

**PARTISAN EUROPE?
POLITICAL PARTIES AND THE IMPLEMENTATION
OF EU PUBLIC POLICY**

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The domestic implementation of policy made beyond the boundaries of the state is an opportunity for political contestation because it activates long-standing cleavages on the basis of which political parties locate themselves in the political spectrum. Drawing on cleavage theory of party positioning - which posits that parties assimilate the new issue of European integration into pre-existing ideologies that are shared by party leadership, activists and constituencies and mirror enduring commitments on core domestic issues – this paper presents a partisan account of this process. It shows that as a result of this positioning, (a) party preferences vary when policy is implemented at the national level and (b) when in power, parties exercise discretion in a manner that reflects these differences. Using empirical evidence from the implementation of the EU's Working Time Directive in the context of the Westminster model, this paper demonstrates the explanatory power of the partisan hypothesis and discusses its implications for our understanding of the autonomy of the state.

STATES AND INTERNATIONAL ORGANISATIONS

The involvement of states in international organisations is often thought to have reduced the autonomy of individual governments, in part because politicians often make this claim in an effort to avoid blame when unpopular policies 'hit home'. Legally binding decisions made in the context of these bodies are often portrayed by politicians and other actors as nothing short of straightjackets; they must be complied with. The European Union² – arguably the most advanced form of inter-state co-operation that is edging increasingly towards a polity, is a prime example: EU law is binding and takes precedence over national legislation. Reality, though, is quite different for two reasons. First, government officials - including ministers - play a key role in decision making³ in these bodies thereby undermining the very notion that the pressure that stems from these bodies is exogenous to the member states and that the latter must simply 'adapt' to it. Second, national governments make important choices when they implement these laws at the national level⁴. The boundaries of the state's real autonomy cannot be identified without the systematic analysis of the implementation of these rules at the domestic level⁵, which is the focus of this paper. So, what shapes the domestic patterns of implementation?

¹ The author should like to thank several politicians, civil servants and officials of trade unions and employers' organisations for agreeing to be interviewed for the purposes of this research project. The financial support provided by the Economic and Social Research Council (award RES-000-22-2510) is gratefully acknowledged.

² This term is used to denote both the EU and its predecessors.

³ See, for example, Hussein Kassim and Vincent Wright, "The Role of National Administrations in the Decision-Making Processes of the European Community," *Rivista Trimestrale di Diritto Pubblico* 31, no. 3 (1991).

⁴ This is why analysis ought to focus on interactions between the 'domestic' and the 'international'. See A. Gurowitz, "Mobilizing International Norms: Domestic Actors, Immigrants, and the Japanese State," *World Politics* 51 (1999), p. 416.

⁵ Implementation is 'process of forging links in a causal chain so as to obtain a policy's desired results. See Jeffrey L. Pressman and Aaron Wildavsky, eds., *Implementation: How Great Expectations in Washington Are Dashed in Oakland*, 3rd, expanded ed. (Berkeley, CA: University of California Press,

Comparativists, international relations scholars and regional integration specialists have answered this question by utilising either a ‘managerial approach’⁶ or an ‘enforcement perspective’⁷ highlighting a broad range of material and other factors. These include culture⁸, institutional factors – such as national administrative capacities⁹, the centralisation of power at the domestic level¹⁰, the role of supranational organisations in detecting and punishing breaches¹¹, and, finally, material factors such as reputation costs¹² and the role of domestic interest groups¹³. Much of this literature is couched in the expectation or the reality of conflict, deviation¹⁴, mismatch, or ‘misfit’¹⁵ between domestic arrangements (policies, interest group organisation, institutions etc.) and the exigencies of membership of these international bodies. However, these domestic arrangements are neither immovable, nor *apolitical*. Rather, they are political constructs that reflect the preferences of their creators and the

1984), p. xxiii. In the context of the EU it entails the transposition of these rules into the domestic legal order and the subsequent action taken by the government and the administration to give concrete meaning to these rules.

⁶ See, for example, Abram Chayes and Antonia Handler Chayes, "On Compliance," *International Organization* 47, no. 2 (1993).

⁷ George W. Downs, David M. Rocke, and Peter N. Barsoom, "Is the Good News About Compliance Good News About Cooperation?," *International Organization* 50, no. 3 (1996).

⁸ Ulf Sverdrup, "Compliance and Conflict Management in the European Union: Nordic Exceptionalism," *Scandinavian Political Studies* 27, no. 1 (2004). For a discussion of the concept of ‘the world of neglect’ where ‘compliance with EU law is no goal in itself’ see Gerda Falkner et al., *Complying with Europe: E.U. Harmonisation and Soft Law in the Member States*, ed. A. Føllesdal, *Themes in European Governance* (Cambridge: Cambridge University Press, 2005).

⁹ Oran R. Young, "The Effectiveness of International Institutions: Hard Cases and Critical Variables" in *Governance without Government: Order and Change in World Politics*, ed. James N. Rosenau and Ernst-Otto Czempiel (Cambridge: Cambridge University Press, 1992), p. 183, Edith Brown Weiss and Harold K. Jacobson, eds., *Engaging Countries: Strengthening Compliance with International Environmental Accords* (Cambridge, MA: MIT Press, 2000).

¹⁰ Andrew P. Cortell and James W. Davis Jr., "How Do International Institutions Matter? The Domestic Impact of International Rules and Norms," *International Studies Quarterly* 40, no. 4 (1996), Peter F. Cowhey, "Domestic Institutions and the Credibility of International Commitments: Japan and the United States," *International Organization* 47, no. 2 (1993), Markus Haverland, "National Adaptation to European Integration: The Importance of Institutional Veto Points," *Journal of Public Policy* 20, no. 1 (2000).

¹¹ Jonas Tallberg, *European Governance and Supranational Institutions: Making States Comply* (London: Routledge, 2003).

¹² Beth A. Simmons, "International Law and State Behavior: Commitment and Compliance in International Monetary Affairs," *American Political Science Review* 94, no. 4 (2000).

¹³ Oran R. Young, *Compliance and Public Authority: A Theory with International Applications* (Baltimore/London: Johns Hopkins University Press for Resources for the Future, 1979).

¹⁴ James D. Fearon, "Bargaining, Enforcement and International Cooperation," *International Organization* 52, no. 2 (1998).

¹⁵ Francesco Duina and Frank Blithe, "Nation-States and Common Markets: The Institutional Conditions for Acceptance," *Review of International Political Economy* 6, no. 4 (1999). Tanja A. Börzel, *States and Regions in the European Union: Institutional Adaptation in Germany and Spain*, ed. Johan P. Olsen and Andreas Føllesdal, *Themes in European Governance* (Cambridge: Cambridge University Press, 2002), Maria Green Cowles, James Caporaso, and Thomas Risse, eds., *Transforming Europe: Europeanization and Domestic Change*, *Cornell Studies in Political Economy* (Ithaca, NJ: Cornell University Press, 2001), Francesco Duina, "Explaining Legal Implementation in the European Union," *International Journal of the Sociology of Law* 25, no. 2 (1997), Christoph Knill, *The Europeanisation of National Administrations: Patterns of Institutional Change and Persistence*, *Themes in European Governance* (Cambridge: Cambridge University Press, 2001), Christoph Knill and Andrea Lenschow, "Coping with Europe: The Impact of British and German Administrations on the Implementation of E.U. Environmental Policy," *Journal of European Public Policy* 5, no. 4 (1998).

balance of power between them and their opponents¹⁶. Consequently, their relationship to the exigencies of membership of international bodies and – more specifically – the requirements of the implementation of jointly agreed policies, is not fixed, nor can it be taken for granted. Rather, it ought to be problematised and examined over time, as part and parcel of domestic politics. As Peter Gourevitch put it,

‘[t]he international system is not only a consequence of domestic politics and structures but a cause of them [...] However compelling external pressures may be, they are unlikely to be fully determining, save for the case of outright occupation. Some leeway of response to pressure is always possible, at least conceptually. The choice of response therefore requires explanation. Such an explanation necessarily entails an examination of politics: the struggle among competing responses’¹⁷.

One cardinal reason why this is so is the very nature of democratic politics: today’s minority might well become tomorrow’s majority and vice versa. For example, whether a veto player will block or support a specific piece of legislation depends on the preferences of the decision makers, i.e. the political actors, who populate it. The understanding of ‘misfit’ (or the absence thereof) that prevails at the domestic level, therefore, is not achieved in a political vacuum; rather, it is subject to change or at least an opportunity for further political action precisely because it is a political construct. Despite the justifiable focus of much of the existing literature on domestic factors, surprisingly little attention has been given to one of the core attributes of advanced liberal democracies, namely the partisan dimension¹⁸ which is exemplified by - though not confined to - the change of party in government, i.e. the key event that symbolises political change at the domestic level. This is surprising given that (i) policy agreed upon beyond the state is implemented in the domestic political space that is characterised by a specific balance of power between parties, the ideologies that they exemplify and the coalitions that support them, and (ii) scholars have demonstrated the impact of ideology on issues that transcend the boundaries of the state¹⁹.

The aim of this paper is to investigate whether and how parties matter in what Donald Puchala appositely termed ‘post-decisional politics’²⁰ in the EU. Political parties reflect different ideological traditions and seek to represent different coalitions of interests within a given political system. This begs the question: to what extent and how does party politics affect the domestic pattern of implementation? The need for an investigation along these lines is motivated by a broad range of considerations. First, a rich body of research shows convincingly that domestic public policy varies as a function of the partisan composition of government²¹, though most of it is based on research carried out before the intensification of

¹⁶ For an explicit call to include preferences and beliefs as key variables in the study of ‘Europeanisation’ see Ellen Mastenbroek and Michael Kaeding, "Europeanization Beyond the Goodness of Fit: Domestic Politics in the Forefront," *Comparative European Politics* 4, no. 4 (2006).

¹⁷ Peter Gourevitch, "The Second Image Reversed: The International Sources of Domestic Politics," *International Organization* 32, no. 4 (1978): p. 911.

¹⁸ One notable exception that focuses only on transposition is Oliver Treib, *Die Bedeutung Der Nationalen Parteipolitik Für Die Umsetzung Europäischer Sozialrichtlinien*, vol. 51, *Schriften Des Max-Planck-Instituts Für Gesellschaftsforschung* (Frankfurt: Campus, 2004).

¹⁹ See, for example, Mark Aspinwall, "Preferring Europe: Ideology and National Preferences on European Integration," *European Union Politics* 3, no. 1 (2002), Brian C. Rathbun, *Partisan Interventions: European Party Politics and Peace Enforcement in the Balkans* (Ithaca, NY: Cornell University Press, 2004).

²⁰ Donald J. Puchala, "Domestic Politics and Regional Harmonization in the European Communities," *World Politics* 27, no. 4 (1975): p. 497.

²¹ See David R. Cameron, "The Expansion of Public Economy: A Comparative Analysis," *American Journal of Political Science* 72, no. 4 (1978), Francis G. Castles, ed., *The Impact of Parties: Politics and Policies in Democratic Capitalist States* (London: Sage, 1982), Douglas A. Hibbs, "Political Parties and Macroeconomic Policy," *American Political Science Review* 71, no. 4 (1977), Manfred G. Schmidt,

European integration. Second, in advanced liberal democracies the implementation of public policy is not the *a*political and uncontroversial extension of policy making. Rather, as a pioneer of implementation research suggests – paraphrasing Carl von Clausewitz - it is ‘the continuation of politics by other means’²². Actors who lost the political battle at the stage of policy formulation, are likely to seek to further their interests by mobilising bias to shape the way in which policy is implemented. Third, in countries where membership of the EU is (or has been) politically salient, the implementation of EU policy provides a window of opportunity to those who want to maintain the issue of membership on the political agenda. Fourth, given the length of time required for the formulation of policy at the level of the EU and the frequent use of transitional periods, the government that negotiated in Brussels need not be the one that is required to implement EU policy at the national level. Finally, given that the legislation that embodies public policy is - to a large extent - an incomplete contract, the officials who implement it (and their political masters) have *de facto* discretion. In the case of the EU in particular, regulatory policies often define minimum standards thus leaving national governments a significant margin of manoeuvre to pursue higher standards both when EU law is transposed into national legislation and when the latter is put into effect. As a result, it is reasonable to expect variation to occur once a change of party in government has taken place.

To show that parties matter in implementation a two-step strategy is required. First, one needs to show why party preferences in one member state can be expected to differ in terms of their location in the EU political space. For that purpose, the next section draws on cleavage theory and the literature on party positioning on European integration to demonstrate that there are sound reasons why party preferences can be expected to differ along ideological lines. Second, one needs to demonstrate that - moving beyond mere declarations – when in government, parties actually behave differently as a result of the historically defined ‘prisms’ identified on the basis of cleavage theory. For that purpose, the case of the transposition and implementation in Britain of the Working Time Directive²³ by governments of different persuasions is discussed in the following section. The final section discusses the implications of this analysis for our understanding of the autonomy of the state.

PARTIES AND THE STRUCTURE OF POLITICAL CONTESTATION IN THE EU

The Dimensions of Contestation in the EU

The structure of political contestation in the EU – and the political space that it covers - is defined on the basis of two dimensions²⁴. The vertical dimension concerns the issue of sovereignty or, more accurately, the position of the nation state in the EU polity, pitching those who support greater against those who want less integration – a core theme in the study of European integration. Although the EU is now involved in virtually every area of public policy, the question of the way (or even whether) this should be done remains on the political agenda. As a result, one extreme of this continuum is occupied by those who seek to preserve the nation state while at the other extreme are those who support closer integration in the

"When Parties Matter: A Review of the Possibilities and Limits of Partisan Influence on Public Policy," *European Journal of Political Research* 30, no. 2 (1996).

²² Eugene Bardach, *The Implementation Game: What Happens after a Bill Becomes a Law*, *Mit Studies in American Politics & Public Policy* (Cambridge, MA: MIT Press, 1977).

²³ Council Directive 93/104/EC of 23 November 1993 concerning certain aspects of the organization of working time, *Official Journal of the European Communities*, L 307, 13 December 1993, pp. 18-24.

²⁴ Simon Hix, "Dimensions and Alignments in European Union Politics: Cognitive Constraints and Partisan Responses," *European Journal of Political Research* 35, no. 1 (1999), Liesbet Hooghe and Gary Marks, "The Making of a Polity: The Struggle over European Integration," in *Continuity and Change in Contemporary Capitalism*, ed. Herbert Kitschelt, et al. (Cambridge: Cambridge University Press, 1999).

belief that national and European identities can co-exist in the European polity²⁵. The other dimension reflects the conflict between the Left and the Right²⁶ that remains an enduring organising principle of political contestation in European states²⁷. On issues of redistribution and the regulation of capitalism, parties of the Right aim to reduce taxes, government spending, regulation and the role of the government in the economy while parties of the Left hold the belief that government should remain a significant actor in the economy. More broadly, the Left supports intervention to promote equality and a more substantial conception of liberty, while the Right is associated with the inequality that is part and parcel of the 'free market'. Although much of the history of European integration is characterised by efforts to downplay or even obscure the ideological content of competence-, policy- and institution-related choices²⁸, its development since the Single European Act and – in particular, the Maastricht Treaty - has highlighted issues that can only be answered with reference to values, ideas and principles that distinguish the political Left from the Right.

Parties and Political Contestation in the EU

Where are parties located in this structure of political contestation and why? How do political parties respond to new challenges, such as the politics of regional integration that intensified in Europe during the late 1980s and 1990s? In the area of European integration two sets of developments have historically obscured the importance of party politics. First, key decisions regarding the institutional set-up of the EU have sought to downplay the significance of the partisan affiliation of major officeholders. Second, national governments²⁹ and, as a consequence, the 'national interest' were core features of theories derived from the study of international relations³⁰. Since European integration is thought - from that perspective - to proceed on the basis of bargaining between national governments, one would expect the *national* location of a political party to be the key determinant of its preferences.

However, comparativists have taken issue with this view³¹. Marks and Wilson have drawn on

²⁵ Hooghe and Marks, "The Making of a Polity: The Struggle over European Integration," p. 76.

²⁶ On the other hand, parties can also be classified on the basis of the 'new politics' or 'GAL/TAN' axis that concerns issues such as ecology, cultural diversity, nationalism, and immigration. One pole brings together ecology, alternative politics and libertarianism (GAL) while the other combines traditional, authoritarian and nationalist (TAN) preferences. In Western Europe the Left is closely connected to GAL and the Right to TAN. Gary Marks et al., "Party Competition and European Integration in the East and West," *Comparative Political Studies* 39, no. 2 (2006): p. 157.

²⁷ Geoffrey Evans and Stephen Whitefield, "Identifying the Bases of Party Competition in Eastern Europe," *British Journal of Political Science* 23, no. 4 (1993), Seymour Martin Lipset and Stein Rokkan, "Cleavage Structures, Party Systems, and Voter Alignments: An Introduction," in *Party Systems and Voter Alignments: Cross-National Perspectives*, ed. Seymour Martin Lipset and Stein Rokkan (New York, NY: Free Press, 1967).

²⁸ Two examples illustrate this point. When the governments of the large member states had the power to nominate two Commissioners, one usually came from the ranks of the main ruling and the other from the main opposition party. Moreover, consensus seeking is a key feature of decision making in both the Commission and Council in the face of opposition to a legislative proposal even when qualified majority voting applies. This was part of a conscious effort to insulate the emerging organisation from normal democratic politics.

²⁹ Stanley Hoffmann, "Obstinate or Obsolete? The Fate of the Nation-State and the Case of Western Europe," *Daedalus* 95, no. 3 (1966), Andrew Moravcsik, *The Choice for Europe: Social Purpose and State Power from Messina to Maastricht* (Ithaca, NY: Cornell University Press, 1998).

³⁰ However, it is worth noting Haas' discussion of the role of political parties. See Ernst B. Haas, *The Uniting of Europe. Political, Social, and Economic Forces 1950-1957* (Stanford, California: Stanford University Press, [1958] 1968), chapter 4. On politicisation and neofunctionalism see Liesbet Hooghe and Gary Marks, "The Neofunctionalists Were (Almost) Right: Politicization and European Integration," in *The Diversity of Democracy: A Tribute to Philippe C. Schmitter*, ed. Colin Crouch and Wolfgang Streeck (Cheltenham: Edward Elgar, 2006).

³¹ Hix, "Dimensions and Alignments in European Union Politics: Cognitive Constraints and Partisan Responses."

the cleavage theory put forward by Lipset and Rokkan³² and new institutionalism in an effort to explain the position of national political parties on European (political and economic) integration between 1984 and 1996³³. First, in their classic examination of political development in Western Europe Lipset and Rokkan construed modern European party systems as the products of a set of historical conflicts that took place between the Protestant Reformation and the Industrial Revolution that created dichotomies of interests. The first pitched the dominant against subject cultures (centre-periphery), the second the church against the state, the third the primary against the secondary economy (rural-urban cleavage) and the fourth labour against capital (class cleavage). The interactions between these cleavages subsequently shaped political alignments. Enduring and distinct identities, institutions and patterns of political conflict have been created that explain the ‘freezing’³⁴ as well as national variations in party systems. Second, as institutionalists have claimed, organisations handle new issues on the basis of existing schemes and standard operating procedures³⁵.

Drawing on these two basic claims, Marks and Wilson hypothesize that these cleavages – whilst not frozen once and for all - constitute institutional frameworks or ‘prisms’ through which political parties respond to new issues such as European integration. Their statistical analysis of empirical evidence from an expert survey leads them to conclude that parties assimilate the new issue of European integration into pre-existing ideologies that are shared by party leadership, activists and constituencies and mirror enduring commitments on core domestic issues³⁶. As a result of their use of these historically defined ‘prisms’, parties develop preferences on European integration that have much more in common with other parties in the same political family (defined on the basis of the Left – Right axis) than they do with other parties in the same country³⁷.

Opposition to the EU stems from the extremes of the political spectrum because the EU is a centrist project. Both the extreme Left and the far Right object to European integration but for different reasons. While the former condemns European integration as an aggressive capitalist scheme, the latter sees it as a threat to national identity. The bulk of mainstream parties (Social Democrats, Liberals, Christian Democrats and Conservatives) lie between these two extremes. In turn, they are divided into two groups (in a way that reflects policy

³² Lipset and Rokkan, "Cleavage Structures, Party Systems, and Voter Alignments: An Introduction."

³³ Gary Marks and Carole J. Wilson, "The Past in the Present: A Cleavage Theory of Party Response to European Integration," *British Journal of Political Science* 30, no. 3 (2000).

³⁴ These cleavage structures produce effects that last for decades. See Lipset and Rokkan, "Cleavage Structures, Party Systems, and Voter Alignments: An Introduction," p. 50.

³⁵ James G. March and Johan P. Olsen, *Rediscovering Institutions: The Organizational Basis of Politics* (New York: Free Press, 1989), p. 34. See also Douglass C. North, *Institutions, Institutional Change and Economic Performance* (Cambridge: Cambridge University Press, 1990), p. 20.

³⁶ Cleavages are important for additional reasons. They provide signals that allow voters to distinguish between parties; they reflect long-standing ideologies that structure competition in the electoral arena and, finally, they ‘represent reputational investments that sustain a party’s credibility’. Gary Marks, Carole J. Wilson, and Leonard Ray, "National Political Parties and European Integration," *American Journal of Political Science* 46, no. 3 (2002): p. 586.

³⁷ Marks and Wilson, "The Past in the Present: A Cleavage Theory of Party Response to European Integration," pp. 458-9. The same applies when the ‘new politics’ dimension is examined. Traditionalist, authoritarian and nationalist parties object to European integration because it generates or amplifies perceived threats against the national community and sovereignty while parties on the other extreme of this continuum associate European integration with (a) better prospects for environmental regulation as well as (b) threats to democracy and the intensification of regulatory competition. On this issue and the similarities and differences in the structure of contestation on European integration in West and Central/East Europe see Liesbet Hooghe, Gary Marks, and Carole J. Wilson, "Does Left/Right Structure Party Positions on European Integration?," *Comparative Political Studies* 35, no. 8 (2002).

considerations), namely those who support *regulated capitalism* and the proponents of *neoliberal capitalism* (Figure 1)³⁸.

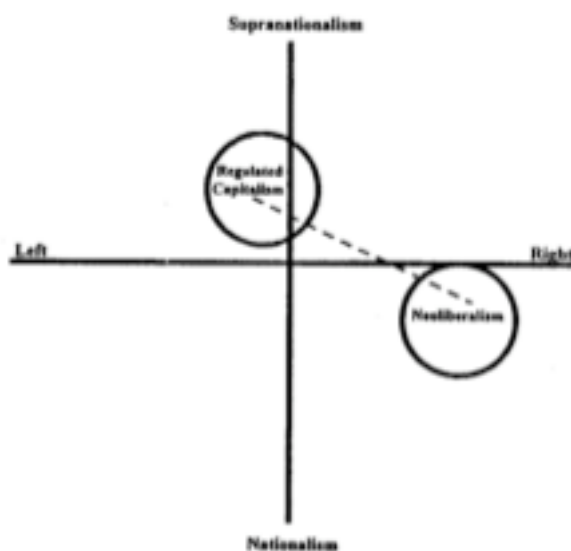


Figure 1. Dimensions of contestation in the European Union³⁹

Economic realities gradually forced the Social Democrats to adopt a less sanguine view vis-à-vis the social democratic model at the national level⁴⁰, at a time when (i) the EU's powers were growing in a number of policy areas (such as social policy, employment policy, cohesion, the protection of the environment) that were of central concern to them, (ii) institutional changes were making EU decision making more democratic through the enhancement of the powers of the European Parliament and (iii) the mobilisation of unions was seeking to reduce the overwhelming role of government and business in EU decision making, thereby rendering deepening integration a preferable and more realistic option than abandoning it⁴¹. This is why Social Democrats now lend their support to European integration as the means to pursue the political regulation of capitalism. By contrast, Right of Centre parties 'support market integration – which means that they support European integration in general terms - but they oppose policies, particularly concerning the environment, cohesion, or employment, that regulate capitalism.'⁴²

The two models differ in a number of ways⁴³. Neoliberal capitalism seeks to insulate markets

³⁸ Hooghe and Marks, "The Making of a Polity: The Struggle over European Integration."

³⁹ Ibid., p. 77.

⁴⁰ The end of the socialist experiment under François Mitterrand in France in 1983 is a turning point in that respect.

⁴¹ Marks and Wilson, "The Past in the Present: A Cleavage Theory of Party Response to European Integration," p. 447. On socialist parties and European integration see Kevin Featherstone, *Socialist Parties and European Integration* (Manchester: Manchester University Press, 1988), Richard T. Griffiths, ed., *Socialist Parties and the Question of Europe in the 1950s* (Leiden: E.J. Brill, 1993), Michael Newman, *Socialism and European Unity: The Dilemma of the Left in Britain and France* (London: Junction Books, 1983).

⁴² Hooghe, Marks, and Wilson, "Does Left/Right Structure Party Positions on European Integration?," p. 975. This does not mean that these are totally coherent groups. Rather, it means that there is much more in common between them than they do with other parties in the same country.

⁴³ Hooghe and Marks, "The Making of a Polity: The Struggle over European Integration," p. 82ff.

from the political sphere. Support for the single market project under narrowly-defined supranational supervision is coupled with decision making in intergovernmental fora where national governments retain a privileged role (as opposed to the national arena where they are faced with historically rooted social groups such as unions and directly elected parliaments). Competition extends to firms, workers as well as governments. The latter compete in an effort to attract mobile factors of production, especially capital. On the other hand, regulated capitalism involves the creation of structures and conditions that facilitate the regulation of markets, re-distribution and public-private partnership⁴⁴. Its supporters⁴⁵ accept the notion that markets – instead of governments – ought to allocate resources, but they also stress the need for (i) positive and negative regulation (promoting the provision of collective goods) which, in many cases is more effective at the European level, (ii) social dialogue and (iii) active policies that seek to enable the less well off to compete more effectively. Finally, unlike many of their opponents, supporters of regulated capitalism favour the enhancement of democratic institutions at the European level, which is where many consequential decisions are made⁴⁶. As a result, the Left – Right dimension is associated with differences in support for EU action in a number of specific policy areas⁴⁷. There is significant support for EU employment, cohesion and fiscal policy amongst mainstream Left of Centre parties but support decreases markedly as one moves to the right of the political spectrum⁴⁸.

Parties and the Politics of Implementation

Parties perform a number of key functions in representative democracy. These functions are associated with three spheres of activity⁴⁹. First, they link individuals to democratic politics by simplifying choices for voters, educating citizens, generating symbols of identification and loyalty, mobilising citizens to participate in the political process. Parties – certainly many of those that aspire to govern – maintain links to society, especially civil society bodies (such as trade unions, business organisations, environmental groups etc.). These links act – in addition to the media - as channels of communication that enable parties to remain *au fait* with the policy preferences of their constituencies and communicate their own to the broader electorate and in an effort to shape the terms, content and outcome of political debates. Second, parties are political organisations that - in addition to recruiting leaders, seeking office, training political elites - articulate and aggregate political interests. Interest aggregation is a particularly important function because of voter de-alignment. As a result of de-alignment ‘catch-all’ parties seek to simultaneously appeal to multiple constituencies. The settlements achieved in this context and the capacity of the leadership to handle internal opposition are powerful signals indicating a party’s priorities and determination to pursue certain kinds of policies but not others. Third, in the political system construed narrowly,

⁴⁴ In other words, what is at stake is the regulation of capitalism, not its future. See Seymour Martin Lipset and Gary Marks, "Social Democracy Lives On," *New Statesman*, 26 June 2000.

⁴⁵ In the context of the EU Jacques Delors has coined the term *espace organisé* to describe this model.

⁴⁶ Neither of these groups is completely homogenous. For example, support for regulated capitalism or aspects thereof can be found amongst Christian Democrats.

⁴⁷ Hooghe, Marks, and Wilson, "Does Left/Right Structure Party Positions on European Integration?," figure 2. It is worth noting that the level of support varies across policy areas.

⁴⁸ This concerns parties that compete primarily on the basis of the class cleavage which remains the dominant feature of West European party systems. For a discussion of other cleavages see Marks and Wilson, "The Past in the Present: A Cleavage Theory of Party Response to European Integration," pp. 438-9. Moreover, Hix’s examination of the major policy statements adopted by the (national and EP) party leaders of the Socialist, Christian Democratic, Liberal and Green European party federations between 1976 and 1994, led him to the conclusion that ‘the policy location of the party families on EU socio-economic issues resembled their ideological locations in the domestic arena.’ See Hix, "Dimensions and Alignments in European Union Politics: Cognitive Constraints and Partisan Responses," p. 86.

⁴⁹ Russell J. Dalton and Martin P. Watterberg, "Unthinkable Democracy: Political Change in Advanced Industrial Democracies," in *Parties without Partisans: Political Change in Advanced Industrial Democracies*, ed. Russell J. Dalton and Martin P. Watterberg (Oxford: Oxford University Press, 2000), pp. 6-10.

parties create majorities, organise the government, determine policy outputs, organise dissent and opposition, ensure political responsibility and control government administration. For example, in the parliamentary arena parties pursue their objectives in the context of high profile events such as Prime Minister's question time but also in less conspicuous fora or opportunities such as committee debates, hearings and reports that attract less attention from the general public but often more attention from the corresponding target groups.

In other words, the influence of parties can be expected to go beyond the stage of policy formulation and is not limited to office tenure. Parties in government can make a number of choices that affect the way in which abstract rules are put into effect. First, since EU regulatory policies often prescribe *minimum* standards, the government of the day retains a margin of manoeuvre. Second, the government can give priority to certain issues over others and – as a consequence, adapt the resources that it devotes to the implementation of a given provision. Finally, the government of the day can adapt the incentives and sanctions that it uses vis-à-vis the target group. More specifically, governments – just like entire political systems – cannot attend to all issues that compete for their attention. Political parties can shape the distribution of attention within a given political system by raising certain issues⁵⁰ or by sustaining debate on them. For example, parties can choose to highlight the unintended consequences of a given policy while this policy is being carried out. In addition, parties can shape implementation patterns by offering alternative solutions for tackling a given issue. Finally, in addition to issues and solutions, parties can propose alternative combinations of resources, including incentives and sanctions. In all cases, since attention, policy alternatives and the resources required for their implementation are finite, political parties – especially those that aspire to govern a country – make choices that reflect their priorities. These choices are made not only in 'heroic' moments, e.g. in the context of the campaigns that precede general elections, but also in other electoral campaigns (e.g. for European and local elections) as well as the context of routine policy making.

On the basis of this analysis of party positions on European integration (and specific aspects or manifestations thereof) it is possible to define the 'partisan hypothesis' regarding the implementation of EU public policy at the domestic level: the historically defined party preferences on European integration shape a party's stance on the implementation of individual policies. In other words, the location of a party within the EU's structure of political contestation is hypothesised to be a predictor of its stance on the implementation of individual policies. Since the issue of European integration is assimilated into pre-existing ideologies that are shared by party leadership, activists and constituencies and mirror enduring commitments on core domestic issues, these historically defined prisms come into play when EU policy takes precise meaning, i.e. when it is implemented at the national level. As regards ruling parties and their main opponents (the focus of this paper), supporters of regulated capitalism are expected to support the implementation of policies that reflect this model, whilst neoliberals are expected to oppose it. When in power, they are expected to exercise discretion in a manner that reflects their commitment to the aforementioned 'prisms'. In other words, the implementation of EU policy at the national level activates long-standing, historically defined cleavages. Political parties use these prisms to make sense of what is at stake, define their position and seek to shape outcomes.

The next section discusses the implementation of Directive 93/104 (Working Time Directive) in Britain. Four factors motivate the decision to focus on this directive and country. First, the Directive lends itself to the analysis of the 'partisan hypothesis' outlined above for it left a number of important choices at the discretion of the member states. If the 'parties matter' thesis holds, one would expect parties to differ (both when in power and in opposition) in terms of the use of this margin of discretion. Second, this case study focuses on one state,

⁵⁰ Ian Budge, David Robertson, and Derek Hearl, *Ideology, Strategy and Party Change: Spatial Analyses of Post-War Election Programmes in 19 Democracies* (Cambridge: Cambridge University Press, 1987), 391.

namely Britain, so as to keep the institutional framework and the policy tradition constant. Third, Britain has a very good track record in the implementation of EU policy due, to a large extent, to the effectiveness⁵¹ of its administration. As a consequence, the administration could be expected to cope effectively with a directive - such as the Working Time Directive - that generated significant pressure for adaptation of the domestic policy regime⁵². Finally, given the main institutional characteristics of the Westminster model – namely the concentration of executive⁵³ power in one party, the dominance of the Cabinet over Parliament, a two-party system, the concentration of the essence of legislative power in one chamber whose members are elected on the basis of the ‘first past the post’ system in single-member constituencies⁵⁴ - electoral contests are of cardinal importance. As a result of the 1997 general election and the change of party in government that followed it, one would expect to observe differences in the domestic pattern of implementation, not least because the outgoing Conservative government fiercely opposed the Directive, while the (opposition) Labour Party supported it. To illustrate the point about partisan influence on the politics of implementation, it is important to demonstrate not only that when faced with the same conditions, party A acts differently from party B. Rather, it is important to show precisely how party behaviour is linked to their respective historically defined prisms.

Using process tracing to analyse this case ‘diachronically’ (on the basis of what George and Bennett called ‘before-after research design’⁵⁵), and drawing on documentary material and interviews with elite participants, analysis here focuses on the comparison of the behaviour of the British government before and after the 1997 general election. Analysis shows (i) that each party’s historically defined ‘prism’ filters new challenges and leads to sharply diverging attitudes and (ii) how the change in government led to differences in the domestic pattern of implementation. This change is consistent with the ‘partisan hypothesis’ outlined above: since parties rely on different *Weltanschauungen* and are located in different parts of the EU political space, their action reflects these differences in the context of the implementation of EU policy at the domestic level.

THE WORKING TIME DIRECTIVE IN BRITAIN

Times are a-changin’?

The Directive – a complex⁵⁶ piece of legislation, originally proposed in 1990 but adopted in amended form in 1993 - establishes compulsory minimum standards regarding

- i. the amount of time a worker can be required to work (48 hours per week⁵⁷ on average including overtime);
- ii. the amount of time a night worker can be required to work (an average of eight⁵⁸ in

⁵¹ Tanja A. Börzel, "Non-Compliance in the European Union: Pathology or Statistical Artefact?" *Journal of European Public Policy* 8, no. 5 (2001): 803-24.

⁵² Treib, *Die Bedeutung*, p. 183.

⁵³ This applies to the policy areas that have not been affected by devolution.

⁵⁴ Arend Lijphart, *Patterns of Democracy: Government Forms and Performance in Thirty-Six Countries* (New Haven, CT: Yale University Press, 1999), chapter 2.

⁵⁵ Arend Lijphart, "Comparative Politics and the Comparative Method," *American Political Science Review* 65, no. 3 (1971): p. 689. Alexander L. George and Andrew Bennett, *Case Studies and Theory Development in the Social Sciences, Basic Studies in International Security* (Cambridge, MA: MIT Press, 2004), p. 166.

⁵⁶ In that sense it differs markedly from the original proposal. See Commission of the European Communities, "Proposal for a Council Directive Concerning Certain Aspects of the Organisation of Working Time, COM (90) 317 SYN 295.

⁵⁷ This was in line with the ILO’s very first Convention dating back in 1919. P. Davies and M. Freedland, *Labour Legislation and Public Policy* (Oxford: Clarendon Press, 1993), p. 25.

⁵⁸ This limit is absolute when it comes to night work involving ‘special hazards or heavy physical or mental strain’.

- 24 hours of work) coupled with record-keeping requirements regarding the regular use of night workers⁵⁹;
- iii. a right for night workers⁶⁰ to receive free health assessments before their employment in night shifts and at regular intervals thereafter;
 - iv. a right to eleven consecutive hours of rest per day and (when the working day is longer than six hours) a right to an in-work rest break;
 - v. a right to a weekly rest period of 35 consecutive hours (including, in principle, Sunday⁶¹);
 - vi. a right to a day off each week and
 - vii. a right to four weeks' paid leave per annum that cannot be replaced by an allowance.
 - viii. Finally, when employers organise work in line with a certain time schedule, they are required to take into account 'the general principle of adapting work to the worker'⁶², especially when it comes to monotonous tasks or work at a predetermined work rate.

Aware of the fact that they were in a minority of one (on the question of principle) in the Council of Ministers, Conservative ministers concentrated on (a) delaying the adoption of the Working Time Directive in part in an effort to ensure that the Maastricht Treaty (and the opt-out from the social chapter⁶³) would enter into force first and, above all, (b) diluting the initial proposal as much as possible. The Directive offers the possibility of various derogations and exemptions, in part as concessions made in an effort to keep the British government⁶⁴ 'on board'. The most important concession was - by far - the 'opt-out' clause⁶⁵ whereby member states have the right to introduce legislation that allows individual workers to exceed the 48-hour limit⁶⁶. Others concern the exclusion of entire sectors⁶⁷ ('air, rail, road, sea, inland waterway and lake transport, sea fishing, other work at sea⁶⁸ and the activities of doctors in training') and derogations (without compensation) from the provisions on daily and weekly rest periods, breaks, limits to work at night, the weekly work limit and the reference period used to calculate working hours for various other groups, activities and occupations (such as managers, family workers and clergymen). Further derogations are possible - in particular with regards to the reference period - if agreed by the two sides of industry but only under the condition of the provision of equivalent rest periods. Member states also have the right - subject to the granting of compensatory rest periods - to vary the arrangements regarding daily and weekly rest periods, breaks, limits to work at night and the reference period (that cannot be longer than six months) in sectors such as security and surveillance, jobs involving

⁵⁹ In addition, workers who suffer from health problems related to work at night have to be transferred to suitable day work 'whenever possible' and the level of health and safety protection offered to night and shift workers must be commensurate to the nature of their work and the corresponding facilities regarding prevention and protection must be available at all times and equivalent to those offered to other workers.

⁶⁰ Certain kinds of night work can be made subject to certain guarantees under conditions laid down by national legislation and/or practice, in the case of workers who incur risks to their safety or health linked to night-time working.

⁶¹ Art. 5.

⁶² Art. 13.

⁶³ See below.

⁶⁴ F. Von Prondzynski, "Council Directive 93/104/EC Concerning Certain Aspects of the Organization of Working Time", *Industrial Law Journal* 23 (1994). Some of the British government's demands were supported by other governments. See Falkner *et al.*, *Complying with Europe*, p. 98.

⁶⁵ Art. 18(1)(b)(i).

⁶⁶ British ministers pressed hard for this concession. Whilst the Conservative government remained opposed to the proposed directive, ministers indicated in public that the principle of a 48-hour limit was acceptable if sufficient 'loopholes' were introduced to render it optional in practice. *The Guardian*, 19 May 1992, p. 7.

⁶⁷ These sectors are covered by EU legislation that was adopted later on. This paper focuses on the original directive.

⁶⁸ This refers to off-shore gas and oil exploration.

traveling⁶⁹, activities involving the need for continuity of service or production⁷⁰, sectors (such as agriculture, tourism and postal services) where there is a foreseeable surge in activity, in cases of unforeseeable circumstances, and in cases of an accident or imminent risk of accident. Moreover, when compensatory rest periods are granted, derogations regarding daily and weekly rest periods are also possible so as to take account of shift work-related requirements and cases where work is divided during the day⁷¹. Finally, the weekly rest period can be reduced from 35 to 24 hours if this is justified by 'objective technical or work organisation conditions' and paid annual leave could be limited to three weeks but only during a three-year transition period that ended in November 1999. In short, the Directive sets minimum standards⁷² in some key areas, coupled with considerable scope for discretion in others and, finally, an emphasis on the involvement of the 'social partners'⁷³.

Working time is a major issue for a number of reasons, including its impact on the individual worker's health⁷⁴, social⁷⁵ and economic effects, such as lower productivity⁷⁶. In Britain in particular these provisions were seen as a precursor of significant change⁷⁷. In procedural terms, the British tradition involves three stages, namely (i) the regulation of working time through legislation (the Factories Acts, focused on working women and children) until the 1870s, (ii) the increasing use of collective agreements rather than legislation, between employers and trade unions negotiated at sectoral or plant level after the 1870s and (iii) state intervention through legislation confined to sectors where collective bargaining had failed to develop (such as those where wage councils and trade boards existed)⁷⁸. In substantive terms,

⁶⁹ This concerns specifically jobs where the worker's place of work and his place of residence are distant from one another or where the worker's different places of work are distant from one another.

⁷⁰ These include services provided by hospitals or similar establishments, residential institutions and prisons, dock or airport workers, media, utilities, emergency services, industries where work cannot be interrupted on technical grounds, and research and development activities.

⁷¹ Cleaning is an example.

⁷² Indeed, Art. 15 stipulates that individual member states reserve the right to apply *higher* standards.

⁷³ The return to national bargaining was a key objective of British trade unions. Interviews with current and former trade union officials, London, 27 and 28 November 2008.

⁷⁴ This literature is vast. See, for example, A. E. Dembe *et al.*, "The Impact of Overtime and Long Work Hours on Occupational Injuries and Illnesses: New Evidence from the United States," *Occupational and Environmental Medicine* 62, no. 9 (2005), N. P. Gordon *et al.*, "The Prevalence and Health Impact of Shiftwork," *American Journal of Public Health* 76, no. 10 (1986), Gaston Harnois and Phyllis Gabriel, *Mental Health and Work: Impact, Issues and Good Practices* (Geneva: WHO/ILO, 2000), A. Spurgeon, J. M. Harrington, and C. L. Cooper, "Health and Safety Problems Associated with Long Working Hours: A Review of the Current Position," *Occupational and Environmental Medicine* 54, no. 6 (1997), Anne Spurgeon, *Working Time: Its Impact on Safety and Health* (Geneva: International Labour Organization, 2003). For a critical treatment see J. M. Harrington, "Working Long Hours and Health," *British Medical Journal* 308, no. 6944 (1994).

⁷⁵ See Paul E. Spector *et al.*, "A Cross-National Comparative Study of Work-Family Stressors, Working Hours, and Well-Being: China and Latin America Versus the Anglo World," *Personnel Psychology* 57, no. 1 (2004).

⁷⁶ This claim and the evidence that supports it are at least a century old. See F. S. Lee, "Is the Eight-Hour Working-Day Rational?," *Science* 44, no. 1143 (1916); A. Derickson, "Physiological Science and Scientific Management in the Progressive Era: Frederic S. Lee and the Committee on Industrial Fatigue," *Business History Review* 68, no. 4 (1994).

⁷⁷ S. Deakin and G. Morris, *Labour Law*, 4th ed. (Oxford: Hart, 2005), pp. 410-11; J. Lourie, "Employment Law and the Social Chapter," in *Britain and the European Union: Law, Policy and Parliament*, ed. Philip Giddings and Gavin Drewry (Basingstoke: Palgrave, 2004), p. 129. The Conservative government estimated that 2.7 million employees regularly work more than 48 hours a week and up to 3.8 million would be affected by the Directive's paid holiday provisions. See J. Lourie, *The Working Time Directive*, House of Commons Research Paper 96/106 (London: House of Commons Library, 1996), p. 22.

⁷⁸ Deakin and Morris, *op. cit.*, pp. 14ff. The prevalence of collective agreements and the concomitant confinement of legislation to an auxiliary role are the central features of the British tradition of 'collective *laissez-faire*'. See Davies and Freedland, *op. cit.*, Ch. 1.

a basic 48-hour week was established through collective agreement in the (trend-setting) engineering industry in the 1920s and was gradually reduced to 39 hours. However, ensuring premium rates of pay for overtime and unsocial hours of work - rather than restrictions on working hours as such, was a core concern for unions and their members throughout the 20th century, to a large extent because of low basic pay rates which meant that paid overtime had become institutionalised both for employers and entire households that relied extensively on it. As a result, the actual hours worked in various sectors, including manufacturing, regularly exceeded the basic working week⁷⁹. In addition to the culture of long working hours that underpinned many sectors of the British economy, there was no statutory annual paid leave entitlement⁸⁰. The Conservative governments of the 1980s repealed whatever legislation had remained in place⁸¹ whilst collective bargaining was rapidly losing momentum, not only because of the neoliberal reforms introduced by the Tories but also because of the considerable weakening of the trade unions and their political allies in the Labour Party who could no longer operate as an effective counter-weight.

The Politics of Transposition: Between the British Right and Left

Although the transposition phase commenced the day the Directive was formally adopted (23 November 1993), much of what followed in the British context can be traced back to the negotiation phase and a political conflict pitching neoliberalism against regulated capitalism, in line with the partisan hypothesis. From the perspective of the two main British political parties, the proposal to introduce an EC-wide directive regulating certain aspects of the organisation of working time was a clear-cut case. While the Conservatives (in power since 1979) opposed the measure, the Labour Party (then the main opposition party) supported it. Neither the preferences of the Conservative government, nor those of the Labour opposition were exclusively or even predominantly shaped by the fact that the Directive originated from the European Commission⁸². Rather, their preferences in the specific case of the Working Time Directive reflected their preferences on the issue of regulation of the economy⁸³, in line with the partisan hypothesis. Although in the case of the Conservatives the origin of the draft directive boosted opposition to it, the essence of this opposition reflected the Tories' emphasis on market liberalism⁸⁴.

Acting in accordance with more than a decade of neoliberal policies pursued at the domestic level, often in the face of staunch opposition, the Conservative government opposed the Directive on grounds of principle. It was, they felt, exactly the kind of regulation that successive Conservative governments since 1979 had sought to abolish in the UK on grounds of economic efficiency, along the lines of the neoliberal model. This was precisely the reason why Margaret Thatcher's government supported the establishment of the single European market: it was thought to cement domestic reforms and extend them across the then EC. In

⁷⁹ European Foundation for the Improvement of Living and Working Conditions, *Bulletin of European Studies on Time - Statistics and News*, ed. Alexander Wedderburn, vol. 9 (Luxembourg: Office for Official Publications of the European Communities, 1996), pp. 17-18; Deakin and Morris, op. cit., p. 309. Eurostat data indicate that 31 per cent of full-time employees worked more than 46 hours a week in Britain, while according to the Royal College of Nursing 19 per cent of nurses were working more than 48 hours a week in 1996. See *Financial Times*, 13 November 1996, pp. 20, 10.

⁸⁰ According to Labour Party and TUC estimates approximately 2.5 million British workers had no contractual paid leave. See *The Independent*, 12 November 1996, p. 1; *Financial Times*, 28 September 1998, p. 8.

⁸¹ Deakin and Morris, op. cit., p. 308.

⁸² After all, the Commission was at the heart of the creation of the single market that the Conservative British government supported wholeheartedly.

⁸³ Interviews with Conservative former Employment Secretary, Labour former Shadow Employment Secretary and former trade union leader, London, 11 November 2008, 13 January 2009 and 21 November 2008 respectively.

⁸⁴ Thus the proposed directive run counter to both the nationalism and market liberalism which characterise many Conservative parties. See Marks *et al.*, "Party Competition and European Integration in the East and West," p. 170.

her Bruges speech in 1988 she famously stated that ‘[w]e have not successfully rolled back the frontiers of the state in Britain, only to see them re-imposed at a European level with a European super-state exercising a new dominance from Brussels’ adding that ‘we certainly do not need new regulations which raise the cost of employment and make Europe’s labour market less flexible and less competitive with overseas suppliers’⁸⁵. This core principle was the primary motive behind the Major-led Conservative government’s vehement opposition⁸⁶ to the proposed directive – mirroring the views of business organisations, notably the CBI⁸⁷ - irrespective of the corresponding minister’s views on European integration. It remained the Conservative government’s key motive both when the employment portfolio was held by a Euro-sceptic (Michael Howard) and a pro-European⁸⁸ (David Hunt) member of the Cabinet⁸⁹. This view was consistent with the preferences of the Conservative government on the broader issues of the EC Charter of the Fundamental Social Rights of Workers⁹⁰ and the opt-out from the Maastricht Treaty’s social chapter - itself an achievement of the Major-led Conservative government. Echoing the views of his predecessor⁹¹ and British business organisations⁹², John Major called the social chapter ‘an unemployment charter which will destroy our future prosperity. It will prevent the creation of jobs. It is a socialist charter and we want nothing of it’⁹³.

In contrast, having unsuccessfully opposed neoliberalism on the domestic front, the Labour Party seized on the opportunity and supported the Directive already since the submission of the Commission’s initial proposal in the summer of 1990. This stance was part of an increasingly evident pro-European attitude that was - crucially - motivated by substantive policy concerns. Although the issue of ‘Europe’ had troubled the party that under Michael Foot fought the 1983 general election explicitly calling for the UK’s withdrawal from the EC, Neil Kinnock made European integration a central component of party policy reform along social democratic lines, a key decision that was confirmed after John Smith’s election as party leader. Under both Kinnock and Smith, the Labour Party consistently supported the charter⁹⁴ and opposed the British opt-out from the social chapter. The Labour Party fought the 1992 general election explicitly calling for the introduction of high employment standards – ‘including the best health and safety legislation’ – as well as the abolition of Britain’s opt-out from the social chapter agreed in Maastricht. John Smith saw the social chapter as ‘essential in transforming a market for business into a Community for people’⁹⁵ and the British opt-out as ‘an absurdity’ tantamount to denying British citizens ‘the social rights, the social

⁸⁵ In the same speech she declared that she supported ‘action to free markets, action to widen choice, action to reduce government intervention. Our aim should not be more and more detailed regulation from the centre: it should be to deregulate and to remove the constraints on trade.’

⁸⁶ In a speech to the Institute of Directors, John Major stated that he opposed the proposed directive because he ‘believed strongly in de-regulation and in getting government off the back of business and was not prepared to let Brussels intervene in areas which Westminster had decided to leave alone’. See *Financial Times*, 29 April 1992, p. 14.

⁸⁷ See the letter of Brian Corby (then President of the CBI), *The Times*, 8 May 1992.

⁸⁸ See *The Guardian*, 31 May 1993, p. 2 and *The Sunday Times*, 30 May 1993.

⁸⁹ Even pro-European Conservative backbench MPs criticised the draft directive on the basis of the argument that it would stifle job creation and undermine the competitiveness of the British economy. See, for example, *Hansard*, 20 May 1992, col. 453.

⁹⁰ The Charter - a declaration of political intent, rather than a legal document - was adopted in December 1989 by the Heads of State or Government of all member states except Britain. The European Council invited the Commission (that had already drawn up an action programme) to submit, at the earliest opportunity, initiatives falling within the competence of the Community. Title I referred explicitly to the duration and organization of working time.

⁹¹ See Margaret Thatcher’s statement on the charter, *Hansard*, 12 December 1989, col. 845.

⁹² See, for example, J. Banham, “Social Charter Will Worsen Dole Queues across Europe”, *The Times*, 29 November 1991.

⁹³ *Hansard*, 20 July 1993, col. 192.

⁹⁴ Neil Kinnock, *Hansard*, 12 December 1989, col. 847.

⁹⁵ *Hansard*, 20 October 1992, col. 321.

opportunities and the social advantages which the whole Community wants for its citizens⁹⁶. Both decisions reflected the party's support for the model of regulated capitalism as a way of promoting 'the creation of a high-productivity, high-skill and high-wage economy in Britain and in the Community, instead of seeking to compete on the basis of low costs and low skills'⁹⁷. In the debate in the House of Commons on the British opt-out from the social chapter, Smith⁹⁸ castigated the Conservative government for persisting in 'the policies of social devaluation which lie behind the opt-out from the social chapter' and 'fail[ing] to understand that low wages, inadequate skills and persistent under-investment are the real drag anchors on Britain's economic performance', arguing instead that Britain has 'no future as the sweatshop of Europe'⁹⁹, trying 'to compete against Taiwan on wages rather than against Germany on skills'¹⁰⁰. In other words, for the then Leader of the Labour Party, at the heart of the debate on the opt-out was 'a *profound difference about the kind of policies that Britain needs* if we are to succeed and to hold our own in a competitive world'¹⁰¹.

Support for the social chapter (and its individual manifestations) within the Labour ranks was not confined to the party leadership or the parliamentary party. Indeed, it was gradually amplified by the trade unions (one of the main targets of the reforms introduced by the Conservative governments during the 1980s¹⁰²) whose leadership increasingly saw in Brussels and specifically Jacques Delors, then President of the European Commission, a potential ally¹⁰³. After more than a decade of Conservative rule in Britain, Delors' social agenda looked to them like nothing short of an oasis in the desert. Delors made a major contribution to the pro-European turn of the British trade union movement – seen until then as 'one of the largest pockets of anti-European resistance in the UK'¹⁰⁴ - when he addressed the Trades Union Congress conference in 1988. Delors' plea focused on a particular *kind* of Europe, namely one that would be couched in regulated capitalism. He earned a standing ovation at the conference by (a) stating that the successful completion of the single market programme entailed a strong commitment to workers' rights and conditions and (b) calling for improved workers' participation rights, the extension of employee rights to life-long education, better health and safety protection and improved living and working conditions¹⁰⁵, at a time when - as the leader of a major trade union put it, '[i]n the short term we have not a cat in hell's

⁹⁶ *Hansard*, 23 July 1993, cols. 632-3.

⁹⁷ *Hansard*, 23 June 1993, cols. 311-12.

⁹⁸ *Hansard*, 22 July 1993, cols. 538-9.

⁹⁹ Reformers like William Cobbett and Robert Owen have supported this argument in Britain since at least the first half of the 19th century.

¹⁰⁰ More than a decade later, when asked to account for the UK's combination of longer working hours and lower productivity in comparison to the USA, France and Germany, representatives of the CBI, the Association of Chambers of Commerce and the Federation of Small Businesses publicly acknowledged that 'lower labour force skills and relative lack of capital investment put the United Kingdom at a disadvantage in comparison with some international competitors and that overtime working was probably used to compensate for these deficiencies. [...] Training and management skills were other relevant factors.' See House of Lords, *The Working Time Directive: A Response to the European Commission's Review*, European Union Committee, 9th report, session 2003-04 (London: House of Lords, 2004), para. 2.32.

¹⁰¹ *Hansard*, 22 July 1993, col. 538-9. Emphasis added.

¹⁰² See Davies and Freedland, *Labour Legislation*, Chapter 9.

¹⁰³ Interviews with former trade union leaders (London, 21 and 25 November 2008) and officials (London, 28 November 2008).

¹⁰⁴ D. Buchan, "Editorial - Now for the Workers", *Financial Times*, 8 September 1988, p. 24. Even their previous stance was motivated by *policy* concerns. A former senior TUC official recalled going to a Commission-organised meeting in Brussels in the mid-1970s 'to argue against legal limits on working time'. See B. Callaghan, *Employment Relations: The Heart of Health and Safety* (Coventry: Warwick Industrial Relations Research Unit/Warwick Business School, 2007), p. 12.

¹⁰⁵ *The Times*, 9 September 1988.

chance of achieving that at Westminster¹⁰⁶. The harmonisation of terms and conditions - including the introduction of a common minimum wage and a 35-hour working week, were core aspects of the widely supported composite motion that called for a campaign on the part of trade unions to combat the unfettered ambitions of the free marketeers¹⁰⁷.

In addition to the opposition in principle, the Conservative government's strategy was couched in the notion that the proposed directive was a social policy measure whose adoption required unanimous agreement, rather than a health and safety measure (that, consequently, could be adopted by QMV), an argument that ignored the fact that the provisions regarding health and safety were part of the section of the Treaty that deals with social policy¹⁰⁸. The opposition in principle, the effort to delay the adoption of the directive and the argument over its legal basis were not mere tactical devices. Rather, they were the prelude to a robust and sustained opposition to the implementation of the Directive in Britain. Although, as the then British Employment Secretary acknowledged, 'the teeth ha[d] been drawn from the original proposal'¹⁰⁹, he abstained from the final vote in the Council of Ministers¹¹⁰ and promptly announced that the British government would seek to have the Directive annulled¹¹¹ by the European Court of Justice (ECJ) despite having been warned of the likelihood of a defeat¹¹².

In its submission to the ECJ the British government attacked the Directive on grounds of its legal basis, the principle of proportionality, the alleged misuse of power and an infringement of an essential procedural requirement¹¹³, in an effort to have the Directive annulled. Despite the Conservative government's determination¹¹⁴, the ECJ rejected these arguments almost in their entirety¹¹⁵. The ECJ's ruling was issued on 12 November 1996, i.e. less than two weeks before the deadline for the transposition of the Directive into national legislation. As a direct consequence of the Conservative government's decision to initiate court proceedings, and the attendant refusal to launch a consultation on the transposition of the Directive, the UK-based firms that were likely to flout the Directive (or at least its spirit), had little or no incentive to phase in changes in their patterns of organisation and operation during the three-year transition period. This was consistent with the preferences of a government that was ideologically committed to neoliberalism but left the workers who needed it most - i.e. those

¹⁰⁶ Ron Todd, then General Secretary of the Transport and General Workers' Union, cited in *The Guardian*, 9 September 1988.

¹⁰⁷ *The Guardian*, 8 September 1988.

¹⁰⁸ Moreover, the provision of Art. 118a that formed the legal basis of the Working Time Directive was included in that part of the Treaty on the initiative of the Danish government in the context of the negotiations that led to the Single European Act that Mrs Thatcher's Conservative government supported. See M. Gray, "A Recalcitrant Partner: The UK Reaction to the Working Time Directive," *Yearbook of European Law* 17 (1998), p. 346.

¹⁰⁹ *Independent*, 2 June 1993, p. 2; *Financial Times*, 2 June 1993, p. 1. The Director General of the CBI had acknowledged this at an earlier stage of the process. See *The Times*, 26 June 1992.

¹¹⁰ The active involvement in the negotiations indicates the British government's awareness of the fact that the Directive would eventually come into effect while the abstention was meant to indicate the opposition in principle whilst avoiding the damaging consequences of being seen to be, once again, in a minority of one.

¹¹¹ C-84/94 *United Kingdom v. Council*, *European Court reports*, 1996, p. I-05755.

¹¹² *The Guardian*, 19 May 1992, p. 7.

¹¹³ For a detailed discussion see Gray, "A Recalcitrant Partner", pp. 344ff.

¹¹⁴ The Conservative government had commissioned Professor John Harrington (a leading occupational health expert) to write a report regarding the impact of working time on accidents and ill health. On the eve of the announcement of the decision of the ECJ, he publicly criticised the government's use of his report, stating 'I believe working hours are a health and safety issue. The maximum limit of 48 hours a week, set out in the directive (...) is a sensible restriction'. He declined to attend court hearings because he disagreed with the government's case. See *Financial Times*, 12 November 1996, p. 1.

¹¹⁵ The only exception concerned Art. 5 of the Directive regarding the inclusion 'in principle' of Sunday in the weekly rest period of 35 consecutive hours.

who were employed by firms that needed to change¹¹⁶, deprived of the protection that the Working Time Directive was meant to offer. Indeed, sectors where excessive working hours were prevalent were also characterised by low levels of union membership and low basic pay rates. At the same time, there was little the government's opponents could do to bring about change while the issue was *sub judice*. Despite the presence of some pockets of resistance (found in workplaces where low pay was prevalent, leading to demand for overtime), trade union officials were becoming increasingly aware of the opportunities offered by the prospect of the implementation of the Directive in a manner that combined the fight against unemployment, increased pay and reduced working time. A trade union official noted the example of staff of the Post Office:

‘the strategy that emerged was to increase staff, increase pay and reduce working hours [...] There were people working 80-90 hours at the time. So, the plan was to seek to reduce gradually the working hours, say, over a five-year period. We realised there was a trade-off between working hours and pay but we did a full calculation of costs for the employer under the Directive and realised that the majority would be better off when they were on basic pay. Only 80-90 hoursers stood to lose.’¹¹⁷

Moreover, during that period the Labour Party was engaged in a process of substantive policy reform, following Tony Blair's election as party leader in 1994. The core feature of the party's policy reform was the determined and sustained effort to shed the image of ‘old Labour’ in favour of decidedly business-friendly preferences - including emphasis on the ‘sound money’ paradigm and flexible labour market¹¹⁸ - exemplified by the party's business manifesto¹¹⁹. This was done in an effort to neutralise business leaders and increase the party's cross-class appeal.

The Conservative government's response to the decision of the ECJ was twofold. It announced¹²⁰ that it would push for Treaty reform¹²¹ to ensure that Britain would be exempted from the scope of the Working Time Directive in line with the spirit of the British opt-out from the social chapter and it was prepared to use its veto and block the ongoing intergovernmental conference (IGC) convened to deal with Maastricht's ‘left-overs’. In the meantime, it would ‘symbolically obey’ the Directive¹²² while its opponents in the trade union movement – including major unions like Unison and GMB - sought to maintain the pressure by publicly threatening¹²³ to take legal action against the government and those in the Labour Party remained committed to the Directive, portraying it as a sensible and fair measure¹²⁴. At

¹¹⁶ The catering industry is a good example.

¹¹⁷ Interview, Leeds, 18 November 2008.

¹¹⁸ The party's policy reform was coupled with the continuation of the internal institutional reforms - initiated by Kinnock and Smith - involving the reduction of union power within the Labour Party against the backdrop of declining union membership.

¹¹⁹ This document was adopted in the run up to the general election of 1997 as an illustration of the party leadership's determination to distance itself from ‘old Labour’ and what business organisations perceived as anti-business preferences. See J. Edmonds, “Positioning Labour Closer to the Employers: The Importance of the Labour Party's 1997 Business Manifesto,” *Historical Studies in Industrial Relations*, no. 22 (2006).

¹²⁰ John Major speaking in the House of Commons. *Hansard*, 12 November 1996, cols. 151-2.

¹²¹ The British Permanent Representative to the EU tabled the relevant proposals on the same day. *The Independent*, 13 November 1996, p. 1.

¹²² *The Guardian*, 12 November 1996, p. 1.

¹²³ *The Guardian*, 11 November 1996, p. 4; Financial Times, 11 November 1996, p. 10. The threat was credible. Two cases had been brought. See J. Lourie, *Working Time Regulations SI 1998 No 1833*, House of Commons Research Paper 98/82 (London: House of Commons Library, 1998), p. 8.

¹²⁴ Tony Blair and Margaret Beckett, *Hansard*, 12 November 1996, cols. 152, 156. This terminology was meant to further enhance New Labour's image as the party that sought to promote fairness, rather than ‘favours’ to unions.

the same time, examples of change in the real economy were beginning to emerge. The first agreement on the application of the Directive in the UK was reached in November 1996 between the Heating and Ventilating Contractors' Association and the Manufacturing Science Finance (MSF). It provided for an extended reference period of 12 months for calculating average weekly working hours to ensure compliance with the 48-hour limit¹²⁵.

The consultation document issued in December 1996¹²⁶ in the context of the process of transposition contained no draft legislation but plenty of evidence of the Conservative government's determination to undermine the operation of the Working Time Directive in Britain, in an effort to protect as much as possible of the domestic neoliberal policy *acquis*. This effort was so pronounced and determined - an extension of the politics of policy formulation at the domestic level - that in parts the intentions of the Tory government fell far short of the requirements of the Directive¹²⁷, in line with the partisan hypothesis. After re-stating its opposition in principle and its determination to ensure through the on-going IGC that the Directive would not apply in the UK¹²⁸, the consultation document indicated that the Directive would create - through the UK legislation that would transpose it - employee rights that a future Conservative government would repeal. It informed employers that if they incorporated these statutory entitlements and obligations as normal parts of employment contracts, they might find it difficult to reverse them 'when the directive and any implementing measures no longer apply'¹²⁹. In addition to betraying excessive optimism regarding the Conservative party's electoral prospects, the opening paragraphs of the consultation document set the tone for the substantive treatment of the Directive's provisions.

Coupled with the decision in principle to make maximum use of the flexibility built into the Directive, such as the opt-out, in line with the wishes of employers' organisations, the consultation document provided ample evidence of the Conservative government's determination to undermine the operation of the Directive in the UK. First, the Conservative government was minded to reduce significantly the *scope* of the application of the Directive through an excessively broad understanding of the sectors that are excluded from the scope of the Directive. So, in addition to air, rail, road, sea, inland waterway and lake transport explicitly mentioned in the Directive, the Conservative government sought to exclude workers who are not primarily engaged in these sectors but are linked to them by spending all or the greater proportion of their time carrying out 'transport activities', such as delivery of goods¹³⁰. The same outcome was sought in relation to (a) any employee whose work had 'a clear enough connection' with an excluded sector - the telling example being 'retail staff who work in an airport'¹³¹ - and (b) night work¹³². Even more important was the Conservative government's decision to opt for a blanket clause that would give meaning to this mechanism without referring to a comprehensive - and therefore *limiting* - list. This is so because 'there would be so many possible [similar] examples that no comprehensive list could ever be drawn

¹²⁵ See M. Hall, New working time Regulations take effect, EIROOnline, 28 October 1998, <http://www.eurofound.europa.eu/eiro/1998/10/feature/uk9810154f.htm> (accessed 2 February 2009).

¹²⁶ DTI, *A Consultation Document on Measures to Implement Provisions of the EC Directive on the Organisation of Working Time ('the Working Time Directive')*, URN 96/1126 (London: DTI, 1996).

¹²⁷ C. Barnard, "The Working Time Regulations 1998," *Industrial Law Journal* 28 (1999), p. 61.

¹²⁸ DTI, *A Consultation Document*, pp. 1-2.

¹²⁹ DTI, *A Consultation Document*, para. 1.6.

¹³⁰ DTI, *A Consultation Document*, para. 3.3.

¹³¹ DTI, *A Consultation Document*, para. 3.3. The cited example is particularly revealing because the retail sector in Britain has extremely low levels of union membership and thus workers do not enjoy the protection offered by membership of a union.

¹³² The consultation document excludes from the scope of the provisions regarding night workers cases where 50 per cent or less of an employee's working days do not involve night work (para. 9.5). This appears to contradict the definition produced by the combined reading of paras. 3 and 4 of Art. 2 of the Directive.

up'¹³³. Second, the Conservative government explicitly justified the use of the 'copy-out' technique for transposition by stating openly that 'a higher degree of certainty could only be achieved at the expense of achieving the widest possible scope for the exclusions under implementing legislation'¹³⁴. In other words, the refusal to offer a substantive interpretation of the Directive's provisions that required it was a calculated attempt to reduce its scope. This would place undue burden on the employees who needed the protection that the Directive is meant to offer for they would have to take costly legal action to assert their rights¹³⁵. Third, the Conservative government was minded to combine copy-out with the cumulative use of the criteria mentioned in the Directive for the definition of working time. However, this would mean that rest breaks (including lunch breaks), time 'on call' and time spent by a worker carrying out tasks for which the law gives them rights to paid time off (such as those performed by employee health and safety representatives) would not count as working time¹³⁶. Fourth, although the Conservative government acknowledged that the duration of the rest break should produce a genuine rest for the workers concerned, it decided that 'in principle, there seems no reason why the statutory rest break must be any more than, say, five minutes'¹³⁷. Finally, the consultation document did not offer a mechanism for the establishment of 'workforce agreements'¹³⁸ to be reached in workplaces where there was no recognised trade union. The consultation period ended on 6 March 1997, i.e. less than two months before the general election of May 1997 which the Conservatives fought promising to extend the opt-out from the social chapter and ensure that Britain would be exempted from the Working Time Directive¹³⁹. New Labour's landslide victory paved the way for the transposition on the Directive into UK law in line with the party's promise to end the British opt-out from the social chapter.

The party's 1997 election manifesto contained a commitment to that effect¹⁴⁰ but the decision in principle¹⁴¹ was coupled with (a) an overall business-friendly tone and (b) language that explicitly alluded to 'family-friendly working practices', and – occasionally – productivity. None of these necessarily ran counter to the preferences of the supporters of the Directive within the Labour Party but, taken together, they were the prelude to important choices made by the first New Labour administration when it transposed the Working Time Directive.

The transposition of the Directive by the New Labour government offers clear evidence in support of the partisan hypothesis in two senses. First, it differed clearly from the intentions outlined in the Conservative government's consultation document. Second, it echoed the centrist moderation that permeates the entire New Labour project, i.e. the reformed party's

¹³³ DTI, *A Consultation Document*, para. 3.4.

¹³⁴ DTI, *A Consultation Document*, para. 3.5.

¹³⁵ The same cannot be said of the employers who were not likely to comply because this method of transposition, coupled with the statement found in the opening paragraph, would not change the structure of incentives for them thus, ultimately, failing to bring about change.

¹³⁶ A worker who is taking a rest break is not working, nor is she carrying out her activities or duties. Thus, if the aforementioned method were to be used, two of the three criteria mentioned in the Directive would not be fulfilled. See DTI, *A Consultation Document*, paras. 3.11, 3.12.

¹³⁷ DTI, *A Consultation Document*, para. 6.4.

¹³⁸ These are concluded by management and elected representatives of the workers.

¹³⁹ 'No Conservative government will sign up to the Social Chapter or introduce a national minimum wage. We will insist at the Intergovernmental Conference in Amsterdam that our opt-out is honoured and that Britain is exempted from the Working Time Directive: if old agreements are broken, we do not see how new ones can be made'. See *You can only be sure with the Conservatives*, <http://www.psr.keele.ac.uk/area/uk/man/con97.htm>

¹⁴⁰ *New Labour because Britain deserves better*, <http://www.psr.keele.ac.uk/area/uk/man/lab97.htm>

¹⁴¹ The mere reference to the decision in principle is unsurprising because (a) election manifestos are by necessity fairly abstract documents and (b) only a small number of key economic decisions – such as the independence of the Bank of England and the minimum wage – had been fully worked out by the time of the 1997 general election. Interview with former trade union official, London, 28 November 2008.

historically defined ‘prism’, seeking to reconcile a flexible labour market with fair minimum standards¹⁴². The consultation document issued by the New Labour government set the tone by highlighting three important points that underpinned its subsequent action. The implementation of the Directive in Britain would entail not only costs but *benefits* as well (including the broader policy of promoting family-friendly employment) reflecting the belief that - as the government’s White Paper indicated, ‘[t]here is no advantage to employers in exhausted employees. On the contrary, the need to work within fair, maximum hours is likely to promote more efficient working practices and innovation’¹⁴³. The proposed national legislation was a significant *addition* to health and safety protection for workers (especially the most vulnerable amongst them). Finally, the government favoured the maximum use of *flexibility*¹⁴⁴. In addition to their general tone, the New Labour government’s proposals and – ultimately, the Working Time Regulations 1998¹⁴⁵ whereby the Directive was transposed into the domestic legal order - differ from those outlined by its Conservative predecessor in a number of important respects¹⁴⁶.

Their scope is much wider. Indeed, the regulations apply not to ‘employees’ but to ‘workers’ which is a broader category¹⁴⁷, but they explicitly reject the mechanism of exclusion by association used by the Conservative government and opt for an expansive method of defining night work thus bringing under the Directive’s protective shield a wider group of workers. A shorter qualification period was established for paid annual leave while more generous provisions were introduced in the agricultural sector¹⁴⁸. Moreover, the formula used for the calculation of holiday pay was more generous (for it includes bonuses and allowances in the calculation of a week’s pay) than the method used even in the engineering industry where pay rates were not problematic¹⁴⁹. A longer in-work rest break (20 minutes counting towards working time) was established, if the working day is longer than six hours. Working time can be defined in a more extensive manner subject to agreement between employers and workers. A mechanism was put in place so that ‘workforce agreements’ can be reached where there is no recognised independent trade union¹⁵⁰ and the ‘workforce’ is defined in a manner that protects the outcome of collective agreements which means that employers are not allowed to bypass a recognised trade union. In addition, the scope of the provisions regarding night work involving special hazards or heavy physical or mental strain is broader than the requirement of the Directive. Finally, as the New Labour government was keen to point out, the regulations provide for a dual system¹⁵¹ of enforcement involving (a) individual complaints

¹⁴² Meanwhile agreements were being reached in various sectors. Examples include the agreement between the Engineering Construction Industry Association and four unions and the company-level agreement reached between Group 4 and the GMB union. See M. Hall, *New working time Regulations take effect*, EIROOnline, 28 October 1998, <http://www.eurofound.europa.eu/eiro/1998/10/feature/uk9810154f.htm> (accessed 2 February 2009).

¹⁴³ DTI, *Fairness at Work*, Cmnd 3968, 1998, para. 5.6.

¹⁴⁴ DTI, *Measures to Implement Provisions of the EC Directives on the Organisation of Working Time (the Working Time Directive) and the Protection of Young People at Work (the Young Workers Directive): Public Consultation*, URN 98/645, (London: DTI, 1998), paras. 1, 8, 9.

¹⁴⁵ Statutory Instrument 1998 No. 1833.

¹⁴⁶ M. Hall, R. Lister, and K. Sisson, *The New Law on Working Time: Managing the Implications of the 1998 Working Time Regulations* (London: Eclipse, 1998), pp. 5ff; A. Blair, J. Leopold, and L. Karsten, “An Awkward Partner? Britain’s Implementation of the Working Time Directive,” *Time and Society* 10, no. 1 (2001), p. 69; J. Lourie, *Working Time Regulations*.

¹⁴⁷ C. Barnard, “The Working Time Regulations 1998”, p. 62.

¹⁴⁸ C. Barnard, “The Working Time Regulations 1998”, p. 61.

¹⁴⁹ Interview with officials of the Engineering Employers’ Federation, London, 19 January 2009.

¹⁵⁰ This is particularly relevant for small and medium-sized firms.

¹⁵¹ By virtue of British employment legislation the Advisory, Conciliation and Arbitration Service (ACAS), an independent body set up in 1975, has a duty to promote ‘the improvement of industrial relations’ by offering conciliation, mediation, arbitration and information services. See Deakin and Morris, pp. 92-6.

to Employment Tribunals for cases regarding rest and leave entitlements and (b) inspections or prosecutions by health and safety authorities¹⁵² in cases that concern mandatory limits and (when it comes to night workers) health assessments. This was coupled with requirements imposed on employers to take all reasonable steps to meet their duties under the regulations and keep adequate records and was backed up by sanctions ranging from fines to imprisonment and a right conferred on workers to take legal action on grounds of unfair dismissal or detrimental treatment suffered as a consequence of their refusal to, *inter alia*, work in breach of the limit¹⁵³.

Nevertheless, some similarities were also evident, the most important being the actual use of the individual opt-out¹⁵⁴, in part as a result of an *arbitrage* which meant that neither business nor trade unions would see their preferences realised in their entirety¹⁵⁵, promoting instead the government's agenda for fairness at work¹⁵⁶. Prime Minister Blair – a former employment lawyer – was directly involved in the making of the key choices that informed the Working Time Regulations as well as his government's entire legislative programme in the area of employment¹⁵⁷. Thus, the government rejected¹⁵⁸ calls from the unions to (i) transpose the Directive in a minimalist, i.e. declaratory, manner that would leave significant room for negotiations between employers and employees on the details, and (ii) use the Irish model of dealing with the opt-out¹⁵⁹. Like its predecessor, the New Labour government used – though only until November 1999, in line with the Directive – the right to restrict to three weeks the statutory entitlement to paid annual leave. DTI guidance indicated that bank holidays would count towards this entitlement¹⁶⁰ and opted for a narrow definition of working time. Moreover, the provisions regarding 'workforce agreements' were introduced in a way that did not require the involvement of a recognised trade union¹⁶¹.

The regulations were challenged and subsequently amended for failing to meet the requirements of the Directive on two grounds. First, subjecting the provision of statutory paid annual leave to a qualifying period had no basis in the Directive. After having alerted the

¹⁵² These are the Health and Safety Executive (HSE) and the environmental health departments of local authorities. Sector-specific agencies such as the Civil Aviation Authority, the Vehicle and Operator Services Agency and the Office of Rail Regulation, are also involved since the implementation in 2003 of the Horizontal Amending Directive which is not covered in this study.

¹⁵³ The HSE can issue improvement notices and prohibition notices. The former instruct employers to remedy any breaches of the legislation within three months or face prosecution. Breaches of improvement and prohibition notices can lead to up to imprisonment for up to two years and an unlimited fine.

¹⁵⁴ Regulation 5(1). Thus Britain became the first and, for years, only member state to do so. As the TUC rightly pointed out there is a logical contradiction between the introduction of the 48-hour limit and the opt-out. If the former is reasonable on grounds of health and safety (as well as fairness, as New Labour rhetoric pointed out), the latter is clearly bound to lead to an unsafe system of work. See Lourie, *Working Time Regulations*, p. 26.

¹⁵⁵ The reference period used for the calculation of average weekly night work is a good example. Some unions wanted it set at 4 months, while some employers preferred 6 months or up to a year. DTI, *Measures*, para. 70.

¹⁵⁶ DTI, *Fairness at Work*.

¹⁵⁷ Interviews with former adviser to Prime Minister Tony Blair and former trade union official, London, 21 January 2009, 28 November 2008.

¹⁵⁸ Interview with former trade union leader, London, 21 November 2008.

¹⁵⁹ This involved the use of the opt-out but only for a transitional period of two years and under strict conditions. See Falkner *et al.*, *Complying*, pp. 106-7.

¹⁶⁰ Hall *et al.* p. 26.

¹⁶¹ The mechanism introduced for that purpose has been criticised by the TUC on grounds of reliability. The TUC also opposed the notion of workforce agreements signed by a majority of individual employees because the Directive refers to 'the two sides of industry' which implies the involvement of representative institutions not least because bargaining power is not distributed evenly between employers and individual employees. See Barnard, "The Working Time Regulations 1998", p. 69; Lourie, *Working Time Regulations*, pp. 25-6.

government about this issue in the context of the consultation process¹⁶², the Broadcasting, Entertainment, Cinematograph and Theatre Union¹⁶³ (BECTU) challenged this provision before the ECJ and won the case because the qualifying period had no basis in the Directive¹⁶⁴. The regulations were subsequently amended in line with the ECJ's ruling¹⁶⁵. Second, overtime was not included in the calculation of the duration of night work. When the trade union, Amicus raised the issue with the European Commission, the latter supported it and initiated proceedings against the British government¹⁶⁶. As a result, the latter amended the regulations accordingly¹⁶⁷.

Beyond Westminster and Whitehall: The Enduring Impact of New Labour's Choices

Three mutually reinforcing trends characterise the process of implementation. First, key decisions made by the New Labour government in the stage of transposition – especially those that seek to reconcile a flexible labour market with fair minimum standards - have had direct consequences for the pattern of implementation. Evidence indicates that the New Labour government's decisions reflect an enduring wish to make these fair minimum standards work in practice but these efforts have been mitigated by the government's effort to remain as faithful as possible to its historically defined business-friendly profile which is a cornerstone of the entire New Labour project. Of secondary importance is the fact that the actors who would be expected to promote reform lack the capacity to do so, in part as a result of sector-specific characteristics. Finally, the New Labour government highlighted in its consultation paper the involvement of formal institutions as one of the key differences of its own approach in comparison to that of its predecessor. Involving the HSE made sense in the light of its 'experience in going into workplaces and dealing with various kinds of businesses'¹⁶⁸, an experience that was shared by local authority enforcing units in their domain. The implications of this decision are potentially significant: the involvement of independent public institutions can de-personalise the conflict over working time in the context of the growing individualisation of the workforce in Britain, and might act as a major deterrent against unscrupulous employers. Moreover, as the government acknowledged in relation to the introduction of the national minimum wage, it 'did not want workers to have to rely on taking action against their employer themselves, as intimidation or fear of losing their job could prevent a worker from making a complaint'¹⁶⁹. The involvement of formal institutions in implementation was not, in fact, antithetical to the New Labour government's business-friendly attitude but consistent with it. The involvement of the HSE was meant to be 'the corollary of the protection of the individual opt-out', i.e. an effort to ensure that individual choice would be exercised genuinely freely¹⁷⁰. In reality though, the pattern of implementation reflects the New Labour government's (often implicit) preference for much 'softer' tools¹⁷¹ such as offering advice¹⁷² and promoting conciliation¹⁷³.

¹⁶² BECTU, Implementation of the Working Time Directive: BECTU Response, mimeo, 7 May 1998, para. 25.

¹⁶³ This sector is characterised by the prevalence of temporary and short fixed-term contracts that often last less than 13 weeks. This meant that the imposition of a qualifying period would de facto deprive thousands of workers of paid annual leave.

¹⁶⁴ C-173/99 BECTU v. Secretary of State for Trade and Industry, *European Court reports*, 2001, p. I-4881.

¹⁶⁵ Statutory Instrument 2001 No. 3256.

¹⁶⁶ Falkner *et al.* p. 105.

¹⁶⁷ Statutory Instrument 2002 No. 3128.

¹⁶⁸ Interview with HSE official, Bootle, 1 December 2008.

¹⁶⁹ DTI, *National Minimum Wage Annual Report, 2005-6* (London: DTI, 2006), p. 7.

¹⁷⁰ Interview with former adviser to Prime Minister Tony Blair, London, 27 March 2009.

¹⁷¹ Part of the government's agenda was an emphasis on family-friendly employment policies. These involved the creation of the right to demand flexible work, the work-life balance campaign launched in spring 2000 with an aim to introduce flexible working practices that enable the workforce to achieve a better work-life balance, the creation of the Employers for Work-Life Balance alliance, the establishment of the Challenge Fund that the diffusion of specialist advice regarding work-life balance policies and the creation of the Ministerial Advisory Committee on Work-Life Balance.

After the transposition of the Directive in 1998, the decision to involve the HSE in this area of policy was met with reluctance and scepticism on the part of some HSE officials. They felt that working time was not a health and safety issue, and ‘they were being asked to carry out industrial relations tasks’¹⁷⁴. Nevertheless, rather than use its own enforcers, the HSE put in place a network of seven regional Working Time Officers (WTOs). They handle only non-risk-based cases¹⁷⁵, while HSE inspectors deal with cases that involve risks¹⁷⁶. WTOs offer advice and have the power to investigate complaints by visit but no power to take enforcement action¹⁷⁷. Although it has been argued that, in general, the HSE is ‘poorly resourced’¹⁷⁸, the initial number of these officers was based on their expected workload and – more importantly – a key decision made directly by the government, in line with its broader preferences. It instructed¹⁷⁹ the HSE (and, as a consequence, local authorities) to adopt a reactive approach to enforcement¹⁸⁰ and not to treat working time as a matter of high priority. This has reduced the incentives for unscrupulous employers to adapt to the new working time-related legislation, not least because the onus is on the individual worker to involve the authorities and to do so in a manner that essentially almost ensures the lack of anonymity due to the kind of evidence that needs to be collected. This is especially relevant in sectors like catering and hospitality where low levels of basic pay and union membership mean that individual workers are in a weak position¹⁸¹. Although the route of individual legal action remains available¹⁸², in those cases, the emphasis of some elements of the institutional

¹⁷² When the regulations came into force the government’s guidance indicated that in reality the relevant authorities would first ‘explain to the employer any suggestions for remedial action’ and ‘concentrate their attentions and resources on the greatest risks and hazards’. Cited in EEF, *Implementing the Working Time Regulations: A Practical Guide* (London: EEF, 1998), pp. 88-9.

¹⁷³ ACAS performs an important role in terms of the provision of conciliation services in individual disputes. Evidence from its annual reports indicates that between 2000 and 2008 it handled on average 1877 cases in which working time was the main issue. Most of these cases were either settled or withdrawn (41.47 and 35.03 per cent on average respectively). Evidence from the annual reports of the Employment Tribunal Service indicate that of the total number of working time-related cases that actually reached the stage of Employment Tribunals each year between 1999 and March 2007, on average 831 ended successfully for the claimant (10.67 per cent).

¹⁷⁴ Interview with former senior Health and Safety Commission official, London, 20 January 2009.

¹⁷⁵ Specifically, they handle general queries on the application and interpretation of the regulations, maximum average working hours, entitlements to health assessment for night workers and compensatory rest for night workers in special circumstances, working patterns, and record keeping.

¹⁷⁶ HSE operational circular 1/3: the role of Working Time Officers, 31 March 2000, para. 4.

¹⁷⁷ Cases that warrant such action are handled by more senior HSE staff.

¹⁷⁸ See A. Edwards, “Commentary - *Barber v. RJB Mining (UK) Ltd.* in the Wider Context of Health and Safety Legislation,” *Industrial Law Journal* 29, no. 3 (2000), p. 280.

¹⁷⁹ HSE operational circular 1/5: Working Time Regulations 1998 – recording of complaints, 31 March 2000.

¹⁸⁰ This was much to the astonishment of Sir Bill Callaghan, a former senior TUC official who took over as Chair of the Health and Safety Commission in 1999. See Callaghan, *Employment Relations*, p. 4.

¹⁸¹ By contrast, in the engineering sector the levels of pay and union membership are higher and this significantly alters the balance of power between individual workers and employees. Interview with TUC regional officers, Leeds, 18 November 2008. On the impact of unions on total hours of work see D. Blanchflower, “The Role and Influence of Trade Unions in the OECD,” mimeo, 1996, <http://www.dartmouth.edu/~blnchflr/papers/UnionsOECD.pdf>

¹⁸² In *Barber v RJB Mining (UK) Ltd.* the High Court ruled that - after having worked 816 hours over the 17-week reference period, the workers involved had the right to cease working (for five weeks in one case) until their average fell within the statutory limit because - as the court explicitly acknowledged Parliament intended that all contracts of employment should be read so as to comply with the 48-hour limit. As a result, the workers have the right to take legal action without being under an obligation to wait until they actually experience damage to their health. See Edwards, “Commentary”, p. 285.

machinery often changes de facto towards ‘softer’ means such as advice¹⁸³ and persuasion¹⁸⁴. This contrasts markedly with the pro-active strategy used (a) for the implementation of the provisions regarding the national minimum wage whereby individual workers can make anonymous complaints to the Inland Revenue that can use various kinds of evidence to conduct targeted investigations of employers who are suspected of breaching the law – a system that has been praised by both the TUC and the CBI¹⁸⁵, and (b) by the Employment Agency Standards Inspectorate which carries out investigations targeted on the basis of risk (including monthly large-scale investigations)¹⁸⁶.

This does not mean that these institutional actors are failing in their duties¹⁸⁷. Indeed, trade union officials who operate at the regional level acknowledged that, faced with the choice of investigating working time-related issues and, for example, a death in a construction site, there is no real dilemma for hard-pressed HSE staff¹⁸⁸. Rather, it means that - as a result of its own decisions¹⁸⁹ - reality does not match the New Labour government’s rhetoric. It might be argued that there are two reasons why the importance of this finding should not be over-estimated. First, unscrupulous employers rarely fail to meet statutory minimum standards only in relation to working hours¹⁹⁰. In fact, as officials who operate at ‘street level’ readily point out, problems regarding working time are usually just one part of a broader set of breaches of employment legislation encountered in specific highly problematic workplaces or, indeed, sectors – such as hotels and restaurants¹⁹¹. As a result, the co-ordination of the

¹⁸³ Local authorities tend to offer advice to employers (rather than take the prosecution route) about the requirements of the regulations. See C. Barnard, "The E.U. Agenda for Regulating Labour Markets: Lessons from the UK in the Field of Working Time," in *Law and Governance in an Enlarged European Union*, ed. George A. Bermann and Katharina Pistor (Oxford: Hart, 2004), p. 203.

¹⁸⁴ ‘We have to sell the message as good practice that leads to good business with tribunal claims as the backdrop’, as a senior official of ACAS put it. Interview with an ACAS area director, London, 12 December 2008. In that sense the case of working time contrasts markedly with the implementation of the smoking ban. Interviews with local government enforcement officers, London, 9 December 2008, 7 January 2009. It is worth noting that although the HSE’s regional offices have a modest communications budgets that can be used for campaigns on working time, they would be unlikely to regard this as a high priority. See BERR, *Vulnerable Worker Enforcement Forum - Final Report and Government Conclusions* (London: BERR, 2008), p. 57.

¹⁸⁵ Citizens Advice Bureau, *Still Wish You Were Here: Continuing Non-Compliance with the Paid Holiday Provisions of the Working Time Regulations 1998* (London: Citizens Advice Bureau, 2004), p. 11.

¹⁸⁶ BERR, *Employment Agency Standards Inspectorate – Annual Report 2007/08* (London: BERR, 2008), p. 4.

¹⁸⁷ According to the HSE’s database, HSE officials issued a total of 35 working time-related improvement notices between April 2001 and early December 2008. Eleven of these notices involved public hospitals. In terms of prosecutions, five breaches (four of which concerned one incident) of the regulations were identified between April 1999 and early December 2008, involving fines worth a total of £30,750. However, the total number of improvement notices would have been much higher if the first couple of years since the transposition of the Directive were covered by the database. Indeed, 62 improvement notices had been served by mid-2004. See DTI, *Working Time - Widening the Debate: A Preliminary Consultation on Long Hours Working in the UK and the Application and Operation of the Working Time Opt Out* (London: DTI, 2004), p. 18.

¹⁸⁸ Interviews with TUC regional officers, Leeds, 18 November 2008.

¹⁸⁹ This is not the only example of inconsistency on the part of the New Labour government in this area of policy. See below.

¹⁹⁰ For example, HSE officials received 49 working time-related complaints but undertook working time-related 88 investigations during 2007-8. The second figure is higher than the first because working time-related issues are often uncovered in the context of broader investigations. See BERR, *Vulnerable Worker Enforcement Forum - Final Report and Government Conclusions* (London: BERR, 2008), p. 12.

¹⁹¹ Interviews with working time officers and ACAS officials, 4, 5 and 12 December 2008. See also NACAB, *Wish You Were Here? A CAB Evidence Report on the Paid Holiday Provisions of the Working Time Regulations 1998* (London: National Association of Citizens Advice Bureaux, 2000), para. 3.4; DTI, *Success at Work*, p. 25.

relevant agencies is of particular importance but not as forthcoming as it should be¹⁹², leading the National Association of Citizens Advice Bureaux to argue that ‘[a] general enforcement body charged with ensuring compliance with a range of basic employment rights [...] would be in a better position to maximise compliance with the range of statutory employment provisions.’¹⁹³

Second, many employees in the UK are covered by collective agreements that typically offer a higher degree of protection. However, this applies mainly to the public sector, and only to one in five private sector workers¹⁹⁴. Moreover, as union leaders were keen to point out to Prime Minister Blair during the process of transposition, the Directive and the corresponding national legislation were not meant to protect ‘union members who were protected by agreement but [...] the poor people who were not members’¹⁹⁵, nor were they meant to guard against employers who scrupulously obey the spirit and letter of the law, but against those who do not.

Indeed, the government’s initiative on ‘vulnerable workers’¹⁹⁶ highlights both its awareness of enduring problems regarding standards as well as its preference for soft tools – in line with its determined effort to be as business-friendly as possible. Following the government’s acknowledgement of the fact that progress made on the legislative front was not matched by the desired degree of change on the ground¹⁹⁷, the Vulnerable Worker Enforcement Forum was established in June 2007. It is chaired by the Employment Relations Minister and it brought together representatives of trade unions, enforcement agencies, businesses and advice bodies and sought to examine (i) the nature and extent of abuse of workplace rights, (ii) whether existing enforcement and support mechanisms tackle abuses effectively and (iii) the need for reforms. As a result, the government has decided to focus on (a) improving awareness, (b) encouraging the reporting of abuses, (c) improving information-gathering and information-sharing between the relevant enforcement agencies and (d) creating the Fair Employment Enforcement Board (bringing together representatives of enforcement agencies, trade unions, business and advice bodies) to oversee the creation of a new helpline and help improve collaboration on multi-faceted investigations¹⁹⁸ but does not have the power to recommend policy reforms¹⁹⁹.

Moreover, the government – in partnership with the CBI and the TUC - has been active in promoting change by showcasing examples of companies that successfully met the challenges posed by the long hours culture. In a series of ‘master classes’ held in 2004 and 2005 businesses - such as Rolls Royce, PricewaterhouseCoopers, British Telecommunications – shared with other companies the rationale for and the experiences of managing change in work patterns, involving reduced working hours whilst maintaining or even improving productivity levels. These case studies were subsequently written up and published by the

¹⁹² A senior official of ACAS argued that ‘The agencies are very poor at talking to each other. Many think that they would breach confidentiality rules if they talked to each other.’ Interview, London, 12 January 2009. Crucially, the notion of more ‘joined-up’ work has support amongst employers. See Callaghan, *Employment Relations*, pp. 14-15.

¹⁹³ NACAB, *Wish You Were Here*, para. 3.39. See also Citizens Advice Bureau, *Still Wish You Were Here*, p. 11.

¹⁹⁴ H. Grainger and M. Crowther, *Trade Union Membership 2006* (London: DTI, 2007).

¹⁹⁵ Interview with former trade union leader, London, 21 November 2008.

¹⁹⁶ A vulnerable worker is ‘someone working in an environment where the risk of being denied employment rights is high and who does not have the capacity or means to protect themselves from that abuse. Both factors need to be present.’ See DTI, *Success at Work* (London: DTI, 2006), p. 25.

¹⁹⁷ DTI, *Success at Work*.

¹⁹⁸ BERR, *Vulnerable Worker Enforcement Forum*.

¹⁹⁹ The TUC’s Commission on Vulnerable Employment recommended that (a) this power be given to the Board and (b) more resources be allocated to enforcing agencies so that they can perform their duties in a more pro-active manner. See TUC Commission on Vulnerable Employment, ‘Hard Work, Hidden Lives’ (London: TUC, 2008).

Department of Trade and Industry²⁰⁰, demonstrating that the reduction of working time can be combined with improved productivity for businesses and a better work-life balance for workers.

However, the introduction of the opt-out, one of the key choices made by the New Labour government – appears to have hampered change. DTI-commissioned research indicates that organisations that made extensive use of the opt-out have reported that the regulations have had marginal or no impact on them²⁰¹. Although approximately one third of the firms surveyed in that research indicate that they have introduced changes with the aim of ‘working smarter’ – thereby leading in some cases to improved efficiency and improved customer satisfaction²⁰², the impetus to do so would have been far greater if the opt-out were not in place²⁰³. Workforce agreements were another victim of the introduction of the opt-out: although in non-unionised workplaces workers and employers could at least seek to reach such an agreement with a view to introducing more efficient working methods, the presence of the opt-out has weakened the employers’ incentive for reform through workforce agreements²⁰⁴.

The culture of long working hours remains present in other sectors of the economy largely due to the New Labour government’s decisions, in conjunction with sector-specific characteristics. When local authority officers in London’s Tower Hamlets conducted a project – on their own volition²⁰⁵ but as a result of many queries, complaints and concerns expressed from workers in the financial services sector - officials discovered that the opt-out was widely used in that sector. This reflects cultural aspects of this sector, where pay is linked to outcomes rather than work to a timetable²⁰⁶. The opt-out can also be seen as ‘an insurance policy’ for employers – i.e. once it has been signed, it can be activated if or when the workload requires it²⁰⁷, but there is evidence of abuses. Indeed, ‘many have signed it without realising it, as part of their employment documents’²⁰⁸, or because they feel compelled to do so (e.g. when employers turn it into a condition of employment²⁰⁹ or when workers feel that their

²⁰⁰ DTI in association with the TUC and the CBI, *Managing Change - Practical Ways to Reduce Long Hours and Reform Working Practices* (London: DTI, 2005).

²⁰¹ F. Neathey and J. Arrowsmith, *Implementation of the Working Time Regulations* (London: DTI, 2001), p. 63.

²⁰² F. Neathey and J. Arrowsmith, *Implementation*, pp. 64ff.

²⁰³ This point has been acknowledged by the CBI. See C. Barnard, S. Deakin, and R. Hobbs, "Opting out of the 48-Hour Week: Employer Necessity or Individual Choice? An Empirical Study of the Operation of Article 18(1)(b) of the Working Time Directive in the UK," *Industrial Law Journal* 32, no. 4 (2003), p. 239.

²⁰⁴ Catherine Barnard also highlights the impact of the employers’ (i) views regarding the cumbersome nature of the procedure for reaching a workforce agreement and (ii) their culture of resistance to this way of relating to employees. See “The E.U. Agenda”, pp. 201-2.

²⁰⁵ Although HSE officials interviewed for the purposes of this project claim that only reactive enforcement is possible, the example given here indicates that carefully targeted action – e.g. focusing on sectors or firms where there is evidence of problematic practices - can produce useful results without being too burdensome on businesses. Also, the deterrent effect of (i) pro-active enforcement (or the possibility thereof) and (ii) the fact that some Working Time Officers encourage workers who contact them to quote them when they liaise with their manager about a complaint, should not be under-estimated. The capacity of pro-active enforcement to bring about change has been demonstrated in the case of the minimum wage. See NACAB, para. 3.38.

²⁰⁶ As TUC officials point out, this trend is often encountered in ‘white-collar’ jobs. See Barnard, Deakin, and Hobbs, “Opting out”, p. 240.

²⁰⁷ Interviews with CBI officials, London, 12 November 2008.

²⁰⁸ Interview with local authority official, London, 5 January 2009.

²⁰⁹ BECTU argues that in the film and television industry freelance staff are often offered contracts that include a clause giving effect to the opt-out. See BECTU, Response to DTI consultation on the application and operation of the working time opt out, mimeo, 16 January 2004, para. 2.

income will, or might, suffer if they do not sign it)²¹⁰. Although the New Labour government supports its retention on grounds of ‘individual choice’²¹¹, the way in which this choice is exercised often reflects the unequal distribution of power between employers and individual workers²¹² as well as a lack of awareness on the part of employees and - as the CBI acknowledges, employers²¹³. Indeed, although 68% of those who work long hours were aware of the legislation regarding working time limits, only 28% of them were able to cite the right weekly limit and no employees have signed the opt-out in approximately three three-quarters of the workplaces that are characterised by sustained long working hours²¹⁴. The problem of lack of awareness is further exacerbated by the complexity of the legislation²¹⁵. These are just some of the reasons why its abolition is supported by the upper echelons of the trade union movement²¹⁶.

More broadly, consistent support for the Directive amongst senior trade unionists has been couched in the belief that its implementation can enhance their capacity to negotiate with employers on a range of issues regarding the organization of work²¹⁷. However, the use of the opt-out means that their willingness to negotiate is not backed up by the legislative impetus to do so. Thus, the re-organisation of work patterns is – unsurprisingly, not high on the agenda of the unions. Moreover, the unions’ own capability deficit and the balance of power in the marketplace have prevented them from successfully pursuing this agenda to the extent that they wanted to, in part because their tactical prowess is not matched by their capacity to

²¹⁰ Commission of the European Communities, Communication to the Council, the European Parliament, the European Economic and Social Committee and the Committee of the Regions Concerning the Re-Exam of Directive 93/104/EC Concerning Certain Aspects of the Organization of Working Time, COM (2003) 843 final, p. 9.

²¹¹ Pat McFadden (Employment Minister), Oral evidence to the Select Committee on the European Union, House of Lords, 10 July 2008. See House of Lords, European Union Committee, Working Time and Temporary Agency Workers: towards EU agreement - Report with Evidence, HL Paper 170, 2008, p. 15.

²¹² This is a major factor behind the problems encountered in the implementation of the entitlement to paid annual holidays. See NACAB, *passim*.

²¹³ DTI, Working Time – Widening the Debate: Summary of Responses to a Preliminary Consultation on Long Hours Working in the UK and the Application and Operation of the Working Time Opt-Out (London: DTI, 2004), p. 9. Organisational capacities are also important. A survey of the users of the helpline of ACAS conducted in 2007 indicates that workplaces without a human resources specialist were more than twice (11 per cent compared to 5 per cent) as likely to generate queries regarding holidays and working time than those that had one such specialist. See H. Hooker, Th. Usher, and D. Robinson, *ACAS Helpline Survey 2007*, Research paper 03/07 (London: ACAS, 2007), p. 13.

²¹⁴ DTI, Working Time - Widening the Debate: A Preliminary Consultation, p. 19.

²¹⁵ As one Working Time Officer put it ‘if you gave the regs to a new Working Time Officer to read, they would leave the job’. Interview, 4 December 2008. The regulations (in part because of the Directive) are so complex that the Engineering Employers’ Federation produced a 130-page guide for its members.

²¹⁶ In the run-up to the 2001 general election the TUC’s Executive Committee considered a proposal regarding the gradual phasing-out of the opt-out which was meant to combine the desired result with a reasonable opportunity for businesses to adapt to it. This proposal was based on the notion that the revision of the Working Time Directive (planned for 2003) was likely to lead to the abolition of the Directive’s opt-out clause. So, this could be presented domestically as an opportunity for an inevitable reform. Although mid-ranking trade union negotiators agreed to it, their leaders were adamant that instead of being phased out, the opt-out should be abolished outright. Their maximalism was not the main reason why the TUC’s internal proposal did not materialise. Given the New Labour government’s continuing commitment to flexibility in the labour market and the turn to the Right in many European states, the proposal was not likely to materialise. Interviews with former TUC senior officials, London, 28 November 2008 and Brussels, 19 January 2009.

²¹⁷ This could be achieved through the provisions that referred to derogations that could be agreed between ‘the two sides of industry’.

develop strategy²¹⁸. As a TUC official put it, although ‘[a] lot of problems are sorted out on the ground via the unions, between union rep and manager’, unions ‘do not always report fully back to HQ. So, information does not flow easily and quickly’. Nevertheless, unions and employers have been ‘negotiating in the shadow of the law’²¹⁹ in an effort to reduce reliance on overtime²²⁰. Several agreements have been reached that meet the unions’ objectives in terms of pay, working hours and productivity. Examples can be found in various sectors such as the food industry, financial services and energy²²¹, and the collective agreement reached in 2005 in the printing industry providing for 48-hour weeks calculated over a year²²². The unions’ ambitions have also been hampered by the combined effect of declining membership and the enduring problem of job security. The decline in membership has reduced the trade unions’ bargaining power vis-à-vis the government. At the same time the sectors where change was needed most – such as retail and catering – are permeated by the fear of unemployment to a large extent because of the wide availability of labour. As a result, workers are far less likely to seek to promote change by means of collective action.

The pursuit of the dual objectives of ‘fairness at work’ and a business-friendly employment policy has remained at the heart of the government’s action since 1998. Acting in response to complaints from certain businesses, the government introduced two changes in 1999²²³. The first reduced the regulatory requirement regarding record-keeping. The Working Time Regulations were revised in 1999 in a manner that removes the employers’ obligation to (i) record the terms on which an individual worker has agreed to opt out of the 48-hour limit and (ii) specify the number of hours that she has actually worked during each reference period since this agreement came into force. Although employers are obliged to keep an up-to-date record of workers who have agreed to opt out, it is up to them to choose how to demonstrate that the workers who have not opted out actually comply with the limit. Secondly, the New Labour government also revised part of the provisions regarding unmeasured time, i.e. one of the most opaque aspects of the regulations (and the Directive), which applies to workers – such as managing executives, family workers and workers officiating at religious ceremonies – whose working time is not measured or predetermined or can be determined by the worker herself, due to the nature of their activities. In those cases, key aspects of the Directive – such as the provisions regarding the 48-hour limit, night work, daily and weekly rest, and rest breaks do not apply. The amendment of 1999 sought to deal with cases where a worker’s working time was only partly unmeasured or determined by the worker. As a result of the amendment, the 48-hour limit did not apply to the part of the job that is not predetermined or measured. Moreover, the guidance issued by the DTI in relation to rest periods indicated that ‘employers must make sure that workers can take their rest, but are not required to make sure they do take their rest’, despite warnings from the TUC that this statement would encourage abuses²²⁴. The European Commission objected to these arrangements arguing

²¹⁸ Interview with former senior TUC official, London, 28 November 2008.

²¹⁹ I owe this point to David Coats.

²²⁰ One such example is the case of the dairy company which – acting in the belief that the opt-out would be abolished after the review of the Directive planned for 2003, switched from the 70-hour per week norm (established in an effort to meet the demands of supermarkets) to annualised hours involving an offer to employees of a range of shifts (varying between 40 and 48 hours per week). As a result, it produced the same amount of milk but much more efficiently. See Barnard, Deakin, and Hobbs, “Opting out”, p. 239.

²²¹ Specific examples include the McVitie’s biscuit plants, Lloyds TSB, Arla Foods, Transco, British Gas. Interview with TUC official, London, 27 November 2008; GMB, Response to EU Commission Communication concerning the re-examination of Directive 93/104/EC concerning certain aspects of the organization of working time, mimeo, March 2004, p. 6.

²²² BPIF/Amicus GPM Sector Partnership Agreement and Code of Practice, 2005. I am grateful to Tony Burke for bringing this agreement to my attention.

²²³ Working Time Regulations 1999, Statutory Instrument 1999 No. 3372. For a critical treatment, see C. Barnard, “The Working Time Regulations 1999,” *Industrial Law Journal* 29, no. 2 (2000); Deakin and Morris, p. 319.

²²⁴ TUC, Comments on draft working time guidance, mimeo, January 2000, pp. 2, 5.

that (i) the former goes beyond the derogation stipulated by the Directive and (ii) the latter supports and promotes a practice of non-compliance with the requirements of Directive and took the matter to the ECJ which found in its favour²²⁵ thus compelling the British government to revoke its initial decision²²⁶.

Another substantive choice made by the New Labour government that indicates its timidity, or at least its wish to avoid alienating businesses - concerned the thorny issue of 'on call'²²⁷ time, i.e. the time spent by workers being available for work but not necessarily working. The DTI's initial guidance contained errors and was ignored by major organisations such as the NHS Executive²²⁸. On the other hand, the government also agreed to increase in two stages the statutory entitlement to paid annual holiday from four to 5.6 weeks by April 2009²²⁹. This was part of the 'Warwick agreement' reached with the unions in July 2004²³⁰, ahead of the general election of 2005 which the Conservative Party fought promising to negotiate to restore the opt-out from the social chapter²³¹. Following the change of leader, the Conservative party's policy review group on competitiveness recommended in 2007 the abolition of the Working Time Regulations²³². A year later the Labour Party's annual conference endorsed a union-backed emergency motion calling for the abolition of the opt-out²³³, though the government maintains its support for it.

Competing Explanations

Alternative explanations would highlight the role of culture, institutions and material factors in the implementation of EU public policy. Arguably, none of these explanations would fare better than the partisan hypothesis. A culture-based account would not offer a convincing alternative because it does not explain the differences between the two parties. In other words, the culture did not change in 1997. The party in government did. Also, the issue does not have institutional roots. It did not result from the inability of the British political and administrative machinery to cope with the exigencies of this particular Directive. At the political level this machinery ('veto points') remained unaltered, unlike the pattern of implementation. Indeed, none of the key and relevant characteristics of the Westminster system changed after 1997. Rather, a different party (with different preferences) came to power. As a result, the pattern of implementation changed. A part of the pattern observed in the post-transposition stage can be attributed to the capacities of the administrative actors that are involved in implementation. However, these capacities and – above all, the way in which they were deployed in Britain after 1997, have been shown to reflect explicit political decisions of the party in government, rather than the autonomous properties of these institutions. In addition, domestic administrative capacities cannot account for the policy pursued by the Conservative governments. Furthermore, the ability of EU institutions to detect and punish breaches – the explanatory factor that would be highlighted by the

²²⁵ C-484/04, *Commission of the European Communities v. United Kingdom of Great Britain and Northern Ireland*, *European Court reports*, 2006, p. I-7471.

²²⁶ Working Time (Amendment) Regulations 2006, Statutory Instrument 2006 No. 99.

²²⁷ The ECJ ruled that (a) when a doctor who is on call is also required to be physically present in the hospital, this entire period of time is working time and (b) working time includes any time that an on call doctor spends resting at their work place even if their services are not actually used. See respectively C-303/98, *Sindicato de Médicos de Asistencia Pública (SiMAP) v. Conselleria de Sanidad y Consumo de la Generalidad Valenciana*, *European Court reports*, 2000, p. I-7963 and C-151/02, *Landeshauptstadt Kiel v. Norbert Jaeger*, *European Court reports*, 2003, p. I-8389.

²²⁸ A. Blair, L. Karsten, and J. Leopold, "Britain and the Working Time Regulations," *Politics* 21, no. 1 (2001), p. 43.

²²⁹ Working Time (Amendment) Regulations 2007, Statutory Instrument 2007, No. 2079.

²³⁰ *Financial Times*, 26 July 2004, p. 1.

²³¹ *Are You Thinking What We're Thinking?*, <http://www.conservatives.com/pdf/manifesto-uk-2005.pdf>, p. 4.

²³² Economic Competitiveness Policy Group. "Freeing Britain to Compete: Equipping the UK for Globalisation - Submission to the Shadow Cabinet." (London: Conservative Party, 2007), p. 58.

²³³ *Financial Times*, 23 September 2008, p. 4.

‘enforcement perspective’ – would not offer a better account of the pattern described in the preceding section. The presence of the European Commission and the ECJ did not prevent the Tory government from blatantly refusing to transpose and then implement the Directive, nor can it account for fundamental decisions of the New Labour government - such the use of the opt-out and the DTI’s guidance. In other words, none of the alternatives can provide a better account than the partisan hypothesis.

CONCLUSION

Cleavage theory and the literature on party positioning on European integration draw attention to the origin and the nature of party preferences. When policy agreed upon beyond the state is implemented in democratic systems, the pattern of implementation can be expected to vary as a function of the political party in power because parties rely on historically defined ‘prisms’ that guide their action. Using empirical material from the implementation of the Working Time Directive in Britain, this paper has demonstrated that faced with the same pressure for change, two governments of different political orientation responded in a way that reflected the historically defined ‘prism’ used by the party in power. This has implications for our understanding of the autonomy of the state.

Policies agreed beyond the state can only produce results through the domestic political process²³⁴. Governments make policy beyond the boundaries of the state and then implement it at the domestic level but they are not automata. Rather, they reflect the balance of power at the domestic level and this has a bearing on the corresponding pattern of implementation. The alternation of parties in power - a key feature of democratic systems, affects this process because parties bring with them historically defined prisms on the basis of which they define their preferences, make and implement policy. In other words, the making of policy beyond the state does not lead to the end of political contestation about these policies. In advanced capitalist democracies the preferences of those who are in power matter. Although this paper examined a case that unfolded in the context of the Westminster model, there is evidence - ranging from foreign policy to employment policy and regulation²³⁵ - that the partisan hypothesis has broader explanatory capacity.

This does not mean that parties matter irrespective of time and context. The literatures on party politics and the impact of political parties on public policy²³⁶ highlight two potential causes of variation. First, the type of government matters: the capacity of single-party governments to turn their preferences into action is greater than that of coalition governments. Second, this capacity depends on the degree of executive dominance (hierarchical v. collegial decision making). Two other factors can be added, namely (a) the capacity of the leadership to impose its line in the face of internal opposition and (b) issue salience. Given the process of de-alignment and the fact that major parties now cast their electoral net much wider than they did in the past, the demands on the leadership to synthesize often competing claims and aspirations and pursue its preferred course of action have increased²³⁷. Finally, the salience of European integration varies across countries. As a

²³⁴ Gurowitz, "Mobilizing International Norms", p. 416.

²³⁵ See Mastenbroek and Kaeding, "Europeanization Beyond the Goodness of Fit", p. 339; Rathbun, *Partisan Interventions*; Falkner *et al*, *Complying with Europe*, p. 129; Dimitrakopoulos, *The Power of the Centre*, pp. 103-5.

²³⁶ H. Keman, "Parties and Government: Features of Governing in Representative Democracy," in *Handbook of Party Politics*, ed. Richard S. Katz and William Crotty (London: Sage, 2006), p. 162ff.

²³⁷ This is important both for parties on the Left and the Right. As regards the former, European integration has challenged many of their domestic achievements and the corresponding constituencies. For parties on the Right the challenges are not less significant. For example, several conservative parties ‘are rifted between nationalism and market liberalism’. Marks *et al.*, "Party Competition and European Integration in the East and West," p. 170.

result, the opportunities afforded to parties vary accordingly. This is why more comparative research is needed.

During the past two to three decades political parties have converged. As an eminent specialist has indicated, 'parties within the mainstream have become less easily distinguished from one another than was the case in the politics of the late 1970s'²³⁸. But convergence does not signify total absence of differences not least because by appealing to everybody, political parties would end appealing to nobody. In other words, political parties have enduring incentives to distinguish themselves from their main rivals. Contrary to claims that are often made by politicians and other supporters of 'endism', the 'national interest' is not fixed and given; rather, it is the outcome of political struggle. The enlargement of organisations like the EU means that its membership will become increasingly diverse and will, as a result increase the need for discretion when jointly agreed policy is implemented at the domestic level. This is why the partisan dimension is unlikely to lose its explanatory power in the foreseeable future.

²³⁸ Peter Mair, "The Challenge to Party Government," *West European Politics* 31 (2008), p. 222.