



HOUSE OF LORDS

European Union Committee

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26th Report of Session 2007–08

**Working Time and  
Temporary Agency  
Workers: towards  
EU agreement**

Report with Evidence

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|  |                             |
|--|-----------------------------|
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### **Oral Evidence**

*Mr Pat McFadden MP, Minister of State and Mr Giles Smith, Department for Business, Enterprise and Regulatory Reform*

Oral Evidence, 10 July 2008 1

NOTE: In the text of the report:  
(Q) refers to a question in oral evidence

## **Foreword—What this Report is about**

This report makes available the oral evidence provided by Pat McFadden MP to EU Sub-Committee G (Social Policy and Consumer Affairs) following the political agreements reached in Council on 9 June 2008 in relation to: amendments to the 2003 Working Time Directive; and a new directive on the working conditions of temporary agency workers. Related correspondence between the Committee and the Government is shown in Appendices.

# Working time and temporary agency workers: towards EU agreement

1. This report describes the developments up to September 2008 in the search for agreement among EU Member States to the Commission's proposals: (a) to amend the present Directive 2003/88/EC<sup>1</sup> on working time; and (b) to introduce a new directive on the working conditions of temporary agency workers.
2. On 10 July 2008, the responsible UK Minister—Mr Pat McFadden MP—gave evidence to us about the agreements reached in Council on 9 June about the two Directives. Subsequently, on 15 September 2008, the General Affairs and External Relations Council formally adopted the Common Position on the Directives and on 22 September these were submitted to the European Parliament for Second Reading.
3. At the time of preparing this report, we had just seen the 7 October 2008 decision<sup>2</sup> of the European Parliament Employment and Social Affairs Committee to approve the Council Common Position on temporary work, without amendment. The Committee expressed the wish that the six year old proposal for a directive should enter into force without further delay. We note, however, that amendments may nonetheless be tabled at the plenary session of the European Parliament when the Council's Common Position is discussed.
4. **This report makes available for the information of the House, the evidence relating to the agreements reached in Council, which we heard from Pat McFadden MP on 10 July. The evidence was taken by Members of EU Sub-Committee G (Social Policy and Consumer Affairs), whose names are shown in Appendix 1.**

## Background

5. Both these Commission proposals are of very long standing and it has been politically difficult for the Ministers representing EU Member States to reach agreement on them at meetings of the Employment Council<sup>3</sup>. The Committee has taken a keen interest in both proposals since their publication and has conducted extensive correspondence with the Government about the progress being made towards agreement on them.
6. In 2004, the Commission conducted a consultation as part of its preparation for its 2005 proposal to amend the Working Time Directive. The Committee conducted an inquiry and published a report<sup>4</sup> as an input to that review. The Government responded to this report<sup>5</sup>, and it was debated on 2 July 2004<sup>6</sup>.

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<sup>1</sup> <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2003:299:0009:0019:EN:PDF>

<sup>2</sup> [http://www.europarl.europa.eu/news/expert/infopress\\_page/048-38811-280-10-41-908-20081006IPR38810-06-10-2008-2008-false/default\\_en.htm](http://www.europarl.europa.eu/news/expert/infopress_page/048-38811-280-10-41-908-20081006IPR38810-06-10-2008-2008-false/default_en.htm)

<sup>3</sup> The full title of the Council forum in which these matters are discussed is the Employment, Social Policy, Health and Consumer Affairs Council (EPSCO)

<sup>4</sup> EU Select Committee, 9th Report (2003–04): *The Working Time Directive: A response to the European Commission's Review* (HL 67)

<sup>5</sup> EU Select Committee, 26th Report (2003–04): *Government Responses* pp 39–43

<sup>6</sup> HL Deb 2 July 2004 cols 481–506

7. Despite attempts by successive Presidencies, agreement on the two Directives could not be reached in Council until the 9 June 2008 Employment Council meeting. In advance of that meeting, the Secretary of State for the Department of Business, Enterprise and Regulatory Reform (BERR), John Hutton MP, wrote to the Committee setting out the background. Attached to Mr Hutton's letter was a copy of a Joint Declaration by the Government, CBI and TUC on the subject of temporary agency workers.
8. The Committee replied to the Minister expressing our support for him to seek agreement in Council on texts that satisfactorily removed the long-standing UK problems with both the Commission's proposals. We went on to confirm that we wished to explore the issues further with the Minister for Employment Relations—Pat McFadden MP—when he came to give evidence to us after the Council meeting.
9. Copies of the correspondence between the Committee and the Government before and after the 9 June Council meeting are shown in Appendix 2 to this report, and a copy of the Joint Declaration by the Government, CBI and TUC on the subject of temporary agency workers is shown in Appendix 3.
10. The Council documents from the 9 June meeting setting out the political agreement on the Working Time Directive<sup>7</sup> and on temporary workers<sup>8</sup>, as well as a joint statement by certain Member States about the agreement on working time<sup>9</sup>, are all accessible on the Council's website.

### The Minister's Evidence

11. The topics we explored with Mr McFadden on 10 July were as follows. The full transcript of the Minister's evidence is printed from pp 1–9.
  - Texts for directives agreed at the 9 June 2008 Employment Council meeting (QQ 1–3)
  - European Parliament Second Reading and beyond (QQ 4–11)
  - Working Time Directive: *SiMAP/jaeger* (QQ 12–13)
  - Working Time Directive: the individual opt-out (QQ 14–17)
  - Working Time Directive: reconciliation of work and family life (Q 18)
  - Temporary Agency Workers directive: application of national agreements (QQ 19–23, 25)
  - Statistics of agency and temporary workers (QQ 23–24)
  - Temporary Agency Workers directive: joint declaration with the CBI and TUC (QQ 26–29)

### Working time Directive

12. Mr McFadden explained that there would no longer be any requirement to phase out arrangements that Member States wished to operate in order to allow individuals the right to opt out from a 48 hours maximum to their working week. It would also now be possible for Member States to exclude inactive periods for workers who were on call from the calculation of average weekly hours. This latter flexibility would be of particular relevance in the

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<sup>7</sup> <http://register.consilium.europa.eu/pdf/en/08/st10/st10583.en08.pdf>

<sup>8</sup> <http://register.consilium.europa.eu/pdf/en/08/st10/st10587.en08.pdf>

<sup>9</sup> <http://register.consilium.europa.eu/pdf/en/08/st10/st10583-ad01.en08.pdf>

context of arrangements for on-call working in the National Health Service which had been affected by the *SiMAP*<sup>10</sup> and *Jaeger*<sup>11</sup> judgments in the European Court of Justice<sup>12</sup> (QQ 1, 12–13).

### Temporary Agency Workers Directive

13. In relation to the temporary agency workers directive, the Minister explained that the main change agreed in Council on 9 June was that it would be now be possible for Member States to apply the directive in a way that allowed the conditions applicable to temporary agency workers to be qualified by national agreements with the social partners. The agreement reached by the Government with the TUC and CBI (shown in Appendix 3) was an example of such an acceptable agreement (QQ 1, 19).

### Next steps with the Directives

14. Mr McFadden made clear to us that the 9 June agreement in Council on the two directives was by no means the end of the story. Since both the proposals were subject to the process of co-decision, it would now be necessary to seek the views of the European Parliament on the texts agreed in Council. The Minister thought that the process for the Parliament to consider the texts would begin in September 2008 (QQ 5–6).
15. The Minister added that, if the European Parliament were to request substantial changes to the latest texts, a process of conciliation between the Council and the Parliament could be entered into in order to find texts acceptable to both institutions (Q 5). He assured us that the Government would be talking to MEPs, not just UK MEPs, in order to try to secure maximum support for the position that had been reached on 9 June. It was for the Parliament to take its own view but, the Minister emphasised, “I think it is worth everyone in this bearing in mind how long it took to get the agreement on 9 June and, therefore, if we all start unpicking it and saying, ‘We don’t like this part and we don’t like that part’, we could be back where we were, which was an inability to agree this” (QQ 10–11).

### Conclusions

16. **We welcome the agreements reached in Council on 9 June on both these long-standing proposals. Bearing in mind, however, that under the co-decision procedure the agreement of the European Parliament must also be achieved, we urge the Government to argue energetically the case with MEPs for the merits of the texts agreed in Council.**
17. **Nevertheless, we recognise that achieving the agreement of the European Parliament may not be straightforward and that, since both the proposals are subject to co-decision, a process of conciliation may be necessary. We plan therefore to retain both these proposals under our scrutiny reserve and to consider further any revised texts that may be brought forward following the European Parliament’s deliberations.**

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<sup>10</sup> Judgment of the Court of 3 October 2000 in case C-303/98, request submitted to the Court by the Tribunal Superior de Justicia de la Comunidad Valenciana (Spain) in the dispute between Sindicato de Médicos de Asistencia Pública (SIMAP) and Conselleria de Sanidad y Consumo de la Generalidad Valenciana, ECR 2000, p. I-07963.

<sup>11</sup> Judgment of the Court of 9 October 2003 in case C-151/02, request submitted to the Court by the Landesarbeitsgericht Schleswig-Holstein (Germany) concerning the dispute pending before that court between Landeshauptstadt Kiel and Norbert Jaeger, ECR 2003, p. I-08389

<sup>12</sup> See the account of the *SiMAP* and *Jaeger* judgments given in chapter 3 of the EU Committee report cited above.

## APPENDIX 1: SUB-COMMITTEE G (SOCIAL POLICY AND CONSUMER AFFAIRS)

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The Members of the Sub-Committee which conducted this inquiry were:

Lord Eames  
 Baroness Gale  
 Baroness Howarth of Breckland (Chairman)  
 Lord Kirkwood of Kirkhope  
 Lord Lea of Crondall  
 Baroness Morgan of Huyton  
 Baroness Neuberger  
 Baroness Perry of Southwark  
 Lord Trefgarne  
 Lord Wade of Chorlton  
 Baroness Young of Hornsey

### Declarations of Interest

Lord Eames  
*No relevant interests*

Baroness Gale  
*Patron, Kidney Wales Foundation*  
*Commissioner for Wales, Women's National Commission*

Baroness Howarth of Breckland  
*Patron and Trustee, Little Hearts Matter*  
*Deputy Chair, CAFCASS (Children and Families Court Advisory and Support Service)*  
*President and Trustee, Livability (formerly Grooms Shaftesbury)*  
*Secretary, All Parliamentary Group for Children*  
*Member, British Association of Social Workers*  
*Associate, Association of Directors of Social Services*

Lord Kirkwood of Kirkhope  
*No relevant interests*

Lord Lea of Crondall  
*No relevant interests*

Baroness Morgan of Huyton  
*Non-Executive Board Member of Southern Cross Healthcare PLC*  
*Member Advisory Panel Lloyds Pharmacy*  
*Board Member Olympic Delivery Authority*  
*Non-Executive Board Member of Carphone Warehouse PLC*  
*Adviser to Board of a charity (ARU), (one of whose areas of work is deinstitutionalisation in Romania and Bulgaria)*

Baroness Neuberger  
*Sister-in-Law to Professor James Neuberger, Gastroenterologist*  
*Non-Executive Director, VHI (Irish Health insurer)*  
*Adviser, Sainsbury Centre for Mental Health*  
*Member, Central Ethical Compliance Group, Unilever*  
*Adviser, Clore Duffield Foundation*  
*Patron, Greater London Forum for Older People*  
*Member, Advisory Board, Centre for Reform*

*Vice President, 'Attend'*

Baroness Perry of Southwark

*Chair, Research Governance Committee of the Addenbrooke's Trust and  
Cambridge University School of Medicine*

*Patron, Alzheimer's Research Trust*

Lord Trefgarne

*President, METCOM*

Lord Wade of Chorlton

*No relevant interests*

Baroness Young of Hornsey

*Member, All Parliamentary Group for Humanists*

*Chair, Nitro Theatre Company*

*Board of Directors, South Bank Centre*

*Non-Executive Director, The National Archives*

*Patron, Josephine Wolf Trust*

*Patron, Post Adoption Centre*

*Patron, Action Space, visual arts and learning disabled people*

*Chair, Arts Advisory Committee, British Council*

## APPENDIX 2: CORRESPONDENCE WITH THE GOVERNMENT

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### Letter from the Secretary of State for Business Enterprise and Regulatory Reform to Lord Grenfell dated 28 May 2008

I am writing to outline the Government's position on the Working Time and Temporary (Agency) Workers Directives. I attach the Slovene Presidency's proposals on both Directives, on which they have indicated an intention to reach political agreement at the Employment Council on 9 June.

On Working Time, the new text is a further step forward. The issue surrounding legal certainty on use of the opt-out has been clarified and the 12 month reference period for offshore workers has been re-instated. There is also important additional flexibility for short-term contracts regarding restrictions on the early use of the opt-out, and the maximum cap on working hours. The text also strengthens previous wording on the reconciliation of work and family life. The text addressing the issues raised by the ECJ *SIMAP* and *Jaeger* judgements remains as previously agreed.

The Government is optimistic that this new proposal can provide a basis for agreement. Our priorities will remain a solution to the problems caused by the *SIMAP* and *Jaeger* judgements, and the retention of the individual right to opt out of the 48 hour maximum working week, without unnecessary restrictions. We will continue to pursue these, and to ensure that the new text on work/life balance is consistent with Government policy on the right to request flexible working.

The new text on Agency Workers (on which we are separately providing an updated Explanatory Memorandum at the Committees' request) is also a significant step forward. Importantly, it provides a means of basing UK implementation of the Directive on the agreement announced between the CBI and TUC on this issue on 20 May. In doing so, the new text provides the UK with similar flexibility to that previously available to other Member States, in particular those with an established practice of implementing Directives via collective agreements, to derogate from the equal treatment principle on the basis of social partner agreement.

The Government considers that the CBI-TUC agreement will deliver fairer treatment for agency workers without removing the important flexibility agency work can offer both employers and workers. A copy of the agreement was sent to your Committee clerk on the day of the announcement and is attached for information.

The agreement deals with a number of key issues, in particular an appropriate qualifying period—after 12 weeks in a given job there will be an entitlement to equal treatment. The agreement uses the terminology in the draft Directive to define the scope of equal treatment (“basic working and employment conditions”) and how the principle would be applied in individual cases (workers should be treated at least as well as if “they had been recruited directly by the hirer undertaking to occupy the same job”). It also clarifies that equal treatment should not extend to occupational social security schemes.

The Government therefore believes that there is now for the first time a real possibility of securing agreement acceptable to the UK on both these dossiers. We believe this can be achieved at the 9 June Employment Council, ending six years of deadlock in the EU. It is highly likely that alternative proposals will emerge on both texts in the run up to the Council and at the Council itself; on which the extremely tight timetable will unfortunately not enable me to seek the Committee's further views. If a deal is on the table that addresses UK concerns and is acceptable on one or both these dossiers, I hope the Committee can agree that we

should accept it. I would of course write to you as soon as possible after the Council with more precise details of the terms of the agreement. Pat McFadden is of course due to meet the Committee on 10 July to discuss both Directives.

### **Letter from Lord Grenfell to the Secretary of State for Business Enterprise and Regulatory Reform dated 5 June 2008**

Your letter of 28 May on the above amended proposals was considered by Sub-Committee G (Social Policy and Consumer Affairs) at its meeting of 5 June 2008.

We very much welcome the progress that has been made in negotiating these proposals and we urge you to continue to press strongly for revised text that meets the points which are of outstanding concern for the UK. We would welcome your assurance that the definitions of “temporary agency workers” and “temporary agencies” used in the draft temporary agency workers directive are sufficiently clear to ensure that the scope of the directive is appropriate.

We consider a high level of flexibility to be crucial in both directives but we also believe that the success of the directives in protecting workers will be dependent on the application of robust enforcement mechanisms in order to avoid any abuse.

We note that you still aim to secure an improved text on clarifying the application of the *SiMAP/Pfjaeger* judgements to the revised Working Time Directive. This is an issue that we take extremely seriously and we regret the lack of information on that matter in your letter.

The continuing uncertainties are such that we are not in a position to release either of the documents from scrutiny. However, we do feel that, if the opportunity arises at the 9 June Employment Council meeting to join political agreement to texts that remove the long-standing UK problems with both of the proposals, you should take it.

We would not regard your agreement to either or both of the revised proposals in those circumstances as a breach of the House of Lords Scrutiny Reserve Resolution of 6 December 1999. Under the terms of section 3(b) of that Resolution, we indicate that such agreement need not be withheld.

We look forward to discussing the outcome of the Council with your ministerial colleague, Pat McFadden MP, on 10 July. In advance of that meeting, it would be helpful if you could write to us describing the outcome of the 9 June Council meeting and addressing the other issues raised in this letter, including the implications for the *SiMA Pfjaeger* judgements.

### **Letter from the Minister for Employment Relations and Postal Affairs to Lord Grenfell dated 20 June 2008**

Further to my letter of 28 May, I am pleased to inform the Committee that political agreement was reached on the Working Time and Agency Workers Directives at the 9 June Employment Council. I attach the texts on which agreement was reached, both of which represent good outcomes from a UK perspective.

On the Working Time Directive, the agreed text addresses the two priority objectives outlined in my earlier letter. There is a solution to the problems caused by the *SiMAP/Pfjaeger* ECJ judgments, enabling Member States to classify ‘inactive on-call time’ as rest in certain circumstances and providing increased flexibility on when compensatory rest can be taken. And, crucially, the right for individuals to opt-out of the 48 hour maximum working week is retained, with a review clause that does not imply an end date or any phasing out.

The text includes a number of safeguards on the use of the opt-out, including a maximum cap on hours of 60 (or in some circumstances 65) hours averaged over 3 months, a 'cooling-off period' of 6 months (or possibly longer if there is a probation period) and a ban on opting out in the first four weeks of a contract. However, there is important flexibility for workers on short-term contracts (up to 10 weeks per year with the same employer), enabling them to opt-out from day 1 and not be bound by the cap. The text is also a step forward as regards the reference period, with the time for calculating an average week's work in the UK effectively set at six months (compared with four months in the current Working Time Directive). Finally, the text also includes a provision on the 'reconciliation of work and family life' which, unlike the draft attached to my previous letter, is consistent with the Government's established policy that the interests of parents and carers be given priority by legislation on the right to request flexible working.

On the Agency Workers Directive we were able to achieve agreement on a text which means the UK can fully implement the recent agreement between the CBI and TUC. This includes specific references to a qualifying period and to the ability of a Member State to decide whether occupational social security schemes, including pension, sick pay or financial participation schemes are included (or excluded) from the definition of pay. These changes are in Article 5(4) of the text.

Political agreement was achieved by a qualified majority on both dossiers. Member States abstaining or voting against did so primarily because of opposition to the very positive text (from a UK perspective) on the Working Time opt-out, a number of them expressing hope that the text will 'improve' in this regard during the European Parliament's consideration of the texts. It will be important, therefore, to engage with the European Parliament in advance of its second reading of both directives to ensure the texts remain as close as possible to the current drafts.

### **Letter from the Minister for Employment Relations and Postal Affairs to Lord Grenfell dated 10 September 2008**

I refer to your letter of 5 June in which you advised that the Committee is not in a position to release either of the above documents from scrutiny, and to my letter of 20 June outlining the political agreement that was reached on the Working Time and Agency Workers Directives at the 9 June Employment Council. Further to my meeting with Sub-Committee G on 10 July, I am now writing to keep the Committee informed of the latest developments and to seek your agreement to voting in support of adopting the Common Position at the General Affairs and External Relations Council on 15 September.

Agreement on a Common Position on both Directives was reached on 6 August; the texts of both Directives are the same as the texts agreed on 9 June (subject to changes agreed by jurist linguists). The next step will be for the General Affairs and External Relations Council to formally adopt the text of the Common Position on 15 September. As you will be aware, this is the formal next step in the process (and does not involve any change in Government policy) so that both Directives can be submitted to the European Parliament for Second Reading on 22 September. Although the Directives are still held under scrutiny reserve, I would appreciate your agreement to vote in support of the Common Position. We will of course continue to keep your Committee informed of developments.

We will of course be engaging with the European Parliament in advance to preserve the texts as currently drafted.

### **APPENDIX 3: AGENCY WORKERS: JOINT DECLARATION BY THE GOVERNMENT, THE CBI AND THE TUC**

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The CBI and TUC have reached agreement on how fairer treatment for agency workers in the United Kingdom should be promoted, while not removing the important flexibility that agency work can offer both employers and workers:

Agreement has been reached on the following points.

- (a) After 12 weeks in a given job there will be an entitlement to equal treatment.
- (b) Equal treatment will be defined to mean at least the basic working and employment conditions that would apply to the workers concerned if they had been recruited directly by that undertaking to occupy the same job. It will not cover occupational social security schemes.
- (c) The Government will consult the social partners regarding the implementation of the Directive more generally, in particular:
  - (i) mechanisms for resolving disputes regarding the definition of equal treatment and compliance with the new rules that avoid undue delays for workers and unnecessary administrative burdens for business;
  - (ii) appropriate arrangements to enable the two sides of industry and also public services to reach appropriate agreements on the treatment of agency workers, while respecting the overall protection of agency workers; and
  - (iii) appropriate anti-avoidance measures reflecting Art 9 (2), in particular relating to the treatment of repeat contracts for the same worker and the position of workers with permanent contracts of employment with agencies who continue to be paid between assignments; it is not intended that article 5 (2) will be used to evade the aims of the Directive.
- (d) The new arrangements will be reviewed at an appropriate point in the light of experience.

The Government will now engage with its European partners to seek agreement on the terms of the Agency Workers Directive that will enable this agreement to be brought into legal effect in the United Kingdom. The Government hopes that EU agreement will be obtained in time for the necessary UK implementing legislation to be introduced in the next parliamentary session.

20 May 2008

## **APPENDIX 4: RECENT REPORTS**

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### **Recent Reports prepared by the EU Select Committee**

#### *Session 2007–08*

The Treaty of Lisbon: an impact assessment (10th Report, Session 2007–08, HL Paper 62)

Priorities of the European Union: evidence from the Minister for Europe and the Ambassador of Slovenia (11th Report, Session 2007–08, HL Paper 73)

The Commission's Annual Policy Strategy for 2009 (23rd Report, Session 2007–08, HL Paper 151)

Priorities of the European Union: evidence from the Ambassador of France and the Minister of Europe (24th Report, Session 2007–08, HL Paper 155)

### **Recent Reports prepared by Sub-Committee G (Social Policy and Consumer Affairs)**

#### *Session 2007–08*

Increasing the supply of donor organs within the European Union (17th Report, Session 2007–08, HL Paper 123–I)

Protecting the consumers of timeshare products (3rd Report, Session 2007–08, HL Paper 18)

# Minutes of Evidence

TAKEN BEFORE THE SELECT COMMITTEE ON THE EUROPEAN UNION  
(SUB-COMMITTEE G)

THURSDAY 10 JULY 2008

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|         |                         |                       |
|---------|-------------------------|-----------------------|
| Present | Eames, L                | Neuberger, B          |
|         | Howarth of Breckland, B | Perry of Southwark, B |
|         | Kirkwood of Kirkhope, L | Wade of Chorlton, L   |
|         | Lea of Crondall, L      |                       |

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## Examination of Witnesses

Witnesses: MR PAT MCFADDEN, a Member of the House of Commons, Minister of State, and MR GILES SMITH, Department for Business, Enterprise and Regulatory Reform, examined.

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**Q1 Chairman:** Welcome, Minister. Thank you very much for joining us. As you know, this is an issue that has taxed and interested this Committee over a considerable period of time and where we have contributed hopefully to the debate and, we hope, helpfully to the Government's discussions in relation to all of this, so we are looking forward to being able to discuss further where we have reached. We are really interested to hear about progress on the Employment Council meeting, and, I must say, that is where we are really keen to get to, but there are a lot of matters of detail and we have people of quite considerable experience in this field and, as always, it is the experience in the field that we have to investigate, but today people are really keen to follow through some of the issues, so we are glad you are here. Can I just begin by asking you to outline what you consider to be the UK's key negotiation successes in relation to the agreements reached on 9 June. How was it possible to reach agreement in Council on this occasion when it had not been possible previously, and we are more than aware of the ramifications and the difficulties and indeed some of the continued difficulties?

*Mr McFadden:* I think we secured a good deal for the UK on 9 June, and the specific question you are asking is: why could you reach an agreement on 9 June that you could not reach in December when these two Directives were also under discussion? There were a few changes, which I will use by way of illustration to make the point about the difference between what happened over those six months. On working time, if I start with that, our objective was two-fold. One was to secure the future of the UK opt-out and the other was to reach a resolution of what we have come to know as the *SiMAP* and *Jaegar* judgments, which are about rest time, on-call time and so on. There were changes from December to June on those points. There had been in the draft before us in December a reference to Member States

having to prove their specific need to use the opt-out. We were opposed to that, we did not think Member States should have to prove a specific need and that this should be an issue of choice for the employee. That has now gone. In previous drafts, not actually in December, but previous drafts of Working Time Amendment Directives put to Council over the years, there had been a lot of language around a phasing out of the opt-out or providing an end date for the opt-out. We wanted to ensure that that was not the case with any draft we agreed and it is not the case with the draft agreed on 9 June. There was also an issue around short-term contracts. The Directive has a ban on the use of the opt-out for the first four weeks of a contract. We were keen to ensure flexibility for people who would be on short-term contracts where that might create a problem and might mean the opt-out was not available to them at all, so written into the agreement on 9 June is that that ban on the use of the opt-out in the first four weeks does not apply for short-term contracts, defined as up to ten weeks with the same employer over a 12-month period, so there were a few changes on working time. On the Agency Workers Directive, there was probably more change between December and June than on the Working Time Directive. The principal change that took place between December and June on that front was that here in the UK we were able to bring together the TUC and the CBI to reach an agreement on the main points of how that Directive would be applied in the UK, and that was published in May, and then our task was to ensure that the Directive that we agreed would allow us to implement the agreement that had been reached between the TUC and the CBI. We were successful in doing that on 9 June, so that was a substantial change compared to the draft that had been put before us in December and a greater change than probably anything that happened on working time, although we did secure our key objectives on working time. I said we had two objectives on

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working time and we probably also had two on the Agency Workers Directive, which was to ensure a fair deal for the agency worker, but also to ensure flexibility for employers, and I think we secured that too. Now, we never particularly wanted these two Directives to be taken as a package, we did not think that was necessarily the best way to make policy and reach agreement, but most Member States wanted it and decided that way. The package, as a whole, before us on 9 June was a much better deal and easier to agree from the UK Government's point of view than on 5 December.

**Q2 Lord Wade of Chorlton:** Does that mean then, in practice, that somebody that disagreed with our view at the earlier date changed their mind at that meeting and did not disagree with you, so you got the consent of all the parties, as it were?

*Mr McFadden:* Well, with 27 Member States, people—

**Q3 Lord Wade of Chorlton:** No, I am not saying that there is anything wrong with that, but obviously I would be interested to know who changed their mind.

*Mr McFadden:* I am not sure I could name a Member State which specifically changed its mind on these points. For example, on the agency workers agreement reached here, our discussions with the Slovenian Presidency, who were very helpful throughout, I should say, and with the Commission were, "Look, you have a Directive that has not been able to reach agreement in Europe for a number of years. We've had specific problems with it, we think it is too inflexible, but we have now reached a domestic agreement which we would like to see reflected in the Directive", so I am not sure that it was a case of A N Other Member State changed its mind between December; I just think it was a better package.

**Chairman:** Minister, maybe I could put the question differently and take us into the next set of questions because, I suppose, the real issue is: where are we now? We may not actually have agreement across all Member States, as we know, and people may not have changed their minds, or am I right in thinking they may not have changed their minds, but needed to get an agreement, and an agreement is now settled? Maybe you could say something about that when we start talking about the Parliament and the Second Reading and where we think that will take us, and Lord Eames wants to take us into that, but, if you could cover those other points, it would be useful.

**Q4 Lord Eames:** I want you to be a bit of a prophet for us. We are wondering, what is the prospect that you see on the European Parliament's Second Reading, as a whole? Do you see the package, as an entity, going through? Do you see it being splintered in any way and what are the obstacles that you see

that might prevent a Second Reading deal during the French Presidency? Then, following on from that, if the package agreed in Council is not accepted by the European Parliament, could you tell us how you see the way forward?

*Mr McFadden:* Well, there are a few questions there, so, if I do not cover all of them, I am sure you will take me back to the right track.

**Q5 Lord Eames:** It is a package!

*Mr McFadden:* Let us start with the first point which is that the agreement on 9 June is not the end of the story, that is true. There is a very important European Parliament process to take place now. The Member States in Council, between December and June or in the run-up to December and then in the six months in between, did treat them as a package of two Directives. The European Parliament will not necessarily. They are free to decide to take these issues one by one or together and they are free to decide that in their own way. There is a very important European Parliament process to begin. My understanding is that that will begin formally probably in December[sic]. I have made some initial contacts with MEPs to make clear what I said in the answer to the first question, that this is a good deal for the UK and that we hope that it will be approved by the European Parliament, but we are very conscious that that is an important part of the law-making process in Europe. I think your second question was, "What if that doesn't happen?" If that did not happen and the European Parliament were to substantially change the agreement of the 9 June, there is then a process referred to as 'conciliation' between the Council and the European Parliament. I am hesitant to be too much of a prophet, even though you have asked me to. It is an important process and we will fully engage with it, as they say, although "engage" is a term I am not always fond of, but we will talk to the MEPs from around the different Member States. I am sure the Commission and the Presidency will also do that. The Commission have a very important role to play in securing the agreement that the Council have reached, as do the Presidency, so we will play our part and hopefully others will also too.

**Q6 Lord Eames:** You are not too despondent then?

*Mr McFadden:* No, I am not despondent. I am clear that it is not the end of the process, what we did on 9 June, by any means and that this is important, but I am not despondent. I think we still have work to do and we will do that. I am just reminded by someone that I said maybe that the European Parliament process starts in December, but September is of course what I should have said.

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**Q7 Chairman:** Before I bring in Lord Lea, could I just take us back to Lord Wade's point in that we know that there are countries that have objected. Are we doing anything there to actually talk to them and make contact or engage?

*Mr McFadden:* Yes, of course we always try to talk to Member States. I would make a more general point about my experience of this in the past year, and there are people around this table with far longer experience in these issues than that. A European Union of 27 Member States has a great variety of labour markets and people take a very different view of things. If you take probably the hottest issue for some Member States, the individual opt-out on working time, we take the view, and the Government is very clear in this view, that that is of value to employees in the UK by giving them choice over their working hours and increasing their earnings by allowing them to work more than 48 hours a week, if they wish, and also of value to employers because it gives them the flexibility and, therefore, it is of benefit to the economy, as a whole. Some other Member States take a very opposed view and they do not believe there should be an opt-out at all. They believe that a 48-hour week should be a firm maximum, and I am sure that there will be some MEPs who take that view too. This is agreed by qualified majority voting, it is not agreed by unanimity, and a number of Member States made clear that they did not support the agreement, more on working time than on agency work, but it is qualified majority voting that it was approved by, so there is work to do in the European Parliament, that is certainly the case.

**Q8 Lord Lea of Crodall:** I wonder if, on this interesting point about the variety of labour markets, the Minister would like to think aloud about how we picture this. Is there not a paradox, and this is lurking behind the different categories of disagreement in the European Parliament and with Member State governments, that, although there are very different labour markets, there is almost an inverse correlation between that and the amount of migration which is a feature of our labour market? The fact is that over the last 20 years, in one respect, we have created one labour market and, in other respects, of course there is a great variety of labour markets, and some of the tensions now are that we are playing a game in one labour market where people's mental position is that there is a great variety of labour markets, but, in some aspects, migration in terms of people who migrate is a very good example of where actually there is one labour market.

*Mr McFadden:* I am not sure what you mean.

**Q9 Lord Lea of Crodall:** The labour markets, I am saying, are not all that different.

*Mr McFadden:* We have freedom of movement around the European Union, if that is what you mean, by virtue of being Member States. We have some conditions with regard to Romania and Bulgaria of course, but, generally speaking, there is agreement on freedom of movement for labour. What I am saying, for example, is that there is a great variety of traditions in labour markets, and let me use a very specific example. One of these Directives deals with the agency sector. We have something like 16,000 agencies or so in the UK and there is one Member State that has five, so they are obviously going to view regulation of agency work through very different eyes, and there is nothing wrong with that, than we would with 16,000 agencies, many of which are small businesses, so that is simply an illustration of the very different types of labour market we have. We could probably go down a long track on this, and maybe that is not the best use of our time. We believe that the flexibility in the UK labour market is one of the reasons why we enjoy a higher rate of employment than many other countries with roughly 75 per cent of the working-age population being in employment, so that flexibility has helped to inform our approach to these two Directives.

**Q10 Baroness Neuberger:** Minister, you have partly answered, you are not a prophet and you cannot quite necessarily see how it is going to go, but I suppose what we would like to tease out from you, insofar as you can go there, is how the Government will try to convince MEPs, both our own and indeed throughout the Union, of the merits of the agreement that was reached in Council, and also how do you expect the other governments to act, both those who disagreed and indeed those who agreed, in trying to persuade the MEPs?

*Mr McFadden:* Well, as I say, we will talk to MEPs, not just our UK MEPs, although that is obviously where we start, and we will try to secure the maximum support for the position that has been agreed. One thing, I think, to bear in mind for everyone here, and it goes back to what we have just been talking about about the diversity of labour markets across the EU, is that it took a long time to get this agreement in Council. These two Directives, as this Committee knows better than most people, have been in discussion for years.

**Q11 Baroness Neuberger:** Yes!

*Mr McFadden:* We were finally able to reach agreement. Now, like all agreements among 27 Member States with different traditions, outlooks and labour markets, for any single Member State it is probably not perfect. We believe, from a UK point of view, that it is a very good deal for the UK and that there is sufficient flexibility in both of these Directives for us to continue on the high-employment route that

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we have enjoyed in recent years. It is for the European Parliament to take its own view, but I think it is worth everyone in this bearing in mind how long it took to get the agreement on 9 June and, therefore, if we all start unpicking it and saying, “We don’t like this part and we don’t like that part”, we could be back where we were, which was an inability to agree this. That is certainly the view we take, and I do not want to repeat what I said to Lord Eames, but everyone will have to play their part and we will play our part as a Member State in this, and the Commission and the Presidency have their part to play too.

**Chairman:** I think what you are hearing from the Committee is that some of us have happily lived with it a long time and would like to see it not fall apart, but we were particularly exercised in some of our previous investigations about *SiMAP* and *Jaegar* and Lord Kirkwood is going to follow on that.

**Q12 Lord Kirkwood of Kirkhope:** Minister, governments are never perfect, but I think that the progress that you have made is really exceptional, and that is to our advantage. Obviously the European Court of Justice (ECJ) put pressure on all the Member States over the *SiMAP* and *Jaegar* judgments. Could you just take us through in detail whether the agreement you got is actually a perfect fix for the problems that arose from these judgments because that is of interest to us all, but for special categories of workers, like health workers and lorry drivers, could you just explain a little to what extent you got everything that you needed to resolve the conflicts that arose from *SiMAP* and *Jaegar*?

**Mr McFadden:** I will say something, but I might bring Giles in because he knows about this in great depth. The *SiMAP* and *Jaegar* judgments did create a difficulty for a number of Member States and, again as committee members here know, this is about defining the rest time or inactive time, if you want to call it that, as working time, and then also about the rest periods that need to take place between different shifts. Obviously, the sectors that that has created the most difficulty in have been probably health and social care. Now, in the UK we have adapted to that by very substantial change in the way that the health sector works, a move far more towards shift working than on-call working in the NHS, although there is still some on-call working and I do not want to pretend that it has gone. What will the changes made in the agreement on 9 June do? Well, they will allow Member States to not regard that on-call inactive time, if you want to call it that, as working time. They also give more flexibility about the rest periods that have to be taken in between working shifts, so, in the health sector, for example, someone who is a trainee surgeon or a doctor might be able to find, how can I put it, a better-suited working pattern to make sure that they are getting the maximum value in terms of

their training or their experience out of the time that they are at work rather than having to count time when they are on-call, not actively working, as working time. The effect of that up until now has been to reduce the amount of available time to, if you like, active working in their working week, so it will have that benefit of being able to use that time better for someone like an NHS worker, and again in the care sector it will have an application there. Giles, do you want to add anything to that?

**Mr Smith:** No, I think you have covered the main points. As the Minister has pointed out, the solutions to the *SiMAP* and *Jaegar* judgments that were agreed in June will not mean a wholesale reverse back to on-call working, it will just mean that there is increased flexibility for working patterns to be developed that will deliver better balance between patient need, doctors’ training needs and doctors’ work/life balance, and it will enable Trusts to come up with patterns that can meet all those objectives. There are instances, for example, more isolated hospitals, where it is very difficult and not cost-efficient to be on shift-working patterns, so it just enables them to have greater flexibility to work more productively.

**Q13 Lord Kirkwood of Kirkhope:** Are there any other sectors that these new changes to the 9 June agreement will start to create problems for? Have you identified any sectors for which there will be a downside from the agreement that you have struck? You seem to be saying that *SiMAP* and *Jaegar* are fixed and that is positive and excellent, but this will not have any perverse, unintended consequences on any other sectors that you can foresee?

**Mr Smith:** Not that we can foresee, absolutely not, no. There are other sectors outside the health sector, the offshore sector, for example, and the Minister has mentioned some others, where there is going to be a positive development.

**Chairman:** Giles, I need to apologise to you because at the beginning I did not ask you to introduce yourself for the record. We were so excited about getting into the content. Lord Lea is going to follow through on this opt-out issue.

**Q14 Lord Lea of Crondall:** As you will know from the list of questions, the first of these two relates to the quite complicated business of 60 hours and 65 hours, and there would appear to be the question of limiting in one week, and then there is the averaging principle and there is the availability of the opt-out. What is your view of the 60- and 65-hour limits set out in Article 22(d) and, in particular, what are the implications of the inclusion of the inactive part of the on-call time in the 65-hour limit? It is two different points really.

**Mr McFadden:** This is a brave step for us all, getting into the territory of—

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**Q15 Lord Lea of Crondall:** Well, someone has got to understand it at some stage!

*Mr McFadden:*—reference periods, so let me plunge forward. Article 22(2)(d) of the revised Working Time Directive sets out these maximum weekly working limits, but it is very important to see these in the context of what we refer to as a ‘reference period’. That is to say, if I take the 60 hours, for example, what this means is that there would be a limit of 60 hours for a working week, referenced over a three-month period, so that does not mean in any particular week you cannot work more than 60 hours, you can, but your average over the three-month reference period must be no more than 60 hours. And it is the same concept with the 65 hour maximum cap. Now, what is the difference between the two, is, I think, the core of your question. The 60 hour cap applies when the inactive part of on-call time is not counted as working time, going back to Lord Kirkwood’s question. The 65 hour cap applies either when there is a collective agreement to have a 65-hour limit or for when there is not a collective agreement but where a Member State has decided not to use the *SiMAP* and *Jaegar* changes by not counting the inactive part of on-call time as working time. If I could give a Member State as an example, France has indicated that it does not intend to use the flexibility in the revised text to not count inactive on call time as working time.. It is complex, but I hope that explains it.

**Q16 Chairman:** So France, for example, will say 65 hours’ average, but will include the inactive part of on-call time as working time?

*Mr McFadden:* Correct.

**Q17 Lord Lea of Crondall:** I am very grateful and, on behalf of the Committee, I think we are all very grateful for that very clear reply. I think we thought that is what it meant, but it is nice to know that you are so clear that that is what it means because out there in Burton-on-Trent somebody has got to understand this at some point along the line. The next point, of which you have had notice as well, is what concerns, if any, do you have about the requirement set out in 24(a) for Member States to report to the Council and the European Parliament about the operation of opt-outs from the weekly hours limit?

*Mr McFadden:* The short answer is no, we do not have concerns. The slightly longer answer is that these kinds of review and reporting clauses are a normal part of Directives. This Article actually represents an important gain for the UK because in previous drafts, not the draft in December that we considered, but in previous drafts over the years this part of the Directive had contained assumptions that the opt-out would be phased out, there would be an end date, there would be a gradual phasing out, this

kind of language. That language has gone from this part of the Directive, so there does have to be a reporting on how Member States are using the opt-out provision and who is affected by it, which is then considered by the Commission, but there is no presumption in that reporting and review, and that is the critical gain for the UK compared to previous drafts of the Directive. So we are perfectly happy with a reporting and review clause which says, “You’ve got to come back and tell us how you are using this provision”. There is absolutely nothing wrong with that, and the important gain for us is that there is no presumption in here that the capacity to use the opt-out cannot continue in the future.

*Chairman:* We want to move on to reconciliation with family life, which again the Committee is very interested in.

**Q18 Baroness Perry of Southwark:** Minister, my question is about the new Article 2(b) which encourages social partners to find ways of better reconciling balance between work and family life. What is your view of that and what impact, do you think, either good or bad, will it have in the UK context?

*Mr McFadden:* We were content with the words in the new Article 2(b). This is an important area. The reconciliation of work and family life is important for all Member States. I think that there were significant gains made in the UK on this broad theme in recent years. We have got extended maternity leave, maternity pay and so on and we also have flexible working for many employees and, specifically, as far as the law goes for parents of younger children and carers. Again, the important thing for us about this clause is that it is permissive, it talks about encouraging business to consider these requests and it also, if my memory serves me right, refers to taking into account the needs of the business. That fits exactly with the model of flexible working that operates in the UK because our flexible working model is that this is a right to request, it is not an absolute right to have, and business can legitimately say on a number of grounds, “I understand your request, but this week”, or this month, “I am afraid that’s not possible because we have a specific business need”. Since that was brought in, it has worked quite well and, in discussing this part of the Directive in the negotiations, we were keen to ensure something that would fit with the right to request model for flexible working which we operated in the UK, which has been successful, I think, because it is a right to request and because it has balance built into it. It does attempt to recognise what we call here the ‘reconciliation of work and family life’, but it also recognises that there are business needs and there is the employer’s need that has to be taken into account here too, so we were content with these words and we

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think it fits with the policies that we have been operating.

**Q19 Baroness Perry of Southwark:** I think there is good evidence that, where these agreements are reached, it actually does help the business case that employees feel better about their lives. Can I move on now to the new Article 5(4) in the text that was agreed on 9 June. To what extent do you feel it meets all the requirements of this country, of the UK, and are there any aspects of it which leave questions open for the future in relation to the way in which the equal treatment of temporary agency workers is applied here?

*Mr McFadden:* Well, I said in relation to the first question that we had reached an agreement between the CBI and the TUC on how equal treatment for agency workers would operate in the UK. What Article 5(4) does is it allows us to implement that agreement, so there was a lot of careful negotiation about these couple of paragraphs, they are very important to the UK and, we believe, they do allow us to implement the agreement. For example, if I can take a couple of specifics, the new Article 5(4) refers to the capacity to have a qualifying period, and there is a qualifying period in the TUC and CBI agreement, of 12 weeks. It also allows Member States not to include occupational social security schemes as distinct from statutory benefits. That too is built into the agreement reached between the TUC and the CBI, so, in different ways, this Article allows us to implement that which was agreed and announced in May. It is a good area to focus on actually because what it shows us is how the domestic process and the European process have knitted together here. It was not enough for us to simply reach a domestic conclusion on the treatment of agency workers if that could then have been second-guessed by a Directive that would have pulled us in a completely different direction, so what happened between December and June was that we were able to reach a domestic conclusion, the validity of which was then recognised in the European Directive, thereby removing, if it is ratified by the European Parliament in its current form, the danger that the domestic agreement would simply be turned over by a Directive doing something different. That is why it is important that this holds together as a package.

**Q20 Lord Kirkwood of Kirkhope:** I come from a Scots law background, which you will recognise, where the concept of a principal and an agent was really quite different in law. I guess we are doing more with commercial agencies than legal agencies, and the question is: are you satisfied that there is clarity in the “temporary workers agency” and is there something more that can be done within the social partners agreement in order to try and get more clarity to the

definitions as to what is actually involved here in the relationships, which are really quite separate from a principal and agent? A principal and agent is almost a fiduciary relationship where an agent can commit contracts and other things on behalf of the principal, and that is not where we are here. Is there not some more work that the Government can do to shine a light into this corner and get clarification where there is, I think, another confusion?

*Mr McFadden:* We think the definitions are clear and that we can work with them in terms of what is in the Directive and what is in our domestic law. If I can just explain what they are talking about here, when we talk about agency workers, we are talking about a three-way relationship. There is the worker, there is the agency, which they have a relationship with, and then there is the hiring company. Say, I am a hiring company for the purposes of this discussion, I will say, “Look, I’ve got a lot on. I need you to get me ten people who have experience of this particular job”, whatever it might be, “and I need them for a month” or two months. The agency then provides them and that is what this definition of “agency worker” in the Directive is about, so it is a three-way relationship between the temporary agency, if you like, the agency that supplies the temporary workers, the agency worker and the hiring business. What does it not include? It is not a normal temporary worker where I come along and I am employed for six months in the office of Lord Kirkwood here in the House of Lords and it is an understanding that that is because you are writing a very interesting book and you only want somebody for—

**Q21 Lord Kirkwood of Kirkhope:** You will be working more than 65 hours a week, I can tell you that!

*Mr McFadden:* It is also not, and this is a point perhaps worth registering because this came up during the Private Member’s Bill that was considered here, it is not what we call ‘head-hunters’. This is not covering somebody whose job it is to find not a member of staff for you for six months, but someone who would come and work for you permanently, so the relationship is one where it is a temporary placement with a third party, a hiring company, and we have legislation, I think, from 1973 which defines these as, we call them, ‘employment businesses’ actually in this, which means that we are talking about the temporary placement of workers, and that is different from head-hunters. The Directive is very clear that it is talking about temporary agency workers.

**Q22 Lord Kirkwood of Kirkhope:** That is a very helpful answer and thank you for that because it is on the record and people can see that. I have no doubt that you understand precisely what the definitions

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are, but what about the co-partners, the agency workers? Some of them may be from overseas states and English may not be their first language, and I defy you to give that explanation to a Pole, who has just arrived here looking for work, in a sensible way. Are you confident that the people who are maybe the applicants for some of these temporary positions actually understand what the status is so that they can make sure that they get the best out of what rights they have available to them?

*Mr McFadden:* Well, that is an interesting and good question: how do you, in what can be a complex deal of employment law, inform people about their rights? We do this in a number of ways. Let us take your example of someone who comes perhaps from Poland to work in the UK and may get work through an employment agency. The Government actually distributes information on employment rights and responsibilities in Poland.

**Q23 Lord Kirkwood of Kirkhope:** In Poland?

*Mr McFadden:* In Poland and in Lithuania and, I think, in Portugal, I am not sure about other Member States, precisely to avoid some of the exploitation that can take place when people do not know their rights, and that is in the interests not just of that person from Poland, Lithuania or wherever they may be from, but it is also in the interests of UK workers and reputable UK business because it is in no one's interests that people are brought into the country and are paid below minimum wage and other bad things can happen. Alongside that publicity which is distributed elsewhere, we know we have to do more within the UK on this. The minimum wage enforcement budget has been increased by £3 million a year during the course of this CSR period, and I have been chairing the Vulnerable Workers Enforcement Forum, which has brought together the trade unions, the CBI, other business interests, and the recruitment agencies themselves are represented and the different enforcement agencies across government, because we have got HMRC enforcing the minimum wage, we have got the Agency Standards Inspectorate enforcing the regulations with regard to employment agencies, we have got the Health and Safety Executive and so on. We have brought them together in the last year in a very co-ordinated way, but I think this is important. Look, let us be honest, in any field of law, does an employee sit and read the primary legislation? No, they are not going to do that. Does the Government then have a responsibility to make sure that the rights that Parliament has legislated for, either through our own domestic legislation or through legislation that derives from Europe, are properly and clearly understood and enforced? Yes, we absolutely do that and we want to do more on that.

*Chairman:* That is extremely helpful. I think Lord Kirkwood has teased out a piece of evidence which we have not had before, which is really, I think, very useful.

*Lord Lea of Crondall:* Minister, it has often occurred to me over the years that a good indicator of the effectiveness of anything one does, whether it is through a voluntary agreement or through the law, is the quality of the statistics because, if the statistics are not very robust and we do not really know what we are talking about in any statistical sense, it probably means we will not be able to implement the thing very well. As you may know, one or two of us have been pushing a little bit at this statistical front and there is obviously a difference between different categories of temporary agency worker and other parts of the labour market. Temporary is one, agency is another, one plus two, temporary and agency are somehow together. Would you agree that everything is a priority, but it is rather important, before we come to look at the problems about implementation and, down the road, enforcement in some sense, that people are very clear if you divide up the whole pie out of, let us say, three million people from domestic service, which at some point in the future may have to be dealt with so that people working for Lord Kirkwood are aware? At the moment, for reasons which are implicit in the nature of this labour market, if I can just finish on a note in parenthesis about labour markets, I think there is a very interesting question, that this illustrates that there are not 27 labour markets, but either there is one or there are a thousand and there is a difference between the London labour and the Aberdeen labour market, is one way of looking at it, but this can be seen as a different labour market. It depends how you define 'labour markets', but the statistics somehow have got lost in some way. I do not think that this is a problem that will go away and I was wondering if you would just comment.

*Chairman:* Just for clarity, are you asking the Minister how the pie is divided up between the different numbers of workers and how we know that in order to help us to make policy?

**Q24 Lord Lea of Crondall:** Yes, linking it to the specific problem that this very, very broad-brush estimate is all we have got at the moment on temporary agency, yes.

*Mr McFadden:* I think it is a fair question because we have temporary workers, to go back to Lord Kirkwood and the person directly hired by someone to work for a few months or whatever, and then we have the agency workers in the three-way relationship I spoke of. I have seen the answer given to Lord Lea by my colleague, Baroness Vadera, recently, saying that the Labour Force Survey estimates a total of about 1½ million in both

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categories, and then there are industry estimates of perhaps a million agency workers. I think it is fair to say that we need a good definition of this. The Government is doing a lot of work on this. One thing I would say is that there are going to be seasonal factors in the number of agency workers. We have talked about migrant workers obviously, and there are certain parts of the economy, the rural economy, when they might be boosted in certain months of the year and so on. We will be publishing some government estimates around this in the relatively near future which, I am sure, will be of value to the Committee.

**Q25 Chairman:** There have been real questions about the definitions and whether or not certain sectors of industry can get enough workers within the timescales because of definitions. Just as a supplementary, are the Government looking at that?

**Mr McFadden:** Yes, sometimes we do get representations saying that a particular area is under pressure, but I am also clear that our Prime Minister, whilst he is deeply committed to free trade and to the free movement of people rules that apply across the European Union, is also very keen that we do more to encourage some people within the UK into the labour market rather than, maybe sometimes as a first resort, doing something different. Maybe, if there are labour shortages in the economy, that will happen in a thriving economy from time to time. Is migrant labour an answer to that, in some circumstances? It is, yes, but we should also do more to ensure that people here in the UK have the right skills and the confidence and whatever other support they need to get into the labour market. I think we have got a duty to do that and I think those capable of work also have a duty to try to use whatever opportunities may be available to them.

**Chairman:** That takes us nicely into the area where there are some concerns about the agreement and that is the SMEs.

**Q26 Lord Wade of Chorlton:** Minister, you have mentioned a number of times how you were able to take these agreements forward once there had been an agreed policy between the TUC and the CBI, but clearly there was a large number of companies that were not represented in that agreement, and that has caused some concern with the Federation of Small Businesses. They have come out very strongly with the view that in actual fact this deal that was agreed between the TUC and the CBI is going to turn out to be a very serious matter for the small business sector. I just wondered how you felt about this and what are the Government doing? Are the Government looking at how they might respond to those comments and are they/you also concerned about how this might affect the small business sector which is, economically

and employment-wise, a very important part of our economy?

**Mr McFadden:** Well, let me start that by agreeing with the part that I can agree with, which is that small businesses are absolutely critical to the economy. They employ half the workforce, or perhaps more, and we have kept very much in mind the needs of small businesses. In terms of the agreement between the TUC and the CBI, the CBI are not here today and, if they were, I think they would say that they do not just represent big business and would be keen to say that. My understanding is that, of the 240/250,000 or so associate and member companies involved with the CBI, about 200,000 are either small- or medium-sized enterprises. We have a lot of very good business organisations in the UK and my job is to have a relationship with them all, as is the Department's job and the Government's job, and we do have a relationship with them all. I think it would be wrong to see the CBI as big business and someone else as exclusively not big business. I think this situation is a bit more fluid than that. I believe that the agreement struck does have flexibilities in it for small businesses. For example, the qualifying period agreed is longer than the qualifying period that was in the draft Directive put before us in December, there is the possibility then of the two sides of industry making agreements beyond that, which is something we have to further consult both the unions and business about, and the Federation of Small Businesses and other business organisations will of course be part of that as we go forward. I have seen their comments, but we will continue to work with them and with other business organisations if we get the approval, to go back to Lord Eames' question, of the European Parliament and we get this agreed in terms of precisely how this is to be implemented in the UK.

**Q27 Lord Wade of Chorlton:** Does that mean then that you will discuss these issues direct with the Federation of Small Businesses as representative, as much as there is, of the small business sector?

**Mr McFadden:** Yes, when we come to issuing our own regulations on how these agreements are to be implemented, the Federation of Small Businesses will of course be a full part of that consultation.

**Lord Wade of Chorlton:** I agree with your point that the CBI does indicate that it feels that it represents a very wide range of business, but, in practice, it is highly dominated by very large companies and, I must admit, my experience of very large companies is that it is in their interests to make life more difficult for the small business sector. The small business sector is their competition, in effect, and I have always been very much aware that there is a great tendency for big companies to sort of try and make

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small companies' life a little bit more difficult than it might otherwise need to be.

**Q28 Chairman:** To translate that more into a question, on a number of occasions in a variety of inquiries that we have undertaken here, the Federation of Small Businesses have made it clear to us that they do not feel as represented in Europe as they would wish, so what are you doing to encourage them to be more engaged—again that word—in Europe? Will there be more opportunity for them to feel linked to these things?

*Mr McFadden:* Perhaps I should say with regard to Lord Wade's comments that the record will show that those are his opinions, not mine, in terms of the relationship between big and small businesses. In terms of your question, there are business organisations that operate on a European-wide level, just as there is a European TUC that operates in that way too. I would hope that UK business organisations of all stripes would do what they could do to take part in those. I think it is important that the voice of both employees and businesses is heard in Europe when these kinds of issues are being considered.

**Lord Lea of Crondall:** I would just remind the Minister, and I did a note for the Committee about this, having done a bit of research on it, that it was a fact, now that you mention the European level of business as opposed to the TUC/CBI question originally, that the Federation of Small Businesses had a disagreement with the umbrella body and

walked out, as I understand it, and I think there is no difference around the table that we hope the FSB at some point will walk back in.

**Q29 Chairman:** There is clearly some difficulty, which is what we are trying to indicate we have heard on a number of occasions, and maybe your Department could have a look at that. It is hardly a question.

*Mr McFadden:* There may be some business politics in this which is not entirely within the gift of the Government.

**Q30 Chairman:** Minister, I certainly and, I am sure, the Committee have found that extremely useful, particularly because we have been picking at this thing for so long and the progress is obviously there. Is there anything else you would wish to say to us about this? I apologise again for not giving you the opportunity to say for the record who you are, I am supposed to do that at the beginning, and I think I have only forgotten this time and it shows how keen we are to know what is going on in this particular area.

*Mr McFadden:* No, there is nothing I want to add and I am very happy to have taken your questions. Of course, it is open to the Committee, if there is something that occurs to you later that you want clarification on, to come back to us.

**Chairman:** Well, I think you have actually covered even more than we had anticipated and, for that, we are extremely grateful, and thank you to you and to Mr Smith.