



TOWARDS A MORE HOLISTIC VISION OF WORKING TIME? REVISION OF THE WORKING TIME DIRECTIVE AS A LITMUS TEST FOR EU'S COMMITMENT TO GENDER EQUALITY

Ania Zbyszewska

PhD in Law and Society from University of Victoria Faculty of Law (2012)
Postdoctoral Research Fellow at the University of Warwick School of Law (as of September 2013)

“Towards a More Holistic Vision of Working Time? Revision of the Working Time Directive as a Litmus Test for EU’s Commitment to Gender Equality”^{*}

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Introduction

Regulation of working time has been a crucial issue on the European Union (EU) policy agenda, with EU policy prescriptions emphasizing its modernization as essential to the achievement of a wide range of social and economic policy goals. Yet two decades since the original adoption of the EU’s first instrument on working hours, the *Directive concerning certain aspects of the organization of working time* (the WTD, or Directive)¹, the development of a coherent Community approach to working time remains elusive and contested. Instead, the highly polarized and, at the time of writing, still unresolved debate on the Directive’s review and revision² evidences a profound lack of consensus between the key actors on what the EU’s approach should be, and whether the many goals that

^{*} This is a draft and comments are welcome. Research for this paper was funded by doctoral grants from the Social Sciences and Humanities Research Council of Canada (SSHRC) and the Interuniversity Research Centre on Globalization and Work (CRIMT). Some of the research content has been published online in the *Women’s Studies International Forum* (2012), with the print version forthcoming as a part of special issue on the unintended gender consequences of “gender neutral” EU policies.

[”] Ania Zbyszewska has a PhD in Law and Society from University of Victoria Faculty of Law (2012). As of September 2013, she will be a Postdoctoral Research Fellow at the University of Warwick School of Law.

¹ *Council Directive 93/104 EC concerning certain aspects of the organization of working time*, [1993] O.J. L 307/18 (repealed); *Council Directive 2003/88 EC of the European Parliament and of the Council of 4 November 2003 concerning certain aspects of the organization of working time*, [2003] O.J. L 299/9.

² As is well known, this particular EU Directive has been plagued by political and legal controversy ever since its adoption in 1993 and the last attempt to revise this instrument failed in 2009, after over six years of negotiation talks and legislative efforts during which the social partners, and then the co-legislators – the Council of the European Union (the Council) and the European Parliament – were unable to reach an agreement. A new consultation of the social partners was initiated by the European Commission in March 2010, but has of yet not produced a result.

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regulation of working time is expected to facilitate are, indeed, fully compatible with each other.

In the meantime, working-time reforms have been an important element of the economic crisis response in many EU Member States. Although some Member States chose to introduce short-term working schemes in order to protect jobs, others, instituted sweeping labour law reforms that have significantly flexibilized (or deregulated) their working-time regimes by expanding the possibilities for working-time extension and less costly use of overtime (Barnard 2012; Clauwaert and Schömann 2012). In the latter cases, the need to comply with the WTD ensured that the minimum standards set at the Community-level had to be maintained, thus preventing a possible “race to the bottom.” In a more sceptical view, however, the Directive’s minimum baseline provided Member State governments with the blueprint for the downgrading of their national norms (Clauwaert and Schömann 2012; Zbyszewska 2012). Indeed, some national reforms have gone below the Directive’s limits, putting more pressure on the European Commission to broker a new Community consensus on working time.

Given the Directive’s complicated past, following its ongoing review process is likely to be interesting in itself, and indeed, the current economic context and the recent adoption of regressive labour law and austerity measures mean that we should closely observe it. Moreover, as this paper proposes, the ongoing reforms of national labour law regimes and the Directive’s revision should be closely watched because they may also provide important insights about the EU’s commitment to gender equality. While much has been written on the legal and political controversies surrounding this instrument,³ the

³ See, for example, Hepple 1990, 1997; Barnard, Dashwood, and Hepple 1997; Moffat 1997; Barnard 1997; Barnard, Deakin, and Hobbs 2002, 2003; Kenner 2004; Hardy 2005; Nowak 2008.

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Directive's apparent gender neutrality and its potential gender impacts have been rarely problematized or systematically examined.⁴ Since the Directive's adoption, however, the role of working-time regulation in facilitating the reconciliation of work and family, promoting women's activation, and enhancing equal opportunities has become a staple in the EU policy discourse and has inspired other EU instruments.⁵ Moreover, the EU has committed itself to the strategy of gender mainstreaming; which, involves integrating gender concerns and perspectives in *all* EU-level and Member State policies and at all stages of the policymaking process.⁶ Thus, the extent to which the Directive's revision will engage these policy objectives, could serve as a litmus test of both, the effectiveness of the EU's gender mainstreaming strategy and its broader commitment to equality.

To make this case, the paper is structured to develop three key points. Section one briefly outlines the scope of the Directive and points out the deeper gender assumptions that underlie its gender-neutral norms. Section two, examines the development of the Directive, focusing on the key conflicts and tensions that characterized the discussions on working-time regulation leading up to its adoption and since,⁷ paying particular attention to the emergence of work-family reconciliation as a potential rationale for regulation. In so doing, this part of the paper shows how the Directive's original framing has continued

⁴ Significant exceptions to this are Supiot 2001 and Conaghan 2005; see also McCann 2005.

⁵ European Employment Strategy; *Council Directive 97/81/EC of 15 December 1997 on the Framework Agreement on Part-time Working* [1998] O.J. L14/9 (20 January 1998), amended by Council Directive 98/23/EC of 7 April 1998, [1998] O.J. L 131/10 (05 May 1998); Roadmap to Equality between Women and Men 2006-2010. Communication from the Commission to the Council, the European Parliament, the European Economic and Social Committee and the Committee of the Regions. COM (2006) 92 final (1 March 2006) <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2006:0092:FIN:EN:PDF/>.

⁶ See the European Commission Communication COM(96) 67 final.

⁷ It is not possible in the scope of this paper to review all developments that took place leading up to and since the Directive's adoption. Since the focus in this paper is on the absence of gender rationales, I am only focusing on those key events that are relevant to understanding how the Directive became gender neutral, and how the discussion surrounding it expanded with the introduction of work-family reconciliation as a possible rationale for regulation.

to prevent its more progressive rethinking. The third section examines recent EU developments pertinent to the Directive's revision, focusing on the current economic context and recent labour law reforms. The paper concludes with a reflection on whether or not the revision is likely to yield a more holistic and gender equal approach to the regulation of working time at European level.

1. What Gender Consequences and How Did We Get Here? Development of the EU Approach to Regulation of Work Hours

Originally adopted on 23 November 1993, the WTD is a relatively traditional piece of protective legislation. With its legal basis in Article 118a (now article 137) of the EC Treaty (Treaty of Rome),⁸ the Directive aims to “improve the working environment to protect workers’ health and safety,” and does this by setting *minimum* standards for the maximum permissible weekly hours of work (48 hours), daily and weekly rest periods (11 and 35 uninterrupted hours), paid annual leave (four weeks) and special provisions to protect night workers.⁹ The Directive also invokes the principle of adaptability of work to worker, which obligates the Member States to take necessary measures to ensure that any changes in the patterns and organization of work do not have undesired consequences for a worker’s the health and safety. However, the principle of adaptability is limited to “alleviating monotonous work and work at the predetermined work-rate, depending on the type of activity, and of safety and health requirements, especially as regards breaks during working time” (art. 13).

⁸ *Treaty Establishing the European Economic Community*, 25 March 1957, 298 U.N.T.S. 3 (EEC Treaty or Treaty of Rome).

⁹ Article 6 sets the 48-hour weekly maximum; the daily break is set by article 4; daily and weekly rest is set by article 5; annual leave is set by article 7(2); night work provisions are set by articles 8-11.

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Notwithstanding its protective functions, the WTD also provides for considerable flexibility in organization of working-time to allow for more efficient and effective deployment of labour at the enterprise level. Working-time flexibility in this context, is achieved predominantly through working-time extensions. Extensions beyond the 48-hour norm are possible either within the limits set – for instance by extensions of reference periods for the calculation of the weekly averages – or beyond these limits – through a series of derogations and exceptions from the average maximums for particular categories of workers¹⁰ or specific sectors.¹¹ Although overtime hours must be balanced with time off for the average 48-hour maximum to be respected, the relatively long reference periods for the calculation of this average mean that increased hours can be potentially carried over significant periods of time. Other extensions of work time are permitted on a more permanent basis, as is the case with the “opt-out” provision. This last, most controversial of the derogations prescribed by the Directive, makes it possible for Member States to include provisions in their national working-time regulations that allow individual employees to “sign off” on their right to be covered by the weekly maximum standard.

The Directive’s tendency to extend work hours – either collectively, through substantially long reference periods, or individually, through the opt-out – has been a source of considerable critique and controversy (Figart and Mutari 1998, Supiot 2001;

¹⁰ Article 17(1), for instance, provided that the 48-hour maximum calculated over the basic period of four months did not apply to managerial staff or workers with “autonomous decision-making power,” “family workers,” and workers “officiating at religious ceremonies in churches and religious communities.”

¹¹ The 1993 Directive excluded a number of sectors, including air, rail, road, sea, inland waterway and lake transport, sea fishing, other work at sea and the activities of doctors in training. These sectors were eventually included by the so called “horizontal directive” in 2000 (2000/24/EC) and a Council Directive on the organization of the working time of persons performing mobile road transport activities adopted on 12 March 2002.

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Barnard et al 2003; Kenner 2004) not the least because it directly conflicts with the overriding objectives of health and safety. Some observers have noted that the Directive's permissive treatment of working-time extensions is also problematic from the perspective of equality, since long hours of work are hard to reconcile with caregiving obligations (Figart and Mutari 2001; Conaghan 2005). Research shows that despite women's mass employment participation, women and men's respective share of time spent on paid and unpaid work continues to be uneven; men are still more likely to contribute a greater number of hours to labour market work and most women still spend more time on unpaid domestic and caregiving work (Figart and Mutari 2001; Rubery, Smith, Fagan 1998). The fact that the Directive provides the flexibility to go beyond the upper limit of working time on the one hand, yet, on the other hand, lacks parallel language on reduction of hours – a necessity for a more equal participation of women in standard work and for increasing men's opportunities to engage in active caregiving – has specific gender and family implications.

The Directive's emphasis on fairly long standard hours of work, and the binary manner in which it delineates the boundary between “working time” and “rest time” (non-work, leisure) are both gendered references to particular traditional conceptions of “work,” as a productive activity (vis-à-vis reproductive work of unpaid care), and a “worker,” as someone who is likely male, unencumbered, and exclusively available.¹²

¹² French labour law scholar Alain Supiot (2001) was the first to point out that the model of working time engendered by this specific Directive is a vestige of the industrial era and fails to correspond with the realities and needs of contemporary workers (see also Conaghan 2005). Indeed, the Directive's focus on the regulation of the upper limit on working time and the way in which it sets the boundary between “work time” and “rest” as mutually exclusive categories suggests that the Directive takes key inspiration from the temporal norms associated with standard employment relationship (SER). Dominant in most industrial economies during the post-WWII period, the SER and legal norms associated with it developed in reference to traditional gender contracts which saddled women with the bulk of unpaid domestic and caregiving work, while assigning men with the status of a breadwinner. As a result, these norms rested on and

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The influence of this traditional model of time regulation is also clear in the Directive's flexibility mechanism, which focuses solely on working-time extensions. The permissible approach to extending hours of work seems to signal that so long as the objectives of health, safety, and adequate rest are safeguarded, a worker's time can be stretched significantly to accommodate the needs of the enterprise. This legal construction has practical implications of reinforcing gendered divisions in how men and women allocate their time for paid and unpaid work, and between each other. Thus, far from being gender neutral, the normative framework set by the Directive has very particular gendered consequences.

Below, I explore in more detail why and how gender got *written out* of the Directive. Mapping out the key institutional factors, political conflicts, and policy discourses that created the context for the Directive's adoption and subsequent revision helps us not only understand the reasons behind the Directive's particular framing; it is also useful for interpreting how the recent events may influence the Directive's future revision.

a. Trends in Working Time Discourse and Practice since the Treaty of Rome

Regulation of working time was not very prominent at the Community level until the mid 1970s. Prior to that, the issue was primarily addressed by Member States, most of whom had individually legislated the 40-hr (or 48-hr) workweek (Bosch, Dawkins, and Michon 1993, 1). Discussions on working-time flexibilization during this period focused primarily on matters of worker's choice (Bosch, Dawkins, and Michon 1993, 26),

perpetuated the gendered assumption that waged workers are mostly male, and, in any case, fully available for paid work, and largely unencumbered by other obligations.

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concerns about leisure and work-life balance (Moffat 1997). At the Community level, the objective of improving living and working conditions, associated with the 1974 Social Action Program, led to the adoption of a non-binding Recommendation affirming the 40-hour workweek (Moffat 1997). However, lack of competence in this area meant that the matter was left to the political will in the Council, which adopted the Recommendation in 1975 but took no subsequent actions to implement it.

Economic downturn that followed the OPEC crisis, shifted the discussion on working-time away from the focus on improvement of living and working conditions to concerns more directly related to economic performance. With this, there was a growing consensus that flexibility was required to better respond to changed economic circumstances (Bosch, Dawkins, and Michon 1993). This consensus was further strengthened through the 1980s, bolstered by deepening economic recession and profound changes in the modes of production, introduction of information technologies, and the globalization of markets which were further exacerbating the tensions felt after the oil shocks. Increased flight of capital and privatization of public entities (Standing 2009) meant that trade unions were losing power (Ebbinghaus and Visser 1998¹³) and the Member State governments gave employers more influence over the working-time agenda.

¹³ Ebbinghaus and Visser (1998, 3) identify the period from 1975 to 1995 as a period of “crisis” during which the rates of union density fell rapidly across Western Europe, from 40% at the start of the 1980s to 34% by 1990. While they stress that the rate of attrition varied in different Western European states, the overall trend was that of decline. The authors cite three types of factors affecting union density as: cyclical (politico economic change), structural (social change), and configurational (institutional context).

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Consequently, through the 1980s, further concessions on working time were made in various national contexts (Bosch, Dawkins, and Michon 1993),¹⁴ which were reflected in new working-time laws that included “longer daily and weekly maximum hours, longer periods of variability, widened possibilities for Sunday work and night work for women and greater derogation from legal minimum standards through collective agreements” (Bosch, Dawkins, and Michon 1993, 26-27). According to Gerhard Bosch, Peter Dawkins, and François Michon (1993, 27), these national developments were being “coordinated” by Member States of the EC, “probably [...] to generate a new and more flexible regulatory framework for employers in the more competitive EEC internal market.” With major economic institutions such as the OECD urging deregulation and flexibility of Europe’s labour markets as the cures for “eurosclerosis” (Grahl and Teague 1989, 91-92), high unemployment, and lagging performance (Ashiagbor 2004), along with similar urgings by the European business, a further shift to flexibility was inevitable.

While the European Community Member States generally agreed on the need for more flexibility, there was no similar consensus, however, on how flexibility should be accomplished, and particularly, whether there was any role for the Community in this field. Most of the continental Member States did not see minimum standards as incompatible with flexibility. Working time had long been regulated by state-level legal intervention in continental Europe (Blanpain 1988, 18), and despite growing concerns

¹⁴ Bosch, Dawkins, and Michon (1993, 26) cite Belgium, France and Sweden as having made legislative changes by that time, and similar laws as being on the agenda in Austria, Germany and the Netherlands. Also, Tergeist (1995), refers to a 1986 European Trade Union Institute (ETUI) document noting that organized labour does not oppose flexibility per se, provided that it can retain a right to examine and evaluate different forms of flexibility from the standpoint of their likelihood to lead to the improvement of working conditions and the ability of employees to have some control over their working time (Tergeist 1995, 12, citing ETUI 1986).

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over labour market flexibility and economic efficiency,¹⁵ most of these Member States maintained that social and economic standards could coexist and, indeed, bolster each other (Ojeda Avilés and Garcia Viña 2009, 79). In juxtaposition to the continental “regulated flexibility” approach, the UK had historically adopted a *collective laissez-faire* approach to regulation of working time; leaving the matter almost entirely to collective bargaining and employer regulation (Hepple 1990; Rubery, Deakin, and Horrel 1994, 274; Barnard 1997b, 9). While the resulting working-time norms were similar to those in continental Europe, in the 1980s, the Thatcher government took active steps to weaken trade unions and to dispense with other forms of regulation, believing them to be sources of rigidity which inhibit labour market flexibility, undermine job creation, and economic growth (Hepple 1987, 80-83; Ashiagbor 2004; Bruun and Hepple 2009, 45-49). From the UK’s perspective, a harmonized transnational approach to regulation was undesirable, regardless of the amount of flexibility it enabled. Only full deregulation could provide the flexibility and efficiency that was necessary for economic success (Deakin and Wilkinson 1994), with the bottom line being that since the UK had avoided setting minimum working-time standards of its own, it was not prepared to accept any from the EC (Bruun and Hepple 2006, 48).

Although both approaches ultimately focused on facilitating efficiency and flexibility, the ideological and regulatory differences between them were fundamental and caused significant tensions at the EC level through the 1980s. Given that the existing institutional framework provided limited legal basis for the Community action in the

¹⁵ Hepple cites examples of Belgium’s and France’s attempts at infusing flexibility via collective bargaining and derogations into their otherwise protective national legislation (Hepple 1990, 25). Throughout the 1980s, other states, like Germany, also promoted negotiated flexibility, and many experiments with working time organization took place in the German context (Strzemińska 2008a, 2008b; Bosch, Dawkins, and Michon 1993).

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social field and made any such action dependent on the political will of all Member States, these differences made futile most of the Commission's efforts to secure a Community-wide approach to regulation of working time during this period.

In the early 1980s, for instance, the Commission proposed a series of working-time measures, partially in response to the regulatory developments taking place in many of the Member States, and as a result of the business lobby's pressures for more flexible and diversified work arrangements (Hepple 1990). Reflecting the limited competences, the proposed measures included draft Directives on part-time (1982)¹⁶ and temporary work (1982)¹⁷, both of which were proposed under the equal treatment provisions of the EC Treaty, as well as a non-binding *Council Recommendation on reduction of working time* (1983)¹⁸. While all of the measures reflected the growing emphasis on flexibility, the Commission's overall approach appeared to be an attempt at breaching the tensions between security and flexibility and the social and economic rationales present in the working-time discourse of the late 1970s and the early 1980s. The proposals clearly articulated promotion of gender equality and redistribution of paid and unpaid work between "marriage partners" as some of the social objectives that could be facilitated by a wholesale reorganization of working time. According to the European Commission, such reorganization was to be achieved through an overall *reduction and convergence* of hours

¹⁶ *Proposal for a Council Directive on voluntary part-time work*, [1982] O.J. C 62/7.

¹⁷ *Proposal for a Directive of the Council on temporary work*, [1982] O.J. C 128/2.

¹⁸ *Draft Council Recommendation on the Reduction and Reorganization of Working Time*. Information Memo. COM (83) 543, P-80/83 (September 1983).

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for all workers along with the promotion of more flexible ways of arranging and scheduling of these hours (*Communication on voluntary part-time work 1980*, 1).¹⁹

Thus, along with attempting to balance security and flexibility and the tensions between their proponents (management and labour, as well as the different Member States), and reconciling the social and economic objectives that working-time regulation could serve, the Commission's approach in the early 1980s also appeared to promote a degree of convergence in working hours of all workers. Crucially, with references to issues such as the reconciliation of paid work with the obligations involved in the care of children, training or flexible retirement, the 1983 *Draft Council Recommendation* also had the potential to expand significantly the discourse surrounding working time. Nonetheless, since the Commission's proposals in the early 1980s ultimately fell within the regulated flexibility approach, all met with the UK's opposition and the country exercised its veto power within the Council to block any Community action in this area (Hepple 1990; Moffat 1997). Indeed, it was not until the passage of the 1986 *Single European Act*²⁰ and the subsequent adoption of the *Social Charter* and the *Action Programme* in 1989, that new opportunities opened for regulatory action on working time. As will be shown below, however, the necessity to reframe the working-time issue to "fit" the new legal basis for action and to overcome the UK opposition had specific and limiting consequences for the political discourse on working time.

b. Setting the Gender-Neutral Foundation

¹⁹ *Voluntary Part-time Work*. Communication from the Commission. COM (80) 405 final (17 July 1980) (hereinafter *Voluntary Part-time Work Communication*).

²⁰ 1987] O.J. L 169/1 (29 June 1987) (hereinafter *SEA*).

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As it is well known, the European Commission proposed the *Working Time Directive* as part of its 1989 *Social Action Programme* and justified it as a health and safety instrument with the basis in Article 118a (now Article 137) of the *EC Treaty* (Treaty of Rome). The choice to frame working time as an issue of health and safety was a departure from the manner in which the Commission had characterized the need for a Community-wide measure on working-time thorough the 1970s and 1980s. Earlier proposals on working time took a broader approach, wherein working time was presented as an organizational matter related to reduction of unemployment, more efficient use of production facilities, as well as a range of social objectives. As already noted, the non-binding 1983 *Draft Recommendation* for instance, clearly articulated promotion of gender equality and redistribution of paid and unpaid work between “marriage partners” as some of the social objectives that could be facilitated by a wholesale reorganization of working time. Nonetheless, lack of legal competence to legislate in this area meant that that no binding action could be taken at the Community level. Moreover, the United Kingdom’s (UK) opposition to the expansion of social policy actions at the Community level through the 1980s, meant that even non-binding measures, such as the 1983 *Draft Recommendation*, met with the UK veto in the Council. Constitutional changes ushered in by the 1986 *Single European Act*, however, opened a new opportunity for action. The Act amended Article 118a of the EC Treaty (Treaty of Rome) to include new competences in the area of health and safety and made decisions taken under the Articles’ ambit subject to qualified majority voting (QMV). The European Commission seized the opportunity to put forward a proposal that fit within this new competence.

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Although this legal and political manoeuvre was indeed effective and the Directive was successfully adopted in 1993 over the UK's ongoing opposition, the decision to base the Directive in Article 118a was not without consequence for the Directive's scope and future prospects. First, the choice of Article 118a meant that the Directive could only set minimum standards; and the standards that it set were by a large lower than those already legislated or collectively agreed to in most EU Member States. Moreover, efforts to appease the UK during Council discussions resulted in a significant diluting of the original 1990 draft proposal. To be sure, the final 1993 Directive *did* set a protective limit for the maximum average weekly hours – albeit the 1990 proposal did not contain such a threshold –, as well as minimum entitlements to daily, weekly, and annual rest periods for most workers. However, the final Directive “balanced” this protective baseline with such a high dose of flexibility, that it rendered the Directive internally dissonant. Indeed, the sheer scope of derogations from the key protective measures, as well as broad occupational and sectoral exceptions, left many observers puzzled as to the real motivation behind its adoption. Although the Directive was generally greeted as a victory for Social Europe, some observers called it “unsatisfactory,” a “bizarre compromise” (Kenner 2004, 589), and a “toothless” measure (Barnard 1997, 11). Others yet, went as far as to suggest that its primary thrust was in fact deregulatory (Moffat 1997). Whether or not deregulation was really the Directive's driving force, the extensive flexibility the instrument ushered in through its derogations certainly indicated presence of a broad consensus between the Member State government on the need for a more flexibility. In the end, while the WTD was a victory for the more moderate continental approach, the amount of flexibility it contained not only undermined its protective functions, it also

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opened the door to potentially significant working-time extensions in those continental Member States whose national working-time standards were more stringent.

The second consequence of the decision to anchor the Directive in Article 118a was that doing so precluded the inclusion of, or reference to, other social objectives that the regulation of working time could also support. Since Article 118a permitted the adoption of only minimum *health and safety* standards, inclusion of broad, aspirational statements referring to other social goals was politically risky and, potentially, legally unsound. Thus, the objectives of work-family reconciliation, redistribution of paid and unpaid work between men and women, or enhancement of equal opportunities, all of which featured in the European Commission's earlier proposals on working time, did not make it into the 1993 Directive. The result of this was that Directive was silent on its implications of long work hours for caregiving and gender equality, thereby setting a seemingly gender-neutral foundation for the EU regulation of standard work hours.

b. Gendering the Working Time Directive Through Work-Family Reconciliation?

By the time of the Directive's scheduled review in 2003, the discussion on the role of working time expanded beyond the concerns of balancing workers' health and safety with organizational flexibility. Adoption of the gender mainstreaming strategy by the EU in 1996²¹, as well as the incorporation of equal opportunities and adaptability as pillars of the 1997 European Employment Strategy, brought new emphasis to the role of working-time flexibility in promoting and supporting women's employment. Most key policy

²¹ Commission Communication of 21 February 1996 on 'Incorporating equal opportunities into all Community policies and activities' COM (96) 67 final.

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instruments from this period – the 1996 *Action for Employment in Europe* report,²² the 1997 Green Paper on *the Partnership for a New Organization of Work*²³ and annual post-Amsterdam Employment Guidelines²⁴ - referred to the desirability of flexible working-time arrangements for facilitating work-family reconciliation, and thus, improving women's access to jobs and supporting their labour market retention, as well as making work more adaptable for a broad range of workers.

While issue of work-family reconciliation was primarily invoked in relation to the flexible forms of work and working time, such as part-time work,²⁵ and the Court of Justice of the European Union (Court of Justice) rulings in *Jaeger*²⁶ and *SIMAAP*²⁷ also brought it into the discussion standard working time, as regulated by the WTD. Both cases concerned the definition of working time under Article 2 of the Directive, and, specifically, whether on-call work, or its inactive parts, could be excluded from the scope of this definition for the purpose of calculating weekly working hours. In both cases, the Court affirmed the fundamental importance of the health and safety objectives and commented on the fact that long and intermittent on-call hours of work had a deleterious impact on the worker's ability to partake in family and social activities. In doing so, the Court of Justice recognized that the maintenance of social and affective bonds is just as

²² *Action for Employment in Europe. A Confidence Pact*, CSE (96) 1 final, 05.06.1996.

²³ *Partnership for a New Organization of Work - Green Paper*. Document drawn up on the basis of COM (97) 128 final, 16 April 1997. Bulletin of the European Union, Supplement 4/97.

²⁴ *Council Resolution of 15 December 1997 on the 1998 Employment Guidelines*, [1998] O.J. C 30/01; *Council Resolution of 22 December 1999 on the 1999 Employment Guidelines*, [1999] O.J. C 96/02.

²⁵ Part-time Work Directive was adopted in 1997: *Council Directive 97/81/EC of 15 December 1997 on the Framework Agreement on Part-time Working* [1998] O.J. L14/9 (20 January 1998), amended by *Council Directive 98/23/EC of 7 April 1998*, [1998] O.J. L 131/10 (05 May 1998).

²⁶ *Landeshauptstadt Kiel v. Norbert Jaeger*, European Court Reports 2003, Case C-151/02 (Jaeger).

²⁷ *Sindicato de Medicios de Asistencia Publica v. Consellaria de Sanidad y Consumo de la Generalidad Valenciana*, European Court Reports 2000, Case C-303/98 (SIMAP).

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significant to a worker's wellbeing as adequate sleep and adequate rest. Particularly, in raising the crucial issue of family life, previously absent in the context of the WTD, the Court of Justice also opened doors to potential future re-casting of traditional norms of working time in terms of their impact on the ability to balance work and family obligations. As labour lawyer Deidre McCann (2005) observed, the Court's analysis revealed an awareness of the complexities and value of workers' lives beyond paid employment, and the fact that long hours not only posed the danger from the perspective of worker's health and safety but also because they removed workers from the rest of their lives (McCann 2005, 136). Paradoxically, however, one of the key consequences of these rulings was that an increasing number of Member States introduced, or planned on doing so, the Directive's opt-out provision in their national employment legislation, either generally (European Commission 2000), or in the medical sector in particular, thereby securing the ongoing possibility to extend working hours of doctors.

Given these developments, the Commission's 2003 Communication²⁸ on the revision of the WTD featured the issue of work-family reconciliation alongside the other major issues for re-examination – the opt-out, the Court of Justice rulings on on-call work, and the reference periods. Over the course of the social partner consultation and negotiations, and then the legislative process involving the Council and the European Parliament, the issue of work-family reconciliation remained on the table. However, the significance attached to it vis-à-vis the other issues, as well as the manner of its potential inclusion in the revised Directive deteriorated as the process went on. This gradual loss of

²⁸ Re-examination of *Directive 93/104/EC concerning certain aspects of the organization of working time*. Communication from the Commission to the Council, the European Parliament, the European Economic and Social Committee and the Committee of Regions and the Social Partners at the Community Level. COM (2003) 843 final/2 (15 January 2004). <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2003:0843:FIN:EN:PDF/>.

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importance assigned to work-family reconciliation in the context of the WTD's revision was not only related to the fact that "bigger" issues took precedence – the opt-out, the Court of Justice's definition of on-call work, extensions to reference periods – but was also related to the fact that work-family reconciliation did not fit neatly into the health and safety legal basis under which the Directive was enacted. Indeed, even the European Trade Union Congress (ETUC) (Commission 2003a), and later the European Parliament (European Parliament Resolution, 11 February 2004), both of whom were the strongest supporters of expanding the Directive's scope to include considerations of balancing work with family and gendered effects of long hours, warned the Commission that any proposals for change had to keep in mind the Directive's legal basis. Consistently, the ETUC and the Parliament urged the framing of work-family as a health and safety issue, and encouraged the removal, or limitation, of those of Directive's provisions that enabled extensions of work hours on the basis that they conflicted with both work-family reconciliation *and* health and safety.

By contrast, the EU-level employer organizations, Union of Industrial and Employers' Confederations of Europe (UNICE, currently BUSINESSEUROPE) and the European Centre of Enterprises with Public Participation (CEEP) were equivocal in their disagreement that a "health and safety" Directive was the appropriate context for regulation on these issues (European Commission 2003a, 4), albeit they did not dispute the importance of work-family reconciliation measures *per se*.

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After the failure of social partner talks, the European Commission moved to introduce its own proposal for amending the Directive²⁹ on 22 September 2004, in which the issue of work-family reconciliation was listed, in the preamble, as one of the broad criteria to be considered in the organization of working time. The ensuing legislative process between the Council and the European Parliament further emphasized the significantly different views on the role the Directive should play in protecting EU workers. The European Parliament's majority continued to support a more meaningful inclusion of work-family reconciliation and some voices within the European Parliament also pointed out the impact of long hours on women's equal opportunities³⁰ (Committee on Women's Rights Opinion 2004). While the equality implications were not directly included in the European Parliament's Cercas Report³¹ or the Parliament subsequent positions³² prepared on its basis, all of these documents did endorse a "right to request" provision, which would enable employees to request changes in working hours and patterns and oblige the employers to consider such requests and refuse them only in the

²⁹ Proposal for a Directive of the European Parliament and the Council Amending *Directive 2003/88/EC concerning certain aspects of the organization of working time*, SEC (2004) 1154, [2004] COM (2004) 0607 final - COD 2004/0209 (22 September 2004) (hereinafter Commission's Revision Proposal 2004).

³⁰ Opinion of the Committee on Women's Rights and Equal Opportunities, 20.01.2004 for the Committee on Employment and Social Affairs on Organization of Working Time (revision of *Directive 93/104/EC*), 2003/2166 INI, appended to Report of 29 January 2004 on the Organization of Working Time (amendment of *Directive 93/104/EC*), 2003/2165 INI (hereinafter Committee on Women's Rights Opinion 2004).

³¹ Report of the on the 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) 0607 – C6-0122/2004 – 2004/0209 COD, 25.04.2005, submitted to Committee on Employment and Social Affairs by Alejandro Cercas (hereinafter European Parliament Cercas Report 2005).

³² Recommendation for Second Reading on the Council Common Position for Adopting a Directive of the European Parliament and the Council amending *Directive 2003/88/EC concerning certain aspects of the organization of working time*, 10597/2/2008, C6-0324/2008, 2004/0209 COD (11 November 2008); Common Position of 15 September 2008 adopted by the Council of 15 September 2008, with a view to the adoption of a Directive of the European Parliament and of the Council amending *Directive 2003/88/EC concerning certain aspects of the organization of working time*, [2008] O.J. C 254 E/3/18.

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circumstances where the organizational disadvantages would be disproportionate to the workers' benefit.

While the Council agreed to the inclusion of provisions enabling work and family reconciliation, the provisions that it was willing to support differed from those proposed by the Parliament majority. The Council saw the right to request in less categorical terms than the majority of the Parliament, and it was only prepared to agree to a provision requiring information of employees in "due time" of only "substantial changes," while asking the Member States to "encourage" employers' to examine employee requests, subject, of course, to business needs and both, the employer and employee's need for flexibility (Common Position 2008, Article 1(2), Statement of the Council's Reasons III(2)).

In the end, the right to request work-family reconciliation was not "the straw that broke the camel's back," as there was a substantial disagreement on all the main issues, which were ultimately more significant in shaping the discussion and polarizing the different actors. The Parliament's 2008 vote rejecting the Council's final proposal and the failure of the subsequent conciliation procedure brought the revision process to halt in April 2009 – six years after the Commission issued its initial 2003 Proposal to amend the WTD. As a result, the Directive continued to be based on what ETUC's Confederal Secretary Catélene Passchier referred to as an "outdated and gendered vision"³³; with its endorsement of the flexibility to extend work-hours running counter to the promotion of work-family reconciliation and equality in the EU's broader policy.

c. Enduring Gender Consequences

³³ As related in an informant interview with the author on 16 February 2010 (Brussels).

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As the story of the WTD's original negotiations and unsuccessful revision demonstrates, what is politically possible and whose interests tend to hold most political sway in a particular context are important variables that act as "gatekeepers" for what makes it into the dominant political discourse and what remains on its sidelines. In case of the 1993 WTD, the decision to embed it in the very traditional health and safety rationales should have been relatively uncontroversial, yet proved exactly opposite. Although the controversy had much to do with the ongoing tensions between security and flexibility, regulation and deregulation discourses, and the reach of the Community's competences, its political effect was also to construct a rather narrow discourse around this particular instrument. Specifically, in focusing on the *political* goal of achieving working-time regulation at the Community-level, the conceptualization of working time was narrowed and other rationales for regulation of working time, such as work-family reconciliation and promotion of equal opportunities, were not reflected in the Directive. Perhaps uncontroversial on its face, this oversight is puzzling, particularly since both of these issues were by the time of the Directive's adoption already fairly prominent in the broader EU social debates. Indeed, the issue of work-family reconciliation had been brought up in the context of working-time regulation by the Commission's failed 1983 draft Recommendation for a measure on working time, but never made it into the text of the 1993 Directive.

Another reason for the absence of gender focus – and one which probably would have kept gender language out of the text even if the political reasons for doing so didn't exist – was the fact that the EU employment policy and regulation have historically evolved around the norms of the standard-employment relationship, within which they

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continue to be embedded. As observed at the outset, standard working-time norms, even those most progressive from a social/worker protection perspective, have been generally set on the presumption of exclusive engagement, with the subject of regulation being an unencumbered (male) employee. Consequently, regulations dealing with standard norms of working time – the daily and weekly limits – have not been explicitly gendered even in the context of changing labour market realities. The WTD, in particular, remained very much embedded in these standard notions of employment; it provided the “gender neutral” foundation for the EU working-time regime.

2. Recent European Developments

The onset of the global financial crisis in 2008 and the subsequent crisis in the Euro zone plunged the EU into a recession. Following the adoption of stimulus packages in the first phase of the crisis, most EU Member States, and particularly those with highest levels of debt, have since 2010 adopted measures of austerity and fiscal consolidation (Leschke and Jepsen 2012).

As part of the second phase response, many Member States also began implementing labour law reforms so as to introduce more flexibility into their labour markets (Barnard 2012; Clauwaert and Schömann 2012). Re-regulation of the working-time rules has been one of the key tendencies identified in many national reforms (Clauwaert and Schömann 2012). The measures adopted have varied widely. Some Member States, including Austria, Belgium, Bulgaria, France, Germany and Spain, have responded by successfully implementing short-term working schemes designed to prevent collective redundancies and, in some cases, supporting these schemes with public subsidies (Leschke and Jepsen 2012).

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At the same time, a number of Member States have also adopted working-time reforms designed to enable employers more flexibly to adapt work hours to changes in demand, and to do so without incurring significant additional costs. A range of such measures – including permissible overtime increases, changes to the rules on overtime compensation, and extensions of reference periods for the calculation of overtime – have been adopted or are being planned in Czech Republic, Hungary, Lithuania, Poland, Portugal and Romania (Clauwaert and Schömann 2012). In Poland, for instance, *Statute on the Alleviation of the Effects of the Crisis*,³⁴ commonly known as the “*Anti-Crisis Bill*”, passed on 1 July 2009 extended the general reference periods for calculation of overtime permitted by the Polish Labour Code from four months to up to twelve months.³⁵ Although the amendment was intended to be temporary and expired at the end of 2011, the Polish government had already drafted a bill that, if passed in the Parliament, will move the measure into the Labour Code on a permanent basis. As Clauwaert and Schömann (2012) note, the same may well be the case for the temporary amendments in the other Member States.

In the context of these emergency labour law reforms, the WTD may have provided a buffer against full deregulation of national working-time rules. At the same time, a more sceptical view is that the Directive provided the Member States with a blueprint for the downgrading of their existing standards; a view which may be consistent with the observation that the Directive’s key thrust was deregulatory (Moffat 1997). Indeed, as I have suggested elsewhere, there is evidence to suggest that this may have

³⁴ 2009) Journal of Laws No. 125, item 1035 (Ustawa z dnia 1 lipca 2009 r. o łagodzeniu skutków kryzysu ekonomicznego dla pracowników i przedsiębiorców, Dz.U. 2009 nr 125 poz. 1035).

³⁵ Possible in all sectors with the agreement of a representative trade union or representatives of employees. Supra note 72, art. 9.

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been the Directive's effect in Poland, where consecutive labour law amendments have gradually deregulated working-time norms prescribed by the Polish Labour Code to the minimums set by the Directive (Zbyszewska 2012).

Significantly, the deregulation of national working-time rules in response to the current crisis has not been halted by the European Commission (Barnard 2012; Clauwaert and Schömann 2012). On the contrary, the flexibility achieved by these reforms is perfectly congruent with the flexibility and flexicurity focus of the *Agenda for New Skills and Jobs*³⁶ – one of the flagship initiatives of the current Europe 2020³⁷ strategy for “smart, sustainable and inclusive growth.” The Europe 2020 strategy places primary emphasis on efficiency, reform/modernization, and “growth for its own sake,” and is characterized by comparatively poor articulation of social objectives apart from those of inclusion and poverty reduction, which, too, are meant to be delivered through growth (via the market, not the welfare state) (Daly 2012).

4. Towards a more holistic vision of working time?

In this context, what are the prospects for the revision of the WTD in a way that is sensitive to the family and gender implications of long work hours? The European Commission issued its first Communication on the revision of the Directive in March 2010. Therein, it asks the social partners to weigh in on whether the regulatory model engendered by the Directive has kept pace with social, economic, and organizational developments of the last two decades, as well as “the needs of companies, workers, and

³⁶ An Agenda for full skills and jobs: A European Contribution Towards Full Employment. COM/2010/8682 final.

³⁷ Communication from the Commission: Europe 2020 A strategy for smart, sustainable and inclusive growth. COM 2010/2010 final.

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consumers of the 21st century.”³⁸ The document suggests that a more flexible model of regulation is needed to ensure that the WTD provides a framework that can support the productivity needs of EU firms and ensure affordable round-the-clock service delivery, all-the-while supporting workers individual preferences, their needs for the balancing of work and family obligations (or work and private life), and “under certain circumstances,” enhancing equal opportunities for labour market access and career progress of “disadvantaged categories of job seekers”.³⁹ Thus, working-time regulation is, again, characterized as capable of addressing a wide range of concerns. This claim is made despite the fact that the last attempt at revision highlighted just how uneasy the balance, and high the tension, between the Directive’s social and economic objectives. Importantly, the issue of work-family reconciliation is on the revision agenda, although review of the consultation documents suggests that the Commission is increasingly collapsing it with the issue of “work life balance,” thereby diluting somewhat the concept’s emphasis on the need to support caregivers in the provision of care. Also, the impact of long work hours on gender equality, although noted in the social impact assessment study ordered by the Commission, it is only in passing addressed in the Commission’s communications.

The WTD is now again with the social partners. Will work-life balance and gender equality play a more significant role this time? Given that the discourse surrounding the Directive had expanded during the 2003-2009 round, the ETUC’s continued insistence

³⁸ Reviewing the Working Time Directive. First-phase Consultation of the Social Partners at the European Union Level under Article 154 of the TFEU. Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee, and the Committee of the Regions. COM (2010) 106 final (24 March 2010). <http://ec.europa.eu/social/BlobServlet?docId=4781&langId=en/>.

³⁹ Ibid.

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for the consideration of these issues, and the fact that previously uninvolved groups like the European Women's Lobby have now expressed a more active interest in the Directive's revision and have begun to lobby around it, there some promise that the Directive will be indeed re-conceived in a way that more explicitly engages with the impact of standard work-hours, and particularly the flexibility to extend them, on the ability of female and male workers to balance their paid work with their unpaid care responsibilities, and, in turn, on gender equality. Moreover, fact that the *Charter of Fundamental Rights of the European Union*, which is now in force, guarantees workers both the right to reconciliation of work and family (art. 33(2)) and the right to the limitation of the maximum work-time (art. 21(2)) are also significant legal developments, as are the recent decisions of the Court of Justice on the relationship between annual leave and sick leave.

However, there are many economic, political, and legal limitations, which are likely to undermine this potential once again. The recent labour law reforms that have started to undermine working-time regimes in EU Member States and the Europe 2020 strategy's focus on growth, suggests that positive developments and creative rethinking of Directive are unlikely because focus on economic competitiveness and efficiency goals may once again polarize the social and political actors. As for the legal restrictions, the European Trade Union Congress (ETUC) suggested that what may be required to amend the Directive and to broaden the universe of political discourse around it is to re-characterize work-family reconciliation itself as a health and safety issue. Indeed, a broad definition of health would/could encompass people's ability/right to partake in the lives of their families and their communities, as personal wellbeing is ultimately connected with one's

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ability to maintain familial bonds and social relations. Thus, recognizing that work-family reconciliation is an issue for all workers – including those in standard jobs– would be a concrete and important step towards creating regulations and a policy environment that provides opportunities for *all* workers to engage in family work. Since according to the European Commission’s 2009 Communication on gender equality between men and women, this kind of universal engagement in care and a more equal allocation of paid and unpaid work is what is required for realize the still elusive objective of equality, the next revision of the *Working Time Directive* will in a sense test the EU’s commitment to its achievement.

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