requirements, according to the TUC, will make it "difficult if not impossible to police those workplaces where workers have 'opted-out' from the 48 hour week."[93] Moreover, soon after the regulations went into effect, reports began surfacing of workers' being pressured or coerced into opting out of their right to be protected under the law.[94]

The Labour Government's 1999 amendments to the regulations also made the derogation provision considerably more favorable to employers by adding this language: "Where part of the working time of a worker is measured or predetermined or cannot be determined by the worker himself but the specific characteristics of the activity are such that, without being required to do so by the employer, the worker may also do the work the duration of which is not measured or predetermined or can be determined by the worker himself," the maximum workweek provision "shall apply only to so much of his work as is measured or predetermined or cannot be determined by the worker himself."[95] Again, as the TUC has pointed out, this change departs from the original intent of applying the derogation only to "genuinely 'autonomous' workers" who "genuinely control their own working time." The amendment "will have the effect of removing virtually all salaried workers doing unpaid voluntary overtime from the scope of the Regulations." The TUC fears such an outcome because the phrase "without being required to do so by the employer" could be interpreted to cover situations in which employers assign a task and specify a deadline and workers feel compelled to work beyond contractual hours to get the work done.[96] The amendment, as TUC Deputy General Secretary Brendan Barber observed, ignores the fact that: "Many white collar workers are trapped in a long hours culture where no-one tells them to work specific hours but the pressure of work, job insecurity and peer groups pressure leaves them no choice."[97] The anticipated consequence is that with such "voluntary overtime"[98] qualifying as "'unmeasured'" and outside the scope of the regulations and thus not counting as working time toward the 48-

---

[92]TUC, Press Release: Working Time Regulations 1998 Amendments (July 28, 1999), on http://www.tuc.org.uk/law/tuc-2158-f0.cfm.

[93]TUC, Press Release: Working Time Regulations 1998 Amendments (July 28, 1999), on http://www.tuc.org.uk/law/tuc-2158-f0.cfm.

[94]Trades Union Congress, *Six Days a Week* (2000).

[95]Working Time Regulations 1999, § 4.

[96]TUC, Press Release: Working Time Regulations 1998 Amendments (July 28, 1999), on http://www.tuc.org.uk/law/tuc-2158-f0.cfm.

[97]TUC, Press Release (July 28, 1999), on http://www.tuc.org.uk/law/tuc-2157-f0.cfm.

[98]TUC, Press Release (Aug. 26, 1999), on http://www.tuc.org.uk/law/tuc-2147-f0.cfm.

Digitized by Google Original from UNIVERSITY OF MICHIGAN

Generated for guest (University of Iowa) on 2012-04-18 14:21 GMT / http://hdl.handle.net/2027/mdp.39015066123715
Creative Commons Attribution-NonCommercial-NoDerivatives / http://www.hathitrust.org/access_use#cc-by-nc-nd

hour limit, when the individual opt-out provision expires in 2003, "salaried workers in the UK will be the only people in the whole EU who can lawfully work more than an average of 48 hours a week."[99]

The United Kingdom remains an outlier, but an incipient trend in the application of flexible working time systems in other countries has been "the elimination of recorded overtime, even though employees work longer hours than are stipulated in their contracts."[100] Several other EU member states have also done little to inhibit the imposition of overtime work.[101] Indeed, in Austria, from 1987 to 1997, the proportion of male employees working overtime rose from 23 percent to 37 percent, while the share among women almost doubled, increasing from 12 percent to 23 percent.[102]

The German Working Time Law, which was enacted in 1994, states in principle that daily working time may not exceed eight hours, but it permits 10-hour days (and thus 60-hour weeks since Sunday employment is permitted only under restricted circumstances), provided that the average workday does not exceed eight hours over a period of six calendar months or 24 weeks[103]—a proviso that does not even meet the Working Time Directive's 4-month reference period rule.[104] This new regime prompted the leading labor law treatise to observe that now "practically all forms of working time flexibilization are possible."[105]

The Netherlands' Working Time Law of 1996 provides for a maximum work shift of nine hours and a maximum workweek of 45 hours, so long as these hours do not exceed an average of 40 hours per week during a period of 13 weeks.[106] Moreover, the Dutch law "explicitly allows for negotiations by which the standard regulations can be avoided to a large extent."[107] Under this negotiated provision, it is lawful for those working under a collective agreement to work 10-hour shifts averaging 50 hours per week over four weeks and 45 hours over 13

---

[99]TUC, *Six Days a Week*.

[100]Bosch, "Working Time Reductions, Employment Consequences and Lessons from Europe" at 187.

[101]For a list of legislated limits on maximum weekly hours in- and excluding overtime, see *Employment Outlook*, July 1998, tab. 5.10 at 168.

[102]"Overtime Working Increases," *European Industrial Relations Rev.*, No. 308:3 (Sept. 1999).

[103]Arbeitszeitgesetz, vom 6. Juni 1994, §§ 3, 10, in Bundesgesetzblatt, I:1170, 1171, 1173.

[104]Commission of the European Communities, *Report from the Commission: State of Implementation of Council Directive 93/104/EC of 23 November 1993* at 15.

[105]Günter Schaub, *Arbeitsrechts-Handbuch: Systematische Darstellung und Nachschlagewerk für die Praxis* 1329 (8th ed. 1996).

[106]Arbeidstijdenwet, 23 Nov. 1996, art. 5:7.1.

[107]B. Sloot, "The Netherlands," in *Legal and Contractual Limitations to Working Time in the European Union* at 525-54 at 531.

Digitized by Google Original from UNIVERSITY OF MICHIGAN

Generated for guest (University of Iowa) on 2012-04-18 14:21 GMT / http://hdl.handle.net/2027/mdp.39015066123715
Creative Commons Attribution-NonCommercial-NoDerivatives / http://www.hathitrust.org/access_use#cc-by-nc-nd

weeks.[108] Pursuant to the standard provision, overtime resulting from "an unforeseen modification of circumstances, incidentally and not periodically" and extending the work shift to 11 hours and the workweek to 54 hours is lawful, provided that these hours do not exceed an average of 45 hours per week for a period of 13 weeks.[109] Under the counterpart negotiated provision, it is lawful to extend work shifts to 12 hours and workweeks to 60 hours, so long as the average workweek does not exceed 48 hours over a 13-week period.[110] Five years after the law went into effect it was "clear that the new license for 'flexibility' is being perceived by employees as, first and foremost, a boon for employers."[111]

In Spain, where the 1995 Workers' Statute Act sets the maximum normal workweek at 40 hours averaged over an entire year,[112] overtime (*horas extraordinarias*), performance of which "shall be voluntary" unless it is agreed on in a collective or individual contract,[113] is statutorily capped at 80 hours per year. Excluded from this annual limit is work performed to prevent or repair unforeseen damages or other extraordinary and emergency damages.[114]

In November 1998, the Italian Parliament updated a 1923 law by enacting a government decree-law restricting overtime work in the industrial sector. Under the new provision, when weekly working time exceeds 45 hours—the statutory norm became 40 hours in 1997—firms are obligated to inform the local office of the Ministry of Labour within 24 hours of beginning the work; this obligation is designed to discourage overtime work, which is capped at 80 hours per quarter and 250 hours per year. Such overtime work is permissible only: for exceptional technical-production necessities which it is impossible to meet by hiring other workers; in cases of force majeure or dangers or damage to people or production; for trade fairs or shows associated with production activity; or in all cases provided for by national collective bargaining agreements. In the absence of a collective bargaining agreement regulating overtime, the law deems overtime work to be voluntary and employers are not empowered to require employees to perform such work without their agreement.[115] Outside of industry, overtime

---

[108]Arbeidstijdenwet, art. 5:7.2-.3.

[109]Arbeidstijdenwet, art. 5:9.1.

[110]Arbeidstijdenwet, art. 5:9.2-.3. Under both overtime provisions, the limits for night-work shifts are lower.

[111]"Working Time Act: Five Years On," *European Industrial Relations Rev.*, No. 331:23-25 at 25 (Aug. 2001).

[112]Ley del Estatuto de los Trabajadores of March 24, 1995, § 34.1.

[113]Ley del Estatuto de los Trabajadores § 35.4. The clause concerning individual contracts could render the voluntariness moot.

[114]Ley del Estatuto de los Trabajadores § 35.2-.3.

[115]Legge 27 novembre 1998, n. 409, in *Gazzetta Ufficiale*, Nov. 28, 1998, No. 279, at 3, on http://www.parlamento.it/parlam/leggi/984091.htm; Legge 24 giugno 1997, n. 196

Digitized by Google Original from UNIVERSITY OF MICHIGAN

Generated for guest (University of Iowa) on 2012-04-18 14:21 GMT / http://hdl.handle.net/2027/mdp.39015066123715
Creative Commons Attribution-NonCommercial-NoDerivatives / http://www.hathitrust.org/access_use#cc-by-nc-nd

(beyond eight hours daily and 40 hours weekly) is statutorily limited to two hours per day and 12 hours per week, but its regulation in collective bargaining agreements varies widely.[116] Whereas the law made the performance of overtime work optional for the individual worker, union collective agreements have tended to make it compulsory for workers; the annual volume of such collectively agreed-on overtime has ranged between 100 and 280 hours in recent years.[117]

Arguably the most extensive revamping of national hours regulation in recent years has taken place in France, where the so-called loi Aubry I of 1998 and loi Aubry II of 2000[118] have phased in the 35-hour week (beginning in 2000 for employers employing more than 20 workers and in 2002 for smaller employers) with a complex set of supporting rules capping overtime at 130 hours per year. The new regime, which was initially justified as a tool for combatting unemployment, does not mean that 35 hours will become the universal workweek, but that that limit will define the threshold for calculating overtime.[119] However, the limit applies only to overtime hours performed at the employer's request; if a worker 'voluntarily' opts to work overtime hours, they do not count toward the limit. Furthermore, an employer is entitled to require its workers to perform overtime up to the statutory 130-hour limit; workers have no right to refuse to perform overtime within the limit and any such refusal may not only trigger dismissal for misconduct, but also deprive the worker of the benefit of a notice period or a severance payment. Employers are also free to require workers to work up to whatever limit is established by collective agreements, many of which set the cap far below 130 hours.[120] A few months after the law went into effect, one-fourth of workers reported working more than 35 hours per week, most stating that the excess hours were unpaid.[121]

"Norme in materia di promozione dell'occupazione" art. 13; Domenico Paparella, "Il Parlamento italiano approva la legge sullo straordinario," (Dec. 28, 1998), on http://217.141.24.196/1998/12/InBrief/IT9812192N.html (appeared in *Il Sole 24 ore* (Nov. 27, 1998) and *Conquiste del Lavoro* (Dec. 10, 1998).

[116]Matteo Fusillo and Raffaella Betti Berutto, "Italy" at 21, in *US & International Employment Law*; T. Treu and L. Pero, "Italy," in *Legal and Contractual Limitations* at 447-94 at 458-60.

[117]Treu and Pero, "Italy" at 458-60, tab. 2 at 490.

[118]Loi no 98-461 du 13 juin 1998 d'orientation et d'incitation relative à la réduction du temps de travail; Loi no 2000-37 du 19 janvier 2000 relative à la réduction négociée du temps de travail. The laws are named for the Minister of Employment and Solidarity Martine Aubry.

[119]Alexandre Bilous, "Working Time Bill Soon to Become Law" on http://217.146.24.196/1998/04/feature/FR9804103F.html; Alexandre Bilous, "35-Hour Working Week Law Adopted" on http://217.146.24.196/1998/06/feature/FR9806113F. html.

[120]Antoine Vivant, "France," in *EU & International Employment Law* at 29-32.

[121]"Most Workers Feel 35-Hour Week Has Improved Quality of Life," *European Industrial Relations Rev.*, No. 329:7 (June 2000).

Digitized by Google Original from UNIVERSITY OF MICHIGAN

Generated for guest (University of Iowa) on 2012-04-18 14:21 GMT / http://hdl.handle.net/2027/mdp.39015066123715
Creative Commons Attribution-NonCommercial-NoDerivatives / http://www.hathitrust.org/access_use#cc-by-nc-nd

This laxness in the EU member states' regulation of overtime work has not escaped the attention of the Commission of the European Communities. In its report on the state of implementation of the Working Time Directive, issued at the end of 2000, it observed that in some countries, "due to the structure of the national legislation on the limits on working time, which differentiates between regular working time and overtime without setting an absolute limit over a given reference period, there is a risk that the average weekly working time of 48 hours is not always respected. This risk is particularly acute in situations where a major proportion of the overtime allowed is worked during a short reference period."[122]

This laxness in enforcing even the generous hours standard set by the EU makes it implausible that the member states will zealously implement the Commission's vague, but potentially invasive aspirational guideline concerning the applicability of the Directive to workers working for two or more employers concurrently. To be sure, the Commission must acknowledge that the Directive does not "expressly" deal with the question of whether its hours limits "are absolute limits in the sense that the hours worked for two or more employers should be added together...or whether the limits are set for each employment relationship separately." Nevertheless, in light of "the need to ensure that the health and safety objective of the Working Time Directive is given full effect, the Commission considers that Member States' legislation should provide for appropriate measures in order to ensure that the limits on average weekly working time...are, as far as possible, respected in the case of workers working concurrently" for two or more employers.[123] Against the background of their "flexibility"-driven agendas, it seems unlikely that European national governments are in fact willing, for the sake of the workers' own health and safety (as well as in order to make more jobs accessible to the millions of unemployed), to take the radical step of prohibiting low-wage workers from working at more than one full-time job to make ends meet.[124]

---

[122]Commission of the European Communities, *Report from the Commission: State of Implementation of Council Directive 93/104/EC of 23 November 1993* at 26.

[123]Commission of the European Communities, *Report from the Commission: State of Implementation of Council Directive 93/104/EC of 23 November 1993* at 26.

[124]In response to the growth of industrialization associated with World War II, India enacted a new Factories Act after independence under which: "No adult worker shall be required or allowed to work in any factory on any day on which he has already been working in any other factory, save in such circumstances as may be prescribed." Factories Act, 1948 (Act No. 63 of 1948), § 60. Curiously, one Indian labor law scholar glossing this provision asserted without any supporting evidence: "Double employment of labour is prohibited in most of the advanced countries, as it adversely affects the health and well-being of the workers." Suresh Srivastava, *Labour Law in Factories, Mines, Plantations, Transport, Shops and Other Industrial Establishments* 128 (1992).

Digitized by Google Original from UNIVERSITY OF MICHIGAN

Generated for guest (University of Iowa) on 2012-04-18 14:21 GMT / http://hdl.handle.net/2027/mdp.39015066123715
Creative Commons Attribution-NonCommercial-NoDerivatives / http://www.hathitrust.org/access_use#cc-by-nc-nd