British Journal of Industrial Relations
43:2 June 2005 0007–1080 pp. 297–319

ANNUAL REVIEW ARTICLE 2004

Regulating the European Labour Market: Prospects and Limitations of a Reflexive Governance Approach

Richard Hobbs and Wanjiru Njoya

Abstract

This article reviews developments in European Union employment policy from the perspective of reflexive governance. Reflexive governance instruments have a procedural orientation and provide a structural framework or steering mechanism to facilitate a process of self-regulation. Recent developments in relation to the Employment Framework Directive, the European Employment Strategy and the Working Time Directive highlight some of the prospects and limitations of this reflexive approach to regulating employment relations and the potential impact on the UK labour market. These developments indicate that the hopes invested in the reflexive approach remain to be fulfilled.

1. Introduction

In this Annual Review Article we focus on developments in labour law and employment policy at the European Union (EU) level. We discuss these labour market developments in the broader context of the emergence and evolution of new forms of governance in the EU (Commission of the European Communities 2001). Much of the new, more flexible, governance approach can be characterized as 'reflexive' governance.

The theory underlying reflexive governance argues that 'traditional' regulatory interventions, consisting of top-down uniform rules backed by sanctions, which seek to directly prescribe or impose particular distributive standards, will fail to achieve their objectives because of the nature of the interaction between the legal system and other systems, such as the economic

Richard Hobbs is a Researcher at the ESRC Centre for Business Research, University of Cambridge. Wanjiru Njoya is a lecturer at the University of Kent Law School.

system or the industrial relations system. As the two systems are autonomous, law cannot simply instruct the industrial relations system to act in the way that law demands (Teubner 1993). According to the theory, legal norms are merely external noise, which the industrial relations system will reconstruct in accordance with its own rationality of efficiency and fairness (Cooney *et al.* 2002).

As an antidote to the limits of 'traditional' regulatory interventions, reflexive governance methods seek to achieve their ends indirectly by adopting a procedural orientation which is intended to induce actions by social actors and encourage autonomous processes of adjustment, in particular by supporting mechanisms of group representation and participation (Deakin 2000). The objective is to structure decision processes without trying to control the substantive outcome of any decision (Black 1996: 46). The role of reflexive governance is thus to stimulate and facilitate a process of self-regulation (Rogowski and Wilthagen 1994: 7) by providing a frame or steering mechanism.

In this review we highlight the significance of the changing approach of EU governance for the regulation of employment relations in the UK. Our principal objective is to make some assessments of the prospects and limitations of this relatively new reflexive approach to regulating labour markets. The discussion identifies areas in which the reflexive governance approach has the potential to enhance the effectiveness of regulation of the UK labour market and also to augment the role of UK industrial relations actors in the development and implementation of employment law and policy. We also identify some areas of weakness and potential improvement in reflexive governance instruments. We do this by reviewing EU-level developments in three areas.

In Section 2 we review recent developments designed to implement European antidiscrimination law in the UK, explaining how these developments meet the aims of reflexive governance. The discussion examines the effectiveness of labour law in communicating norms of equality to the workplace environment, taking into account the response of employers to these laws. This section highlights the procedural orientation of equality laws, which require that all workers be subject to the same rules and treatment in the workplace without going further to establish a substantive measure of justice or fairness. It is left to the parties to determine the precise content of rules governing the treatment of workers in the contract of employment. In this sense, these laws aim to establish a 'floor of rights', prescribing standards and establishing norms while leaving room for self-regulation (Deakin and Wilkinson 1994). We argue that this approach makes it possible to ensure that equality laws do not simply impose restrictions on behaviour, but go further to encourage the development of fairer norms and working practices.

In section 3 we discuss the evolution of the European Employment Strategy (EES). The EES has been heralded as the first and most developed example of a flexible and participatory alternative approach to governance in the EU

(Mosher and Trubek 2003: 83; Regent 2003: 191; Scott and Trubek 2002: 5), which since the Lisbon Summit of March 2000 has been referred to as the Open Method of Co-ordination (OMC). The EES has much in common with a reflexive approach (Barnard 2002: 100; Syrpis 2001: 282) as it operates through a framework of guidelines and recommendations and a process of mutual learning, benchmarking, best practice and peer pressure to achieve objectives. The EES thus represents a shift 'from management by regulation to management by objectives' (Biagi 2000: 161). Although the framework is not legally binding, the essence of the EES is to steer the process of evolution of the employment policies of the member-states in the light of the experiences of others and to deploy evidence of below-average national performance as a lever for improvement (Terry and Towers 2000).

In section 4 we discuss proposed amendments to the Working Time Directive (WTD). Strictly speaking, the WTD was conceived as a traditional rather than a reflexive regulatory instrument, designed to impose 'hard' standards backed by sanctions. Nevertheless, the form of the directive, which was the result, in part, of political concessions granted to the UK and other member-states, can be seen as being characteristic of reflexive regulation. Although the WTD sets a near-comprehensive set of working time limits, many of these take the form of default rules that can be avoided by derogations of various kinds. The basic standards set in the default rules together with the procedural conditions attaching to the derogations can thus be seen as providing a 'frame' to steer rather than command industrial relations actors.

2. Equality in the labour market: regulatory aims

The antidiscrimination provisions passed under the European Employment Framework Directive (EFD) prohibit discrimination against workers who have traditionally been prevented from participating fully in the labour market because of their age, religion or belief, sexual orientation or disability. Restrictions on sex and race discrimination have also been extended. In prohibiting employers from treating employees less favourably on these additional grounds, the law takes important steps in achieving the 'coherent and integrated approach towards the fight against discrimination' referred to by the European Commission in its recent Green Paper, *Equality and Non-Discrimination in an Enlarged European Union* (Commission of the European Communities 2004a). There are also proposals, within the framework of the EES, to extend this kind of regulation to gender equality outside the field of employment. The equality guidelines under the EES include 'gender equality', 'active ageing' and 'discrimination against people at a disadvantage' (Rubery *et al.* 2004).

Promoting equality of opportunity in employment is a central aspect of European social policy, incorporating the principles of non-discrimination, equal access to the labour market, and the eradication of social exclusion.

The aim is not simply to outlaw discriminatory treatment of specified categories of employees, but also to develop a more comprehensive notion of equality based on the dignity and humanity of all workers. The new regulations, therefore, move beyond the previous approach of simply prohibiting discrimination on stated grounds, and aim to *promote* equality by requiring employers to create a fairer working environment. The regulations recognize that 'the achievement of equality depends not simply on avoiding negative discrimination, but on the active participation of all stakeholders, on training and improving skills, and developing wider social networks and encouraging adaptability' (Hepple 2004: 13). It could be said that the regulatory aim is not simply to impose mandatory restrictions on employers, but to use this as a means of eradicating barriers that exclude disadvantaged social groups from the labour market. The rationale of this approach is that discrimination at work is 'wrong in principle and inefficient in practice' (Collins 2003: 55). Flexibility is introduced by making these rules subject to exceptions, such as where an employer shows that there is a 'genuine occupational requirement' for persons of a particular group. Although the antidiscrimination laws are mandatory in that employers cannot opt out of them, liability for breaching these laws generally remains subject to a defence of 'justification'.

Recent Developments in European Equality Law

The provisions of the EFD dealing with age discrimination are to be implemented in the UK by October 2006. Apart from the social aims of inclusiveness and respecting the dignity of all persons regardless of age, the Directive aims to foster the economic integration of the elderly ensuring that their experience and skill continue to contribute to economic productivity. Empirical evidence illustrates that age discrimination is widespread (Harcourt *et al.* 2004). Differences of treatment on grounds of age, for instance in hiring, promotion, pension schemes or selection for redundancy, are to be outlawed unless the employer can provide a reasonable justification for the practice. The government proposes to set the default retirement age at 65, with a duty on employers to consider allowing employees to work longer if the employee wishes to do so. The employer will be allowed to set an earlier retirement age where 'appropriate and necessary'. Because the retirement age is to be set as a default rule rather than a mandatory rule, the employer is free to establish a different practice, subject to a procedural obligation to negotiate or justify derogation from this rule.

Regulations preventing discrimination on grounds of sexual orientation, religion or belief came into force in December 2003. The definitions used under the regulations are broad. Sexual orientation includes gay, lesbian, heterosexual and bisexual, while religion or belief extends to any philosophical belief or none at all. The regulations cover both direct and indirect discrimination, as well as harassment and victimization. These regulations introduce new grounds of prohibited discrimination into domestic law.

From 1 October 2004, new regulations came into effect extending the scope of disability discrimination. The aim is, among other things, to enhance the economic integration of disabled people who are often prevented from making a valuable contribution by an inaccessible workplace or employers' reluctance to invest in making reasonable adjustments. There are new definitions of direct discrimination and harassment, and the employer's duty to make reasonable adjustments has been extended to include adjustments to physical features of the premises. In an exception to the general approach, direct discrimination on the ground of disability, such as choosing not to hire an applicant simply because they are disabled, cannot be justified by an employer for any reason. However, the duty to make reasonable adjustments remains subject to a test of proportionality.

Apart from the new grounds of discrimination, the scope of sex and race discrimination has been extended since July 2003. The main innovation is to impose on public authorities a duty to take positive action to promote race and gender equality, for instance by taking steps to encourage women or ethnic minorities to apply for jobs and promoting them where they are underrepresented. Once again, liability for discrimination on grounds of race and sex is not automatic — an employer can defend itself by showing that the requirement for a particular gender, or for a person of a particular racial or ethnic origin, was a 'genuine occupational requirement'. Within the context of the EES, the promotion of 'equal opportunities' no longer enjoys a central status (as one of the four main pillars of the EES). Instead, it now constitutes one of 10 new 'guidelines' for implementation of the strategy (Rubery *et al.* 2004).

Responses to the New Equality Laws

A crucial aspect of reflexive governance involves an assessment of the responses of industrial relations actors to the new regulations, with a view to future alteration of the regulatory framework should this be deemed necessary. In the context of the EFD, industrial relations actors are given an enhanced role in the implementation of the new regulations, as the regulations rest on an explicit recognition that equality cannot be achieved without positive action on the part of employers. The EFD allows member-states to adopt 'specific measures to prevent or compensate for disadvantages linked to any of the grounds' on which discrimination is outlawed (Article 7). This duty to take positive steps to promote equality is controversial. Critics in the Chicago 'law and economics' tradition argue that any measures designed to promote equality simply amount to inefficient and unconstitutional transfers of wealth from 'favoured' groups to 'disadvantaged' groups. Antidiscrimination laws are seen as amounting to discrimination against people thought to be 'privileged', creating not *equal* opportunities but *more* opportunities for those thought to be disadvantaged (see Epstein 1992, 2002; Fischel and Lazear 1986; Posner 1989; Donohue 1989; Sunstein 1991). However, the clear position of European and British law is that even where positive action is

taken to encourage diversity, selection for employment or training is still required to be on merit, and equality remains the standard. Employers remain free to 'discriminate' based on criteria such as competence, qualifications and experience (Collins 2003: 54). The aim is not to establish compulsory obligations, but rather to define positive duties in such a way as to give a clear signal that will help set new standards of behaviour and change prevalent norms according to which discrimination is deemed acceptable. The point of equality protection is to create equal *opportunities*, and not, as critics suggest, to artificially engineer equal *outcomes* (Fredman 2004: 309).

The law may also be criticized for retaining its procedural orientation, and making no attempt to require the fair treatment of workers in a substantive sense (Fredman 2004). The emphasis on procedural fairness means that the outcome of individual claims often depends on what appear to be legal technicalities, which have nothing to do with the alleged discrimination. For instance, allegations of discrimination may depend not on analysis of the employer's conduct, but on whether the claimant falls within the legal definition of 'employee' required to bring a claim to the Employment Tribunal. Several categories of workers fall outside this legal definition (Deakin 2004), which means that they remain unprotected by the antidiscrimination laws.

Another illustration of this effect, where the substantive fact of discrimination is peripheral in individual cases, is the need for a 'comparator' in establishing discriminatory treatment. The test of discrimination is not whether the employee has been treated unfairly, but whether that employee has been treated *less favourably*, in comparison to an employee who does not have the characteristic of the complainant. For instance, a woman who complains that she receives less pay than a man doing the same job must take as comparator a man employed by the same employer in the same position, a test which is applied in a technical manner that ignores economic reality (Fredman 2004). In the context of sexual orientation, defining the appropriate comparator as a homosexual person of the opposite sex (i.e. comparing homosexual men with homosexual women) prevented claims from succeeding under the Sex Discrimination Act. This situation is now ameliorated by the new sexual orientation regulations under which comparison may be made with a heterosexual of the same sex — homosexual men may now be compared with heterosexual men (Williams 2004).

This procedural focus may be justified by the recognition, central to the reflexive approach, that imposing a test of substantive fairness would have little or no direct capacity to change practice in the workplace. Discriminatory norms are still prevalent in the industrial relations system (Painter and Holmes 2004: 236), and there is no effective direct way of simply replacing this with legal norms of fairness and equality. In this context reflexivity (feedback between the two systems) requires that the law must take into account the complexity of inequality in the labour market. Empirical studies indicate that prejudice is only one of a complex set of 'pre-market' factors such as economic background, social status and schooling, which also influence the fortunes of women and ethnic minorities in the labour market

(Carneiro *et al.* 2005; Frijters *et al.* 2003; Weichselbaumer 2002). Recognizing this complexity, a reflexive approach favours tackling discrimination *indirectly* through procedural safeguards, such as regulating dispute resolution or, more recently, encouraging employers to keep records showing the diversity of their workforce.

Thirdly, there is a need to promote the role of unions in enhancing equality. This meets the aims of a reflexive approach in that it favours self-regulation rather than external regulation through law. The law is necessarily limited in terms of its enforcement capabilities. All it does is to ensure that if workers are treated differently based on the specified grounds, they have a right to claim compensation through the Employment Tribunal. Changes in the discriminatory working practice or prejudice which gave rise to the complaint will not necessarily follow, and given the reluctance of many people to take action against their employer there may well be no change in the overall status quo. As Hepple (2004: 12) puts it, '[e]ven if direct or indirect discrimination can be established, the outcome is usually compensation for an individual, not positive measures to ensure the full participation of disadvantaged groups in the workforce'. This is where unions play a vital role, in ensuring collective rather than individual enforcement of the right to equality, and in ensuring that employers change their attitudes towards the workforce as a whole (Harcourt *et al.* 2004; Healy *et al.* 2004). The primary concern of persons facing discrimination in the workplace is the opportunity to continue working, and where there is no realistic probability of continuing to work for the same employer, litigation cannot produce a satisfactory outcome for the employee. For these reasons the role of unions is crucial in shifting the emphasis away from non-discrimination (a negative duty) towards promoting equality (a positive duty) (Bell 2004).

Assessing the Regulatory Impact of the New Equality Laws

The overall effect of developments in 2004 under the EFD is to extend significantly the duty of employers to protect their employees from discrimination. This has, not for the first time, given rise to a 'burden on business' reaction, based on the perception that there is 'too much law' (for an exposition of this view see Epstein 1996). In considering this reaction it is useful to distinguish between different functions of equality law. Certain rules serve as an outright ban on specified conduct (prohibitions); other rules aim to 'provide normative guidelines for social relationships' (prescriptions). Looked at in this way the question is not whether there is 'too much' law, but whether we have the right kind of law (Schmid 1994: 321–7).

The better approach is for equality law to be prescriptive rather than prohibitory in its underlying aims. While prohibitive law is limited to protecting existing rights (by conferring a right not to be deprived of these rights), prescriptive law goes further to set new norms and standards: it 'expands the scope of individual action by creating a social infrastructure' (Schmid 1994: 342). There may well be a degree of overlap between different functions in

that prescriptive law may rely for its effectiveness on elements of prohibition, but in the context of equality the ultimate goal is to change norms, not simply to prohibit discriminatory acts. The aim, as Hepple (2004: 14) puts it, is not simply the 'fault-finding and retrospective analysis of decisions' that accompanies a prohibitive approach. In focusing on positive action that improves standards across the board, the new regulations take a prescriptive approach, which is coupled with information from the government on how employers could best achieve the aims of the regulations as well as derive benefit for themselves (see, for example, Department of Trade and Industry 2004b). The role of government in supporting the implementation of this legislation illustrates the use of 'promotional standards' as a form of normative regulation (Deakin and Wilkinson 1994). Concerted efforts to make such information available to employers include an advisory role for the Equality Commissions. This is a valuable application of the notion of partnership between employer and employee which is central to the EES, and also meets the aims of reflexive governance in enhancing communication between the legal and industrial relations systems.

Critics of this kind of prescriptive law (e.g. Epstein 2002), argue that it should not purport to change attitudes and behaviour because attempts to do so impose unacceptable restrictions on the freedom of contract and the inherent ability of the market to correct any inefficiencies caused by discrimination without legal intervention. Regarding the ability of the unregulated market to correct inefficient discrimination, the reality is that market failures prevent such spontaneous adjustment from occurring. This requires the intervention of antidiscrimination law (see Deakin 2002). Such intervention can take a reflexive approach, not by attempting to compel people to abandon deeply ingrained prejudices, but by enforcing procedural safeguards against discriminatory treatment. In the long term this would raise standards, encourage the development of equality norms, and enhance the creation of a fairer working environment.

3. The EES

The Reflexive Framework of the EES

The EES was launched at an extraordinary meeting of the European Council in Luxembourg in November 1997 (the so-called 'Jobs Summit') on the basis of the Employment Title of the EU Treaty, which was agreed upon at the Amsterdam Summit of June 1997. The EES now has the key role in the implementation of the EU's employment and labour market objectives of more and better jobs, as set out at the Lisbon European Council (March 2000).

The EES integrates a wide range of policies, including social, educational, tax, enterprise and regional policies as well as active labour market policies. However, the institutional framework of the Employment Title respects

national competences in these politically sensitive policy areas (Article 127(1) Treaty of the European Union (TEU); Henderson 1998: 567). Moreover, the traditional EU governance method of legal harmonization is explicitly eschewed (Article 129(2)). Rather, the 'Luxembourg process', as the EES is known, represents a reflexive method of governance whereby member-states 'progressively develop their own policies' (Presidency Conclusions of Lisbon European Council 2000: point 37) but they do so within an EU-level programme of planning, monitoring, examination and readjustment which gives direction to and ensures co-ordination of the employment policy priorities to which member-states should subscribe.

The reflexive steering mechanism of the 'Luxembourg process' consists of several components. Following consultations with the European Parliament and several EU committees and a proposal from the Commission, the Council adopts annual *Employment Policy Guidelines* (EPGs) setting out common priorities for member-states' employment policies. Subsequently, each member-state provides the Council and Commission with an annual National Action Plan (NAP) explaining the principal measures taken to implement the guidelines nationally. National employment polices are then subject to an *evaluation process* based on the principles of benchmarking and peer review. This evaluation procedure is intended to be a mutual learning process promoting the exchange of experiences and best practices. An annual Joint Employment Report (JER) on the implementation of the guidelines and the employment situation in the EU is drawn up by the Commission and the Council and addressed to the European Council. The Council may decide, by qualified majority, and acting on a proposal from the Commission, to issue a recommendation to any member-state failing to follow the EPGs. The recommendations complement the EPGs by allowing for a differentiation in policy guidance between member-states according to their respective situation and progress in implementation (Commission of the European Communities 2004c: 4).

It is difficult to make a conclusive assessment of the impact of the reflexive mechanism of the Luxembourg process on national employment policies. First, the quantitative effects on employment and unemployment rates induced by the EES are difficult to disentangle from the effects of separate national polices and cyclical macroeconomic conditions on the labour market (Goetschy 2001: 415). Second, the evidence concerning qualitative impacts is ambivalent. On one interpretation there have been 'significant changes in national employment policies, with a clear convergence towards the common EU objectives set out in the EES policy guidelines' (Commission of the European Communities 2002: 2). But, another view is that the Luxembourg process has so far had 'an uneven impact on member-states' policy making across countries and policy areas' (Mosher and Trubek 2003: 75) with the influence of the EES being greater when EU-level objectives coincide with national policy objectives (de la Porte and Pochet 2002).

However, although it is difficult to provide an overall assessment of the effectiveness of the EES, developments in 2004 can be seen as addressing

some of the weaknesses of the reflexive mechanism of the Luxembourg process.

Addressing the Weaknesses of the Luxembourg Process

One weakness of the Luxembourg process is that the focus has been on the constant redefinition of policy strategies at the EU level rather than on the implementation of reforms by the member-states (Commission of the European Communities 2003a: 5–6). To address this, the EES was reformed in 2003 so as to enhance the medium-term orientation of the EPGs. The EPGs will now be fully reviewed only every three years with any amendments in the intermediate years being strictly limited. Consequently, the EPGs that were adopted in 2003 were maintained without change in 2004. This stability is designed to strengthen the visibility and impact of the EPGs.

A further deficiency was that the EPGs had 'blurred' priorities, lacked 'intrinsic coherence' and were 'widely perceived as complex' (Commission of the European Communities 2002: 19). The 2003 EPGs, which were maintained without change in 2004, were therefore restructured, simplified and made more result-orientated. The present EPGs set 'three overarching objectives' of full employment, social cohesion and an inclusive labour market, and quality and productivity at work, and they identify ten specific guidelines as priorities for action in pursuing the three objectives.[1] Furthermore, a limited number of the EPGs are now explicitly underpinned by quantified objectives, which can be seen as providing additional pressure on member-states to comply with the guidelines (de la Porte 2002: 43).

The 2004 recommendations can be seen as further clarifying the priorities for policy reform. Incorporating the conclusions of the Employment Task Force (ETF) (Employment Task Force 2003), which was constituted at the request of the Spring 2003 Council to identify practical reform measures that can have the most impact on achieving the EES objectives, the recommendations emphasized that although member-states should implement the full range of policies identified in the EPGs, immediate priority should be given to increasing adaptability of workers and enterprises, attracting more people to enter and remain in the labour market and investing more and more effectively in human capital.

A further innovation in 2004 was that the country-specific recommendations were framed in more forceful language. This followed from the JER reporting only 'limited responses' to the 2003 recommendations and the ETF proposal that the EU should challenge member-states when they underperform. The Commission asserted that the 'shorter, more concentrated, and strengthened' country-specific recommendations for 2004 should make the EES 'more hard-hitting and effective' (Commission of the European Communities 2004b: 5).

Nevertheless, although greater clarity will enhance the functioning of the recommendations as a cognitive resource for member-states, it remains the case that their efficacy as a sanctioning instrument is neutered as, by

definition, they are devoid of formal binding effect (Article 189 TEU). The process of benchmarking and issuing recommendations represents merely a political constraint in the form of peer pressure among the member-states. The weakness is that this external pressure may be outweighed by internal political pressure exerted by domestic electorates or trade unions keen to maintain existing social models. The lack of a system of legal or formal sanctions or enforcement procedures in the event of the non-alignment of a given member-state with the EPGs is thus a fundamental weakness of the reflexive framework of the Luxembourg process and undermines its effectiveness as a co-ordinating mechanism (Velluti 2003: 369).

The Role of UK Industrial Relations Actors in Implementing the EES

In addition to addressing some of the weaknesses of the Luxembourg process, the 2004 EU Employment Package also highlighted the potential influence of the reflexive mechanism of the EES in promoting co-operation between the UK government, unions and employers in the development of labour market policies. The EES is intended to be a multi-level, multi-actor process that reaches beyond the relationship between the EU and national governments and it provides a framework within which national-level industrial relations actors can influence domestic employment policy. The 2004 EPGs stated that: 'In accordance with their national traditions and practices, Social Partners at national level should be invited to ensure the effective implementation of the Employment guidelines'. The EPGs also called on the national level social partners to report on their most significant contributions to implementing the EES. Furthermore, the 2004 recommendations exhorted member-states to build 'reform partnerships' involving social partners, civil society and public authorities, in accordance with national arrangements and traditions.

The 2004 UK NAP provided some evidence of government, union and employer co-operation within the EES framework. The NAP stated that the government 'believes strongly in a partnership model that brings together . . . a wide partnership of actors, including . . . business and employee representatives in both the development and delivery of employment measures' (Department of Work and Pensions 2004: 31). In practice, this UK 'partnership model' constitutes involvement in task forces, detailed discussions at national and regional levels, the agreement of common ground and the delivery of recommendations which all parties have been able to endorse (Department for Work and Pensions 2004: 32). The Confederation of British Industry (CBI) and the Trades Union Congress (TUC) had also contributed jointly to a European report on social-partner involvement in the NAP.

The 2004 NAP particularly emphasized the joint role of government, employers and unions in promoting investment in skills and overseeing implementation of the skills strategy and their working together, along with the Equal Opportunities Commission (EOC), to promote voluntary pay reviews so as to address the gender pay gap. Several other areas of active co-operation

between the government, TUC and CBI were also highlighted. These included:

- the development of strategies to encourage the integration of disadvantaged groups in the labour market, notably concerning immigration issues and disabled and incapacitated people;
- reviewing the Investors in People programme and negotiating a package of financial support for small businesses to identify their skill needs and develop staff competences;
- development of the regulatory framework for implementing the Information and Consultation Directive and production of guidance for employers when implementing teleworking arrangements.

It is arguable that the lack of effective sanctions for non-compliance means that the EES framework provides only fragile support for the involvement of UK industrial relations actors in policy making. This is especially so given that the factors that have undermined a partnership approach at firm level, such as lack of union power (Heery 2002) and employer defection due to short-term economic pressures (Godard 2004) could also undermine, to varying degrees, the efficacy of a partnership approach at the national level. Moreover, it can be argued that the emphasis on 'national traditions and practices' dilutes the potential influence of the EES in promoting co-operation between government, unions and employers in developing employment policy. For example, the 2003 NAP explicitly eschewed 'institutionalized social dialogue arrangements' (Department for Work and Pensions 2003: 47).

On the other hand, the very fact that the UK lacks institutional arrangements for national-level social dialogue and established structures of 'social partnership' arguably increases the potential of the reflexive governance mechanism of the EES to be an important dynamic in UK industrial relations practice. So, although on one view the evidence of co-operation in the 2004 NAP is limited in nature and policy scope, on another interpretation this level of co-operation is significant given the lack of ideological and institutional commitment to 'social partnership' in the UK (we use the term 'social partnership' loosely here; see Hyman 2005). At the very least, this review of co-operation in policy making within the EES framework proffers a different perspective for UK industrial relations than preceding Annual Review Articles, which have emphasized the areas of dispute between unions and the government (Waddington 2003) and the diminished ability of unions to influence government policy (Charlwood 2004).

4. The WTD

Following an extensive consultation and review process (Commission of the European Communities 2003b, 2004c), the European Commission published its proposals for amending the WTD[2] on September 22, 2004 (Commission of the European Communities 2004d).[3] The proposals concentrate on three

matters: the individual opt-out from the average 48-hour limit on weekly working time (Article 22(1)), the reference period over which the average maximum working time is calculated (Articles 16(b), 17(3) and 19); and the redefinition of working time to incorporate time spent on-call. The proposed revisions illustrate how reflexive regulatory frameworks can be refined with the intention of structuring, but not prescribing, alternative responses by industrial relations actors.

In this regard, it is important to view the revision of the directive in the broader context of the objectives of EU employment policy. The 2004 EPGs explicitly harnessed the reorganization of working time arrangements to the overarching objective of improving productivity and quality at work. Moreover, the 2002 EPGs expressly invited the social partners 'to negotiate and implement at all appropriate levels agreements to modernize the organization of work, including flexible working arrangements, with the aim of making undertakings productive, competitive and adaptable to industrial change'. The guidelines specifically highlighted 'working time issues such as the reduction of working hours, the reduction of overtime, [and] the expression of working time as an annual figure' as subjects that may be covered by such agreements.

The Individual Opt-out from the 48-Hour Limit

The UK is the only member-state that has generally implemented the individual opt-out. Evidence indicates that many UK employers responded to the Working Time Regulations (WTR), which implemented the WTD into UK law, by applying opt-outs (Neathey and Arrowsmith 2001). According to data from the 2003 Labour Force Survey, provided by the Office for National Statistics, the number of UK workers usually working more than 48 hours per week has fallen by only 8 per cent to 3.6 million since the implementation of the WTD into UK law in 1998. In most cases the use of the opt-out does not reflect the actuality of sustained long working hours but is a precautionary response to the regulations in work environments where additional working hours are the norm (Hogarth *et al.* 2003: 57). This highlights the malleability of the regulatory constraint in contrast to the rigidity and durability of tried and tested arrangements of overtime working which are simple and flexible for employers and offer workers premium rates of pay (Arrowsmith and Sisson 1999). Moreover, it indicates how the opt-out has significantly diluted the regulatory stimulus for UK employers (and trade unions) to implement changes in work organization practices, and associated pay and productivity packages (Barnard *et al.* 2003a: 238–9; Neathey 2003; Trades Union Congress 2003: 19).

The European Commission proposes to retain the individual opt-out from the 48-hour limit but to introduce a maximum duration of working for any one week of 65 hours, unless otherwise provided for by collective agreement. On one interpretation this amendment will do little to change the status quo. Labour Force Survey data indicate that only 0.4 million UK workers usually

exceed 65 hours per week compared to almost 4 million that usually exceed 48 hours (Commission of the European Communities 2003b: 12). However, this two-tiered approach is a sensible compromise. It addresses the worst excesses of long working hours but acknowledges the complexity and difficulty of regulating weekly working time (Rojot 1998: 193).

There is only weak and equivocal evidence to support the imposition of a 48-hour weekly limit on the grounds of protecting the health and safety of workers, which is the legal rationale underpinning the WTD. Empirical studies indicate that there is a small statistical association, but not necessarily a causal relationship, between longer working hours and some health and safety outcomes, especially stress and heart disease (Kodz *et al.* 2003: 192–205; Sparks *et al.* 1997). However, the relationship is complex and influenced by many individual factors (such as gender), and work characteristics (such as work intensity and freedom of choice) (Beswick 2003). Moreover, relatively few studies have used the 48-hour benchmark and, as the relationship may be nonlinear, studies using, say, a 60-hour benchmark do not necessarily indicate the health effects of working over the 48-hour limit (see Barnard *et al.* 2004: 58–77).

Furthermore, the Commission's proposal acknowledges that, in the UK at least, many workers do not want to have their working hours limited by regulation and are motivated to work long hours for overtime pay, the prospect of promotion and higher rewards in the future or a sense of autonomy in managing their own working time (Barnard *et al.* 2003a: 245–8; Kodz *et al.* 2003). Although there is some evidence of employers pressuring workers to opt-out (Trade Union Congress 2003: 11–16), in the majority of cases opt-outs are voluntary (BMRB Social Research 2004: 25–30; Neathey and Arrowsmith 2001: 37). The fact that many workers do not necessarily perceive the 48-hour limit as a desirable policy objective perhaps helps to explain the limited impact of the WTD on weekly working hours.[4]

However, the Commission's proposals can be seen as making the opt-out more difficult to deploy and less attractive as a low cost mechanism of complying with the regulatory requirements. First, the amendment requiring the annual renewal of opt-out agreements will make them significantly more expensive and inconvenient to administer and so could provide an incentive for employers to explore changes in working practices and to use opt-outs only where really necessary. The WTD does not currently make any provision for the duration of opt-out agreements. Under the UK WTR, opt-outs can relate to either a specific period or apply indefinitely. Evidence indicates that in most cases opt-outs are for indefinite rather than specified periods, although they are terminable on the giving of written notice (Barnard *et al.* 2003b: 46).

Second, the introduction of an explicit obligation for employers to record 'the number of hours actually worked' by workers who work over 48 hours, in addition to the present obligation to keep 'up-to-date records', removes a significant administrative incentive for UK employers to use opt-outs. Under the current provisions, although employers need to record the hours worked

by those not opting out to show that the weekly working time limit is being complied with, they do not have to record hours worked by those workers that have signed an opt-out. Evidence indicates that many UK employers use opt-outs to avoid the bureaucracy of recording the working hours of individual workers rather than the actuality of sustained long working (Barnard *et al.* 2003a: 242).

A third proposal, to render opt-out agreements given at the time of the signature of the individual employment contract or during any probation period null and void, is primarily intended to 'ensure that the choice of the worker is entirely free' (Commission of the European Communities 2004d: 4). However, this could also deter employers from automatically getting all new starters to sign an opt-out agreement.

The Reference Period

The European Commission proposes to maintain the standard reference period over which the average limit on weekly working hours is calculated at 4 months but to allow member-states to extend the reference period to 12 months by law. On one view, retaining the opt-out coupled with extending the reference period to 12 months dilutes the protections of the WTD. However, on another view extending the statutory reference period to 12 months removes a significant barrier to UK employers utilizing the alternative flexibility of annualized working hours to manage fluctuations in demand.

Under the current provisions, the reference period can only be extended to 12 months by collective agreement or, where there is no recognized trade union, by a workforce agreement made directly with the workers or with their elected representatives. Collective agreements are not possible in the majority of UK workplaces that do not recognize a trade union, and workforce agreements have been rarely used because of their procedural complexity. A 12-month statutory reference period could therefore provide an incentive for more UK employers to move to a system of annualized hours, thereby reducing their reliance on the opt-out.

On-call Time

The Commission's proposals concerning on-call time also dilute a major incentive for using individual opt-outs. Time spent on-call is not currently defined in the WTD, which only defines 'working time' and 'rest time'. However, in the *SIMAP*[5] case the European Court of Justice (ECJ) held that on-call duty performed by a doctor when they are required to be physically present in a medical centre must be regarded as working time for the purposes of the directive. In *Jaeger*[6] the ECJ went further and said that this was so even though the person concerned is permitted to rest at their place of work during the periods when their services are not required.

To alleviate the financial and personnel challenges created by these decisions (Commission of the European Communities 2003b: 16; House of

Lords European Union Committee 2004: 32–40), several member-states, including Germany, the Netherlands, Spain and Slovenia, drew up legislation applying the opt-out in the health sector or in cases where working time regularly includes time spent on-call. The Commission's proposals neuter the impact of the ECJ decisions by establishing two new definitions of 'on-call time' and 'inactive part of on-call time', with the inactive part of on-call time not being considered as working time, unless otherwise stipulated by national law or by collective agreement or agreement between the two sides of industry.

Augmenting the Role of Trade Unions

In addition to adulterating the attractiveness of the opt-out, the European Commission's amendments are also designed to provide a significant regulatory stimulus for collective negotiations over innovation in working time arrangements, pay and productivity. First, before member-states can extend the reference period to 12 months there must be consultation of the social partners concerned and every effort made to encourage all relevant forms of social dialogue, including negotiation if the parties so wish. Second, it is possible to derogate from the maximum weekly limit of 65 hours by collective agreement. Third, the Commission proposes that the use of individual opt-outs will require prior authorization by collective agreement or agreement between the two sides of industry at the appropriate level.

Nevertheless, it should not be assumed that reinforcing the framework for collective negotiations is going to produce significant changes in working time practices. Evidence indicates that those UK employers that recognize a trade union do already consult with them before implementing opt-outs (Barnard *et al.* 2003b: 44), and in some cases opt-outs are authorized in collective agreements (Barnard *et al.* 2004: 33). In some cases this may represent a lack of union negotiating power. However, the route of annualization and less overtime could be unpopular with manual workers in that it may mean less pay and higher productivity. Rather than confronting their workers and members, both employers and unions may settle for the easier option of the status quo.

Moreover, the Commission's failure to address concerns over the scope of the derogation for so-called 'autonomous workers' (see House of Lords European Union Committee 2004: 43) means that there is still a significant gap in the reflexive framework of the WTD through which employers will be able to avoid the weekly working time limits without applying opt-outs or negotiating with unions. Under Article 17(1) of the WTD the weekly limit does not apply when 'the duration of the working time is not measured and/or predetermined or can be determined by the workers themselves'.

This derogation is even more broadly defined in Regulation 20 of the UK WTR, also covering workers whose working time is *partly* unmeasured, not predetermined or determined by the worker with the 48-hour limit not applying to the part of the job which is not predetermined or unmeasured

(see Barnard 2000b: 169–70). Labour Force Survey data for 2003, provided by the Office for National Statistics indicate that 60 per cent of the full-time employees usually working more than 48 hours per week are managers, professionals or associate professionals. Many of these workers potentially fall within the broad definition of 'autonomous workers'. The failure to clarify the scope of the autonomous worker derogation could therefore significantly undermine the impact of the Commission's other proposals.

5. Conclusion

We have identified how a reflexive governance approach has influenced regulatory developments at the European level and illustrated the potential significance of this approach for the regulation of employment relations in the UK. Rather than providing an overall evaluation of the efficacy of this reflexive method of governance, in the confines of this Annual Review our primary concern has been simply to assess some of the potential benefits and also some of the limitations of the reflexive approach, as highlighted by recent developments in the three policy areas we have discussed.

In the context of promoting equality under the EFD, reflexive labour law has the potential to alleviate discrimination in the workplace by encouraging self-regulation in the industrial relations system. The reflexive approach would help to achieve the correct balance between enhancing equality of opportunity on the one hand, and retaining efficiency and competitiveness on the other. This would result from recognizing the limitations of law as a means of creating a society in which all people are treated equally and none are excluded from the world of work, while at the same time retaining the essential role played by the legal system in influencing employers' incentives to abandon discriminatory practices.

In this way the reflexive approach sees the labour market and the industrial relations system as being capable of self-regulation in relation to equality and other desirable outcomes, and sees its own function as one of prompting, not directing or replacing, this self-regulation. The EFD is in this sense reflexive, in that it responds to existing inequalities in the labour market and attempts to redress them, while at the same time recognizing its own limits and allowing the parties, within the framework of the legislation, to determine their own rules of engagement. The outcomes of the new antidiscrimination legislation are not yet clear, but proposed future amendments, notably the creation of a Single Equality Commission and a Single Equality Act (Department of Trade and Industry 2004a), are designed to clarify the regulatory framework and make it more responsive to the needs of both employers and workers.

The EES and the WTD emphasize the fundamental importance of the design of reflexive frameworks or steering mechanisms. The recent evolution of the Luxembourg process has concentrated on enhancing the clarity, coherence and intelligibility of the EPGs and the recommendations so as to enhance their functioning as cognitive resources, which stimulate

autonomous policy responses from member-states. However, the purpose of reflexive frameworks is also to provide a structure or a constraint within which the process of self-regulation occurs. This can take the form of sanctions, in cases of non-compliance, or default rules, which come into force if parties are unable to agree on their own standards. In this regard, the EES and the WTD indicate the potential dichotomy between flexibility and fragility in designing an appropriate regulatory framework.

It can be seen that the lack of any meaningful enforcement procedures seriously undermines the effectiveness of the steering mechanism of the Luxembourg process. However, two factors must be considered here. First, the particular reflexive mechanism of the EES, which is known as the OMC, is not intended to be used 'when legislative action, under the Community method, is possible' (Commission of the European Communities 2001: 22). Second, member-states are unlikely to willingly relinquish their national competence in many of the politically sensitive policy areas integrated into the EES. So, although it has weaknesses, the reflexive governance mechanism of the EES at least offers a method of intervention when the issues at stake cannot be covered by a legislative option.

In the context of the WTR, the ease with which individual opt-outs can be employed have exacerbated the plasticity and malleability of the regulatory constraint of the weekly working time limit and rendered the regulatory stimulus for innovation in working practices virtually impotent. However, the proposed amendments to the WTD adulterate the appeal of using the opt-out and at the same time dilute some of the impediments to moving to systems of annualized working time. This illustrates how a reflexive framework can be made more robust and the guiding mechanism can be fine-tuned so as to make different options more or less attractive.

The EES and the WTD also demonstrate how reflexive regulation of labour markets provides a framework to support dialogue and negotiation between industrial relations actors in the development and implementation of employment policy and regulation. This could be a significant dynamic in the context of UK industrial relations given the lack of structures promoting social dialogue. On the other hand, the limited coverage of collective bargaining in the UK and the relative weakness of trade unions could be impediments to the reflexive governance of the UK labour market.

This review therefore suggests that a reflexive approach to regulating employment relations presents many positive opportunities, but as yet the hopes invested in such an approach remain to be fulfilled.

Final version accepted 22 February 2005.

Acknowledgements

We are grateful to Edmund Heery and the editors of the Journal for helpful criticisms of an earlier draft of this paper.

Notes

1. The 10 specific guidelines are: active and preventative measures for the unemployed and inactive; job creation and entrepreneurship; address change and promote adaptability and mobility in the labour market; promote development of human capital and lifelong learning; increase labour supply and promote active ageing; gender equality; promote the integration of, and combat the discrimination against, people at a disadvantage in the labour market; make work pay through incentives to enhance work attractiveness; transform undeclared work into regular employment; and address regional employment disparities. The 2002 EPGs consisted of 18 action points, many divided into a number of sub-headings, organized under four pillars of employability, entrepreneurship, adaptability, and equal opportunities, and an additional six 'horizontal' objectives.
2. Council Directive 93/104/EC concerning certain aspects of the organization of working time, OJ 1993, L307/18. The directive has been amended by European Parliament and Council Directive 2000/34/EC concerning certain aspects of the organization of working time to cover sectors and activities excluded from Directive 93/104/EC, OJ 2000, L195/41. The consolidated text is now contained in European Parliament and Council Directive 2003/88/EC, concerning certain aspects of the organization of working time, OJ 2003, L299/99.
3. At the time of submitting this review (February 2005) the proposals of the Council and the European Parliament were still awaited.
4. This can be contrasted with the substantive impact the WTD has had in the area of paid holiday rights in the UK. In part, this may be due to there being no opt-out from the holiday provisions. But, paid holiday entitlement is also a more clearly desirable policy objective from the perspective of workers (see Green 2003: 142).
5. Case C-303/98 *Sindicato de Medicos de Assistencia Publica (SiMAP) v Conselleria de Sanidad y Consumo de la Generalidad Valenciana* (2000) ECR I-7963.
6. Case C-151/02 *Landeshauptstadt Kiel v Norbert Jaeger*. Judgement of 9 October 2003.

References

Arrowsmith, J. and Sisson, K. (1999). 'Pay and working time: towards organization-based systems?'. *British Journal of Industrial Relations*, 37: 51–75.

Barnard, C. (2000a). 'The social partners and the governance agenda'. *European Law Journal*, 8: 80–101.

—— (2000b). 'The working time regulations 1999'. *Industrial Law Journal*, 29: 167–71.

——, Deakin, S. and Hobbs, R. (2003a). 'Opting out of the 48-hour week: employer necessity or individual choice? An empirical study of the operation of article 18(1)(b)(i) of the working time directive in the UK'. *Industrial Law Journal*, 32: 223–52.

——, —— and —— (2003b). *The Use and Necessity of Article 18(1)(b)(i) in the UK*. Report submitted to the European Commission.

——, —— and —— (2004). *Second Report on the Use of Article 18(1)(b)(i)*. Report to the European Commission.

Bell, M. (2004). 'Equality and the European Union constitution'. *Industrial Law Journal*, 33: 242–60.

Beswick, J. (2003). *Working Long Hours*. Sheffield: Health and Safety Laboratory Research Reports HSL/2003/02. Available at http://www.hse.gov.uk/research/hsl_pdf/2003/hsl03-02.pdf (accessed 12 January 2004).

Biagi, M. (2000). 'The impact of European employment strategy on the role of labour law and industrial relations'. *International Journal of Comparative Labour Law and Industrial Relations*, 16: 155–73.

Black, J. (1996). 'Constitutionalising self-regulation'. *Modern Law Review*, 59: 24–55.

BMRB Social Research (2004). *A Survey of Workers' Experiences of the Working Time Regulations*, EMAR Series 31. London: Department of Trade and Industry.

Carneiro, P., Heckman, J. J. and Masterov, D. V. (2005). 'Labor market discrimination and racial differences in premarket factors'. Institute for the Study of Labour IZA Discussion Paper No. 1453. Available at http://www.ssrn.com (accessed 5 April 2005).

Charlwood, A. (2004). 'The new generation of trade union leaders and prospects for union revitalization'. *British Journal of Industrial Relations*, 42: 379–97.

Collins, H. (2003). *Employment Law*. Oxford: Oxford University Press.

Commission of the European Communities (2001). *European Governance — A White Paper*. COM (2001) 428 final, Brussels, 25 July 2001.

—— (2002). *Taking Stock of Five Years of the European Employment Strategy*. COM (2002) 416 final, Brussels, 17 July 2002.

—— (2003a). *The Future of the European Employment Strategy (EES). A Strategy for Full Employment and Better Jobs for All*. COM (2003) 6 final, Brussels, 14 January 2003.

—— (2003b). *Communication Concerning the Re-exam of Directive 93/104/EC Concerning Certain Aspects of the Organization of Working Time*. COM (2003) 843 final, Brussels, 30 December 2003.

—— (2004a). *Equality and Non-Discrimination in an Enlarged European Union*. (COM) (2004) 379 final, Brussels, 28 May 2004.

—— (2004b). *Strengthening the Implementation of the European Employment Strategy*. COM (2004) 239 final, Brussels, 7 April 2004.

—— (2004c). *Second Phase of Consultation of the Social Partners at Community Level Concerning the Revision of Directive 93/104/EC Concerning Certain Aspects of the Organization of Working Time*. Available at: http://www.europa.eu.int/comm/employment_social/labour_law/docs/wtd_en.pdf (accessed 21 May 2004).

—— (2004d). *Proposal for a Directive of the European Parliament and of the Council Amending Directive 2003/88/EC Concerning Certain Aspects of the Organization of Working Time*. COM (2004) 607 final of 22 September 2004.

Cooney, S., Lindsey, T., Mitchell, R. and Zhu, Y. (2002). *Law and Labour Market Regulation in East Asia*. London: Routledge.

Deakin, S. (2000). 'Two types of regulatory competition: competitive federalism versus reflexive harmonisation, a law and economics perspective on Centros'. *Cambridge Yearbook of European Legal Studies*, 2: 231–60.

—— (2002). 'Equality, non-discrimination, and the labour market: a commentary on Richard Epstein's critique of antidiscrimination laws'. In R. A. Epstein (ed.), *Equal Opportunity Or More Opportunity? The Good Thing About Discrimination*. London: Institute for the Study of Civil Society, pp. 41–66.

—— (2004). 'Interpreting employment contracts: judges, employers, workers'. *International Journal of Comparative Labour Law and Industrial Relations*, 20: 201–26.

—— and Wilkinson, F. (1994). 'Rights vs. efficiency? The economic case for transnational labour standards'. *Industrial Law Journal*, 23: 289–310.

Department of Trade and Industry (2004a). *Fairness for All: A New Commission for Equality and Human Rights*. Cmd 6185 May 2004.

—— (2004b). *Equal Opportunities is Your Business Too*. Available at http://www.dti.gov.uk/er/equality/eo_yb.pdf (accessed 5 April 2005).

Department for Work and Pensions (2003). *UK National Action Plan for Employment*.

—— (2004). *UK National Action Plan for Employment*.

Donohue, J. (1989). 'Prohibiting sex discrimination in the workplace: an economic perspective'. *University of Chicago Law Review*, 56: 1337–68.

Employment Task Force (2003). *Jobs, Jobs, Jobs. Creating more employment in Europe*. Available at: http://www.europa.eu.int/comm/employment_social/employment_strategy/pdf/etf_de.pdf (accessed 12 October 2004).

Epstein, R. A. (1992). *Forbidden Grounds: The Case Against Employment Discrimination Laws*. Cambridge: Harvard University Press.

—— (1996). *Simple Rules for a Complex World*. Cambridge: Harvard University Press.

—— (2002). *Equal Opportunity Or More Opportunity? The Good Thing About Discrimination*. London: Institute for the Study of Civil Society.

Fischel, D. R. and Lazear, E. P. (1986). 'Comparable worth and discrimination in labor markets'. *University of Chicago Law Review*, 53: 891–918.

Fredman, S. (2004). 'Women at work: the broken promise of flexicurity'. *Industrial Law Journal*, 33: 219–319.

Frijters, P., Shields M. A., Theodoropoulos, N. and Wheatley Price, S. (2003). 'Testing for employee discrimination using matched employer-employee data: theory and evidence'. Institute for the Study of Labour IZA Discussion Paper No. 807. Available at http://www.ssrn.com (accessed 5 April 2005).

Godard, J. (2004). 'A critical assessment of the high performance paradigm'. *British Journal of Industrial Relations*, 42: 349–78.

Goetschy, J. (2001). 'The European employment strategy from Amsterdam to Stockholm: has it reached its cruising speed?'. *Industrial Relations Journal*, 32: 401–18.

Green, F. (2003). 'The demands of work'. In R. Dickens, P. Gregg and J. Wadsworth (eds.), *The Labour Market Under New Labour: The State of Working Britain*. Basingstoke: Palgrave Macmillan.

Harcourt, M., Wood, G. and Harcourt, S. (2004). 'Do unions affect employer compliance with the law? New Zealand evidence for age discrimination'. *British Journal of Industrial Relations*, 42: 527–41.

Healy, G., Bradley, H. and Mukherjee, N. (2004). 'Individualism and collectivism revisited: a study of black and minority ethnic women'. *Industrial Relations Journal*, 35: 451–466.

Heery, E. (2002). 'Partnership vs. organising: alternative futures for British trade unionism'. *Industrial Relations Journal*, 33: 20–35.

Henderson, D. (1998). 'The UK presidency: an insider's view'. *Journal of Common Market Studies*, 36: 563–72.

Hepple, B. (2004). 'Race and law in Fortress Europe'. *Modern Law Review*, 67: 1–15.

Hogarth, T., Daniel, W. W., Dickerson, A. P., Campbell, D., Winterbotham, M. and Vivian, D. (2003). *The Business Context to Long Hours Working*. DTI Employment Relations Research Series No. 23. London: Department of Trade and Industry.

House of Lords European Union Committee (2004). *The Working Time Directive: A Response to the European Commission's Review*. HL Paper 67. London: The Stationery Office Limited.

Hyman, R. (2005). 'Whose (social) partnership?'. In M. Stuart and M. Martínez Lucio (eds.), *Partnership and Modernisation in Employment Relations*. London: Routledge.

Kodz, J., Davis, S., Lain, D., Strebler, M., Rick, J., Bates, P., Cummings, J., Meager, N., Anxo, D., Gineste, S., Trinczek, R. and Pamer, S. (2003). *Working Long Hours: A Review of the Evidence*. DTI Employment Relations Research Series, No. 16. London: Department of Trade and Industry.

Mosher, J. and Trubek, D. (2003). 'Alternative approaches to governance in the EU: EU social policy and the European employment strategy'. *Journal of Common Market Studies*, 41: 63–88.

Neathey, F. (2003). *Implementation of the Working Time Regulations: Follow-Up Study*. EMAR Series 19. London: Department of Trade and Industry.

—— and Arrowsmith, J. (2001). *Implementation of the Working Time Regulations*. EMAR Series 11. London: Department of Trade and Industry.

Painter, R. W. and Holmes, A. (2004). *Cases and Materials on Employment Law*. Oxford: Oxford University Press.

de la Porte, C. (2002). 'Is the open method of coordination appropriate for organising activities at European level in sensitive policy areas?'. *European Law Journal*, 8: 38–58.

—— and Pochet, P. (eds.) (2002). *Building Social Europe Through the Open Method of Co-ordination*. Brussels: PIE-Peter Lang.

Posner, R. (1989). 'An economic analysis of sex discrimination laws'. *University of Chicago Law Review*, 56: 1311–36.

Presidency Conclusions of Lisbon European Council (2000). 23–24 March 2000.

Regent, S. (2003). 'The open method of coordination: a new supranational form of governance?'. *European Law Journal*, 9: 190–214.

Rogowski, R. and Wilthagen, T. (1994). *Reflexive Labor Law: Studies in Industrial Relations and Employment Regulation*. Deventer: Kluwer.

Rojot, J. (1998) 'Legal and contractual limitations to working time in the European Union'. *Bulletin of Comparative Labour Relations*, 32: 193–96.

Rubery, J., Figueiredo, H., Smith, M., Grimshaw, D. and Fagan, C. (2004). 'The ups and downs of European gender equality policy'.*Industrial Relations Journal*, 35: 603–28.

Schmid, G. (1994). 'Flexibilization of the labour market through law: On equity and efficiency in the regulation of working-time'. In R. Rogowski and T. Wilthagen (eds.), *Reflexive Labour Law: Studies In Industrial Relations and Employment Regulation*. Deventer: Kluwer, pp. 317–343.

Scott, J. and Trubek, D. (2002). 'Mind the gap: law and new approaches to governance in the European Union'. *European Law Journal*, 8: 1–18.

Sparks, K., Cooper, C., Fried, Y. and Shirom, A. (1997). 'Effects of hours of work on health: a meta-analytic review'. *Journal of Occupational Organizational Psychology*, 54: 367–75.

Sunstein, C. (1991). 'Why markets don't stop discrimination'. *Social Philosophy & Policy*, 8: 22–37.

Syrpis, P. (2001). 'Smoke without fire: the social policy agenda and the internal market'. *Industrial Law Journal*, 30: 271–88.

Terry, M. and Towers, B. (2000). 'Editorial: developing social policy in the EU: prospects and obstacles'. *Industrial Relations Journal*, 31: 242–46.

Teubner, G. (1993). *Law as an Autopoietic System*. Oxford: Blackwell.

Trades Union Congress (2003). *The Use and Abuse of the 'Opt-out' in the UK*. Report submitted to the European Commission.

Velluti, S. (2003). 'Towards the constitutionalization of new forms of governance: a revised institutional framework for the European employment strategy'. *Yearbook of European Law*, 22: 333–405.

Waddington, J. (2003). 'Heightening tensions in relations between trade unions and the labour government in 2002'. *British Journal of Industrial Relations*, 41: 335–58.

Weichselbaumer, D. (2002). 'Sexual orientation discrimination in hiring.' University of Linz Economics Working Paper No. 00-21. Available at http://www.ssrn.com (accessed 5 April 2005).

Williams, A. (2004). 'Appraising the measures introduced to protect employees against discrimination on the grounds of their sexual orientation'. *Business Law Review*, 25: 56–65.