

# A little less autonomy? The future of working time flexibility and its limits

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## Abstract

The European Court of Justice has recently issued rulings on the interpretation of the European Working Time Directive 2003/88, which appear to restrict flexible working time arrangements (especially *Matzak* C-518/15, *Syndicat* C-254/18 and *CCOO* C-55/18). Only a few months prior to the latter ruling of the CJEU, the Austrian legislator amended the Working Time Act in order to make it more flexible. The article argues that the measures taken by the Austrian legislator to enable more flexibility and autonomy can still be regarded as compatible with Union law. In general, the article tackles the question of possible further legislative developments in order to strike a balance between autonomy and the need for security of both parties to the employment relationship. Among other suggestions, the article introduces the concept of molecularisation of working time and examines whether work intensity should be introduced as a qualitative dimension to the concept of working time, thus deviating from the current European Working Time Directive. Finally, the article suggests security measures – often referring to Austria as a best practice example – in order to safeguard workers in view of working time flexibility.

## Keywords

Working time, Directive 2003/88, flexibility, molecularisation, rest period, stand-by time, subordination, ICT, right to disconnect

## I. Introduction

The current labour market requires increased flexibility, i.e. both parties to the employment contract need to show a high degree of resilience. Flexible working (time) arrangements are particularly in demand by both employers and workers. Especially with the latter, work-life

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balance<sup>1</sup> (WLB) is a driving factor. Some envision it as becoming digital nomads (picturing a hammock and a laptop on Bali), hence being independent geographically. Others wish for a working time ‘rag rug’, where they spend two hours working before they even set foot in the office, often working through emails before getting out of bed or taking a shower. Once up, they make phone calls while preparing breakfast before taking the children to kindergarten, the dog to day care or simply themselves to the gym. In the early afternoon, they leave the office to pick up children so they can spend time with them and put them to sleep before reading files for another two hours. This fragmentation of the day as well as geographical independence are seemingly easier to achieve by those not under the subordination of their employer, i.e. self-employed or freelancers. With regard to employees, flexible working arrangements carry the stigma of being disadvantageous to their health and safety. The European Court of Justice (CJEU) – working on the premise that employees are the weaker party to the employment contract – has recently issued rulings (especially in the cases of *Matzak* C-518/15, *Syndicat* C-254/18 and *CCOO* C-55/18) on the interpretation of the European Working Time Directive 2003/88 (WTD), which appear to restrict flexible working time arrangements and advocate the classic concept of working time regulation. At the same time, quite contrarily, the Austrian legislator amended the Working Time Act in order to make it more flexible, which prompted the Austrian Chamber of Labour to ask the European Commission to introduce an infringement procedure.

This article argues that the measures taken by the Austrian legislator to enable more flexibility and autonomy can still be regarded as compatible with Union law. In general, it tackles the question of possible further legislative developments in order to strike a balance between autonomy and the need for security of both parties to the employment relationship. Therefore, it evaluates the risks of introducing flexibility to the employment relationship, especially the risk of increased monitoring, the shift of entrepreneurial risk and gender imbalances. It argues, that seeing the concept of autonomy against the background of subordination as an important concept in defining employment relationship, introducing working time flexibility runs the risk of undermining the definition of employee. The article suggests a judicial solution to this conundrum. Furthermore, it establishes the concept of molecularisation of working time as a means to make the WTD more flexible and examines whether work intensity should be introduced as a qualitative dimension to the concept of working time, thus deviating from the current WTD, in order to facilitate digital nomads and working time ‘rag rugs’. It proceeds with discussing security measures (or rather ‘rules of the game’) to safeguard employees as the weaker party to the employment contract, bearing in mind that there is ‘no one size fits all’ solution. The article wishes to advance the balance of flexibility interests of both parties to the employment contract, using the example of Austria. In the end, it aims at balancing the interests of both parties with regard to flexibility on the one hand and security on the other in order to reach a ‘double balance’.

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1. Since work is a part of life rather than something outside of it, this term has been criticized. Nevertheless, it has come to refer to the reconciliation of work and non-work lives. See P. Blyton, Working Time and Work-Life Balance, in *The SAGE Handbook of Industrial Relations* 513, 523 (P. Blyton et al. 2009). In comparison, ‘work–life blending’, refers to a blurring of work and life, i.e. by bringing their whole personality to work. See J. Bendell & I. Doyle, *Healing Capitalism* 30 et seq. (2014).

## II. Regulatory framework in the EU

According to Art. 31 para 2 EU Charter of Fundamental Rights (Charter), every worker has the right to limitation of maximum working hours, to daily and weekly rest periods, and to an annual period of paid leave.<sup>2</sup> The CJEU<sup>3</sup> assigns various functions to this fundamental right, in particular protection against erosion and ensuring practical enforcement or effect. However, the key instrument regulating working time in the EU is the Working Time Directive 2003/88 (WTD).<sup>4</sup> It was introduced as part of the EC's Social Charter Action Programme to ensure minimum health and safety requirements in how working time is organised across the EU. The WTD establishes a daily and weekly rest period of 11 and 35 hours respectively (Article 3 and 5) and limits the weekly working hours to 48 per week including overtime (Article 6). Nevertheless, it leaves room for flexibility and recognises the principle of voluntariness,<sup>5</sup> in fact the provision on annual leave (Article 7) is the only one that cannot be derogated from.<sup>6</sup> However, the European Court of Justice (CJEU) consistently maintains that the derogation laid down in Article 17(1) must be interpreted so as to limit its scope to what is strictly necessary to safeguard the interests of those whose protection the derogation permits.<sup>7</sup> Recently, the CJEU has issued rulings on the interpretation of the WTD, which appear to restrict flexible working time arrangements.

The fact that stand-by time performed by employees in the workplace is to be counted as working time has been consistently held by the CJEU for about two decades now.<sup>8</sup> In the *Matzak*<sup>9</sup> ruling, however, the CJEU explicitly stated its position on the legal qualification of stand-by times which employees spend at home rather than at the workplace. It clarified that if employees must be able to reach the place of work within eight minutes, the stand-by time is working time in the sense of the WTD, since the employee's ability to carry out other activities during this time is severely restricted. In on-call duty, on the other hand, where the employee is reachable but does not have to be present at a certain place, only the time of the actual performance of the service must be regarded as working time.

French law provides that the weekly working time for each seven-day period, including overtime, may not exceed, on average, 48 hours in the course of a six-month period in a calendar year.

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2. See for further information, E. Ales in *International and European Labour Law 1207-1209* (E. Ales et al. 2018). See, to that effect, C 397/01 to C 403/01, *Pfeiffer and Others*, EU: C:2004:584, para 100 (CJEU 5 Oct. 2004); C 176/12, *Association de médiation sociale*, EU: C:2014:2, para 42 (15 Jan. 2014); C 178/15, *Sobczyszyn*, EU: C:2016:502, para 20 (CJEU 30 June 2016); C 684/16, *Max-Planck-Gesellschaft zur Förderung der Wissenschaften*, EU: C:2018:874, para 20 (CJEU 6 Nov. 2018).

3. C-55/18, *Federación de Servicios de Comisiones Obreras (CCOO) v Deutsche Bank SAE*, ECLI: EU: C:2019:402, para 31, 43, 48, 50, 56, 65 (CJEU 14 May 2019).

4. See V. Leccese in *International and European Labour Law 1285-1320* (E. Ales et al. 2018); M. Risak in *EU Labour Law 385-419* (M. Schlachter 2015); B. Bercusson in *European Labour law 305-347* (Butterworths 1996); C. Barnard in *EU Employment Law 533 et seq.* (4th ed 2012).

5. C. Barnard, *The Working Time Regulations 1998*, 28 *ILJ* 61 (1999).

6. C. Barnard et al., *Opting out of the 48 Hour Week: Employer Necessity or Individual Choice? An Empirical Study of the Operation of Article 18(1)(b) of the Working Time Directive in the UK*, 32 *ILJ* 223 (2003); L. Rodgers, *The Notion of Working Time*, 38 *Industrial Law Journal*, 80, 88 (2009).

7. C-175/16, *Hannele Hälvä u. a. v SOS-Lapsikyläry*, ECLI: EU: C:2017:617, para 31 (CJEU 26 July 2017); C-151/02, *Landeshauptstadt Kiel v Norbert Jaeger*, EU: C:2003:437, para 89 (CJEU 9 Sept. 2003); C-428/09, *Union syndicale Solidaires Isère v Premier ministre et al*, EU: C:2010:612, para 40 (CJEU 14 Oct. 2010).

8. C-303/98, *Sindicato de Médicos de Asistencia Pública (Simap) v Conselleria de Sanidad y Consumo de la Generalidad Valenciana*, ECLI: EU: C:2000:528 (CJEU 3 Oct. 2000).

9. C-518/15, *Ville de Nivelles v Rudy Matzak*, ECLI: EU: C:2018:82 (CJEU 21 Feb. 2018).

The French trade union considered that it was contrary to the WTD to set a fixed reference period of one calendar half-year to calculate the average weekly working time. Initially, the CJEU held in the *Syndicat*<sup>10</sup> ruling that, in the absence of other indications in the WTD, Member States were free to set fixed or rolling reference periods. It is only essential that the objectives pursued by the Directive, namely effective protection of the safety and health of workers, are achieved. Fixed reference periods can, however, lead to a worker being allocated a great deal of working time during two consecutive fixed reference periods, thereby exceeding on average the maximum weekly working time. This would be contrary to the protective purpose of the WTD. Member States providing for fixed reference periods must therefore introduce mechanisms to ensure that the maximum average weekly working time of 48 hours is respected during each six-month period straddling two consecutive fixed reference periods.

In the initial case that led to the *CCOO*<sup>11</sup> ruling, a Spanish trade union complained about the lack of a systematic recording of working hours at Deutsche Bank. Deutsche Bank, on the other hand, referred to Spanish jurisdiction, according to which only overtime hours are to be recorded. After the Spanish court appealed to the CJEU, the CJEU ruled that in order to ensure the effectiveness of the rights provided for in the WTD and the Charter, the Member States must require employers to set up an objective, reliable and accessible system enabling the duration of time worked each day by each worker to be measured. The CJEU emphasised, that it should be taken into account that the employee is to be regarded as the weaker party to the employment contract. It was therefore necessary to prevent the employer from restricting his rights or enabling the employees to enforce their claims in this respect. Without a system of systematic recording of working hours, neither the number of hours worked and their distribution over time nor the number of overtime hours could be determined objectively and reliably according to the CJEU.

Instead of meeting the requirements of the current labour market for flexible working time arrangements, the CJEU has thus issued rulings on the interpretation of the WTD that restrict these tendencies. Once again, the CJEU confirmed the strict dichotomy between ‘working time’ and ‘rest time’, which does not allow for any intermediate category. Moreover, they ended up introducing additional red tape and restricting flexibility, including the autonomy of employees, limiting flexitime arrangements as well as working-time accounts and putting trust-based working time in question. These decisions seem to be based on the premise that the Directive prioritises the protection of health and safety of employees over economic considerations. It is not taken into account that flexible working time arrangements can serve not only the latter but also the former. This is diametrically opposed to the recent efforts of the Austrian legislator to make the Working Time Act more flexible. This amendment was aiming at a better adjustment of working time volumes to employers’ changing needs reflecting production cycles as well as a better compatibility of workers’ preferences regarding family, career and leisure time, better known as work-life balance (WLB).

Under the ‘WLB umbrella’ there is room for different scientific approaches and policy initiatives. At European level the most recent Directive on Work-Life Balance for Parents and Carers (EU) 2019/1158 extends the right to request flexible working arrangements to carers and working

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10. C-254/18, *Syndicat des cadres de la sécurité intérieure v Premier ministre et al*, ECLI: EU: C:2019:318 (CJEU 11. Apr 2019).

11. *Supra* n3 (CJEU 14 May 2019).

parents of children up to eight years old.<sup>12</sup> Unfortunately, it does not tackle the root of the issue, namely that it is mostly women who take on these responsibilities at the cost of their employment participation. From an egalitarian point of view it appears questionable to restrict flexible working arrangements, that are more favourable, to some workers and only for a restricted period of time.

### III. Working time regulation in Austria

The most current Austrian Working Time Reform, which, *inter alia*, aimed at improving WLB of workers, entered into force on 1 September 2018. It entailed amendments to the Working Time Act (AZG) and the Hours of Rest Act (ARG). In this reform, additional exemptions to the scope of application were introduced, such that in addition to managing executives, other persons with autonomous decision-making powers and family workers are also exempt (§§ 1, 19b (3) AZG and § 1 ARG). The maximum number of working hours (including overtime) was extended from 10 to 12 hours per day and from 50 to 60 hours per week (§ 9 (1) AZG). The existing flexitime was extended for standard working hours of up to 12 hours per day, but only if time credit will be compensated by taking full days off, and when taken in combination with a weekly rest period, is not forbidden (§ 4b (4) AZG). Overtime limits were revised such that within a reference period of four months (extendable up to one year by collective bargaining agreements), working time, including overtime, must not exceed 48 hours. Hence overtime must not exceed 8 hours per week on average. In some weeks working time may amount to 60 hours, that is 20 hours of overtime (§ 7 (1) AZG), as long as it is within the average. A new stipulation is the right of workers to refuse to work overtime if working time exceeds 10 hours per day or 50 hours per week (§ 7 (6) AZG). In addition, workers now have the right to choose between monetary compensation and time off in lieu for work exceeding 10 hours per day or 50 hours per week (§ 10 (4) AZG). The reforms also clarify that collective bargaining agreements can allow multiple transfers of time credit and time debt to the next reference period(s) (§ 4 (7) AZG). Last but not least, an additional exception from weekend rest and rest on public holidays was introduced that can be administered at the company level (§ 12b ARG).

These controversial changes have prompted the Austrian Chamber of Labour to ask the European Commission to introduce an infringement procedure. The Chamber stated, that the exceptions of managing executives and other persons with autonomous decision-making powers are to be classified as being in breach of EU law because they constitute complete exceptions to the scope of the Austrian Working Time Regulations. Seeing as the Austrian legislator copy-pasted almost the exact wording of the WTD it does not appear surprising that an infringement procedure has not been initiated so far. Moreover, the exception only applies if the employees concerned also have sufficient working time autonomy, the necessity of which results from the particular characteristics of the activity. This means that the objective justification for the exception lies in the fact that it only covers activities with decisive independent decision-making authority (e.g. management functions). Apart from this, the exception in no way means that the persons concerned are not afforded any protection and their rights are restricted. This is because the collective agreements covering almost all employment relationships in Austria – seeing as there is a collective bargaining coverage of 98% – generally also contain restrictions on working hours.<sup>13</sup> Subsidiarily, excessively

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12. See for further information, E. Cheriegato, A Work-Life Balance for all? Assessing the inclusiveness of EU Directive 2019/1158, 36 *Journal of Comparative Labour Law and Industrial Relations* (2020) citing further references.

13. <https://stats.oecd.org/Index.aspx?DataSetCode=CBC> (last visit 23 Oct. 2019).

long working hours would have to be measured against the prohibition of immorality guaranteed by law.

Furthermore, although it may seem that a lot of changes were introduced in these latest reforms, the most important principles have remained untouched. The definitions of working time, standby duty and on-call duty remain unchanged. The statutory standard working time remains 8 hours per day and 40 hours per week. The definition of overtime remains unchanged. The statutory overtime premium remains 50 per cent of a regular salary per hour of overtime (up to 100 per cent in case of a corresponding regulation, i.e. a collective bargaining agreement). Social partnership on a company level will continue to play a crucial role in the future; therefore, workers are not disenfranchised by the working time reform. Flexitime arrangements and shift work arrangements at the company are still set up by work council agreements. Besides, two aspects of the amendment have been proclaimed to serve the principle of voluntariness, namely, the right of workers to refuse to work overtime if working time exceeds 10 hours per day or 50 hours per week, and the right to choose between monetary compensation and time off in lieu for work exceeding 10 hours per day or 50 hours per week. These reforms strengthen the autonomy of employees, and therefore also serve as a means to improve WLB. In Canada, as a *quid pro quo* for enhanced employer flexibility, the right of individual employees to refuse overtime was proposed already over two decades ago.<sup>14</sup>

#### **IV Flexibility in working time arrangements**

Seeing these rather contradictory tendencies of the Austrian legislation on the one hand and CJEU interpretative rulings to the WTD on the other, the question arises as to whether labour law should allow for, and maybe even advocate, flexibility in working time arrangements.

##### *A Significance of flexibility and autonomy*

During the industrial era, working processes started to become more complex, while competition and mobility of economic resources increased.<sup>15</sup> Globalisation in its neoliberal form refers to processes of increasing international economic integration, often in partnership with multinational corporations or even driven by them.<sup>16</sup> Integration requires not only adjustment to different rules, but a high degree of resilience and proactivity in those being integrated. The spread of an increasingly globalised 24/7 economy requires the adjustment of both service providers and their employees,<sup>17</sup> who are at the same time recipients of services themselves.<sup>18</sup> Digital transformation is also changing the world of work. The performance of work is increasingly less time- and location-

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14. J. Fudge, *Control over Working Time and Work-Life Balance: A Detailed Analysis of the Canada Labour Code Part III*, 74 (Federal Labour Standards Review Commission 2006).

15. S. Deakin & F. Wilkinson, *The Law of the Labour Market: Industrialization, Employment, and Legal Evolution* (Oxford Scholarship Online, 2012).

16. S. Frenkel & S. Kuruvilla, *Logics of Action, Globalization, and Changing Employment Relations in China, India, Malaysia, and the Philippines*, 55 *Industrial and Labor Relations Review* 387 (2002).

17. Questioning the added value of a neoliberal capitalist globalised world as a driver to the increased and worldwide inequality is not the objective of this article. See T. Piketty, *The Economics of Inequality* (Belknap Press 2015); J. Stiglitz, *The Price of Inequality: How Today's Divided Society Endangers Our Future* (W.W. Norton & Company 2012).

18. C. Fagan et al., *The Influence of Working Time Arrangements on Work-Life Integration or 'Balance': A Review of the International Evidence* 38 *International Labour Organization* (2012).

bound when work processes can be controlled and monitored by computers. The digital infrastructure of companies makes work possible at any time and from any place. Traditional company structures such as fixed workplaces and regular working hours are becoming less and less important. Thus, employers should be able to deploy staff more efficiently, and employees should be able to better adapt their work to their own needs,<sup>19</sup> especially enabling digital nomads and working time ‘rag rugs’.

The changing environment of economic upheavals, technological transformation and the dominance of service employment is the reason for time issues in the workplace being interconnected with harmonising work and life.<sup>20</sup> Katsabian<sup>21</sup> stresses the impact of information technology (IT) and Information and Communications Technology (ICT) on society and labour, especially with regards to working time. In the case of ICT and non-standard work arrangements, both parties to the employment contract can profit from the physical absence of the worker in terms of improving WLB and reducing costs. Krings et al<sup>22</sup> identify a clear trend towards a differentiation of working time patterns, an intensification of control on working time, and new measurements of time regimes, distinguishing between a broad variety of working time models, and new organisational patterns due to an internalisation of working demands (especially in high-skilled occupations). These changes suggest a correlation between the adaptation of security mechanisms and improved employment relations wherein WLB could be the driving factor. Therefore, in the past decade, much attention has been given to reforms that seek to increase autonomy and flexibility, and thereby to allow better integration of work and private life.<sup>23</sup>

According to research conducted for the International Labour Organisation (ILO), worker autonomy and control over work schedules, along with the ability to choose particular hours of work has a positive effect not only on WLB, but on workers’ health and well-being overall.<sup>24</sup> Hendrickx rightly claims that autonomy rather than subordination is the key feature of cooperation for the parties and that labour law can be enriched with the idea of autonomy.<sup>25</sup> Golden et al<sup>26</sup> claim that the consequences of hours of employment for workers’ work-life interface depends not only on the number of hours of work, but also the degree to which workers perceive they have discretion over the setting and timing of their work hours and schedule. Low perceptions of discretion may have as much of an adverse effect on work-life balance as working long or extra hours. Many scholars have argued that flexible work arrangements are key to minimising employee role strain and also maximising productivity and other positive outcomes.<sup>27</sup> Positive

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19. See also E. Wolf & M. Beblo, *Does Work Time Flexibility Work? An Empirical Assessment of the Efficiency Effects for German Firms* 04-047 ZEW (2004).

20. B.-J. Krings et al., *Working Time, Gender and Work-Life Balance* KU Leuven 63 (2009).

21. T. Katsabian, *It’s the End of Working Time as We Know It – New Challenges to the Concept of Working Time in the Digital reality*, forthcoming.

22. Krings et al., *supra* n20 at 63.

23. P. Van Echtelt et al., *Post-Fordist Work: A Man’s World? Gender and Working Overtime in the Netherlands*, 23 *Gender & Society* 188, 191 (2009).

24. Fagan et al., *supra* n18 at 14.

25. *From Digits to Robots*, *Comp. Labor Law & Policy Journal* 40, 365 (378).

26. L. Golden et al., *Working Time in the Employment Relationship: Working Time, Perceived Control and Work-Life Balance*, in *Research Handbook on the Future of Work and Employment Relations* 188 et seq. (K. Townsend & A. Wilkinson 2011).

27. S. C. Eaton, *If You Can Use Them: Flexibility Policies, Organizational Commitment, and Perceived Performance*, 42 *Industrial Relations* 145 et seq. (2003); K. Sutton & R. Noe, *Family Friendly Programs and Work-Life Integration*:

attributes to flexibility may be versatility and adaptability, whereas continuity and stability seem to suffer from it.<sup>28</sup> Hill et al<sup>29</sup> link flexibility as one of the most powerful drivers of retention and engagement to higher levels of productivity, resilience, and shareholder value. Yet achieving workplace flexibility is the most difficult task because success often requires an organisation to reinvent its culture.<sup>30</sup> Hence, flexibility, especially with regard to working time, appears as the ultimate tool for balancing professional, social and private needs against efficient work and management,<sup>31</sup> as long as both parties' need for security (especially regular income, factual and legal certainty) is taken into account equally. This is not least because concrete circumstances and individual preferences can be taken into account. It therefore needs a balance of interests before flexibility can actually serve as means to improve WLB.<sup>32</sup> Doing so, all the risks of flexibility need to be taken into account.

### *B Identifying the risks of flexibility*

As presented at the outset, the CJEU works on the premise that workers are the weaker party to the employment contract, which is not so farfetched considering their economic dependency. Therefore, employees indeed run the risk of underlying their employers' domination and having disadvantages from employer-led flexibility.<sup>33</sup> It is true that ill-conceived terms of flexibility can put employees at risk of working longer hours when they are not used to facilitate WLB.<sup>34</sup> The tendency for employees to perceive their autonomy (or at least some forms of it) as a pressure to work even more<sup>35</sup> is known

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More Myth Than Magic?, in *Work And Life Integration: Organizational, Cultural, And Individual Perspectives* (E Kossek & S Lambert 2005); J. Swanberg, *Illuminating Gendered Organization Assumptions* 7Com, *Work & Fam* 3 (2004); L. Van Dyne et al., *Less Need to be There: Cross-Level Effects of Work Practices that Support Work-Life Flexibility and Enhance Group Processes and Group Level OCB* 60 *Human Relations* 1123 (2007).

28. A. Dastmalchian & P. Blyton, *Workplace Flexibility and the Changing Nature of Work: An Introduction* 18 *Canadian Journal of Administrative Sciences* 1 (2001).
29. E. J. Hill et al., *Defining and Conceptualizing Workplace Flexibility*, 11 *Community, Work & Fam.* 149, 160 (2008).
30. Id.
31. For various definitions of workplace flexibility see V. Schultz, *Feminism and Workplace Flexibility*, 42 *Connecticut Law Review* 1203, 1213 et seq. (2010)
32. P. Blyton, *Working Time and Work-Life Balance*, in *The SAGE Handbook of Industrial Relations* 513, 525 (P. Blyton et al. 2009); J. Fudge, *Working-Time Regimes, Flexibility, and Work-Life-Balance: Gender Equality and Families*, in *A Life in Balance: Reopening the Family/Work Debate*, 170, 180 (C. Krull & J. Sempruch eds, Canada UBC Press 2011); Fudge, *supra* n14 at 74.
33. G. Vallée & D. Gesualdi-Fecteau, *Setting the Temporal Boundaries of Work: An Empirical Study of the Nature and Scope of Labour Law Protections*, 32 *International Journal of Comparative Labour Law and Industrial Relations* 344 (2016); S. Fredman, *Women at Work: The Broken Promise of Flexicurity*, *Industrial Law Journal* 299 (2004); compare É. Genin, *Proposal for a Theoretical Framework for the Analysis of Time Porosity*, 32 *International Journal of Comparative Labour Law and Industrial Relations* 297 (2016).
34. F.J. Milliken & L.M. Dunn-Jensen, *The Changing Time Demands of Managerial and Professional Work: Implications for Managing the Work-Life Boundary*, in *Work and Life Integration: Organizational, Cultural, and Individual Perspectives* 43, 46 (E Kossek & S Lambert 2005). According to Milliken and Dunn-Jensen, managerial and professional workers experience three types of time pressure: pressure to get tasks done faster, pressure to work longer hours, and pressure to work 24/7.
35. Eurofound and ILO 2017 *Working Anytime, Anywhere: The Effects on the World of Work* 24 et seq., <[http://www.ilo.org/wcmsp5/groups/public/—dgreports/—dcomm/—publ/documents/publication/wcms\\_544138.pdf](http://www.ilo.org/wcmsp5/groups/public/—dgreports/—dcomm/—publ/documents/publication/wcms_544138.pdf)> (last visited 3 Sept. 2019); H. Russell et al., *The Impact of Flexible Working Arrangements on Work-Life Conflict and Work Pressure in Ireland* 189 *ESR* (2007), <http://hdl.handle.net/10419/68001> (last visited 3 Sept. 2019).



as the autonomy paradox.<sup>36</sup> Putnam et al<sup>37</sup> associate this paradox with three primary tensions: variable versus fixed arrangements; supportive versus unsupportive work climates; and equitable versus inequitable implementation of policies. This might also include the risk of de-solidarisation between employees.

ICT in the form of email or instant messaging can make employees feel pressured 'to be present, responsive and available, whether in or out of the office'.<sup>38</sup> It has been argued that the capacity to connect at any time can lead to hyperconnectivity,<sup>39</sup> which in turn can lead to 'techno-stress', resulting in burn-out, depression or other signs of psycho-social overburdening.<sup>40</sup> Also, Mayerhofer et al discuss how mixing up different time structures (private and working time) can lead to fluid boundaries of work time.<sup>41</sup> Their analysis is primarily focused on the negative aspects of fluid boundaries.

Often flexible working arrangements trigger increased monitoring by employers who want to know how their employees use their time. As already pointed out the CJEU has recently decided that it is necessary to track working time and hence employers are obliged to set up an objective, reliable and accessible system enabling the duration of daily working time to be measured.<sup>42</sup> Monitoring can be detrimental when it leads to the restriction of personal freedom.<sup>43</sup> For example, employees can experience a loss of dignity by being required to wear an electronic badge that can monitor their every move and action, including private behaviour. Automated systems that measure work through IT, software, etc. can also lead to de-personalisation of authority.

Another risk of flexible working arrangements is that they might shift the costs of flexibility that enhances employer control over the scheduling of work to employees.<sup>44</sup> This tackles the question of how much of the entrepreneurial risk of the employer can be shifted to the worker. Ales<sup>45</sup> stresses that the line between self-employment and 'autonomised' work is not to be found within the modalities in which work is performed, but in the fact that the worker contributes to the accomplishment of the mission of the organisation in which he is integrated and which is designed by the employer. By consequence, the 'autonomised' worker does not bear the entrepreneurial risk, the organiser does. Although risk-bearing appears a chancy point of distinction it might indeed indicate the integration into company organisation.

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36. M. Mazmanian et al., *The Autonomy Paradox: The Implications of Mobile Email Devices for Knowledge Professionals* 24 *Organization Science* 1291 (2013).

37. L. L. Putnam et al., *Examining the Tensions in Workplace Flexibility and Exploring Options for New Directions* 67 *Human Relations* 413 (2014).

38. D. Frayne, *The Refusal of Work: The Theory and Practice of Resistance to Work* 72 (2015) referring to M. Gregg, *Work's Intimacy*, Cambridge Polity Press 2011; N. Chesley, *Blurring Boundaries? Linking Technology Use, Spillover, Individual Distress, and Family Satisfaction* 67(5) *Journal of Marriage and Family* 1237(2005).

39. Defined as the use of many systems and devices so that you are always connected to social networks and other sources of information.

40. M. Kullmann, *The Right to Disconnect*, forthcoming.

41. H. Mayerhofer et al., *Working in Polycontextual Environments: An Empirical Analysis of Expatriates' Lifestyles, in Creating Balance? International Perspectives on the Work-Life Integration of Professionals* 185-192 (S. Kaiser et al. 2011).

42. *Supra* n3 (CJEU 14 May 2019).

43. Fudge, *supra* n14, at 73.

44. Fudge, *supra* n14, at 71.

45. E. Ales, *Subordination at Risk (of 'Autonomisation')*: Evidences and Solutions from Three European Countries, *Italian Labour Law e-Journal*, Issue 1, Vol. 12 (2019) 65, 67.

The prevailing concept of defining the employment relationship departs from subordination of the employee. The term ‘subordination’ refers to the condition of being under the control of another, of lacking the ability to influence the way the work is performed, and of choosing how the work is to be performed.<sup>46</sup> This is especially true for the obligation to comply with directives in terms of time and place,<sup>47</sup> along with the obligation to monitor such directives and their associated disciplinary responsibility. The more autonomy over working time and place the workers have, the less subordinated they are. Hence, employee-led flexibility that serves the WLB at the same time poses a threat to the categorisation as employees.<sup>48</sup> Moreover, some scholars have denounced how the extant work-life literature is mainly focused on the experience of professionals, to the detriment of workers in lower-income occupations or in non-standard employment.<sup>49</sup>

A further issue is that of enhancing equal opportunities for employment and career progress for women.<sup>50</sup> Given that autonomy is primarily found in managerial and professional occupations, and flexible work schedules oriented towards the WLB of employees are unevenly dispersed across occupational levels and sectors in industrialised countries, fewer women are able to benefit from time autonomy.<sup>51</sup> Van Echtelt et al argue that increased flexibility runs the risk of unleashing competitive forces instead of easing the tensions of balancing family and work. They claim that it is not the superficial features of the boundary between work and home, but the underlying structures of time competition that must be addressed to gain equal opportunities for women.<sup>52</sup>

### *C Evaluating the risks with a view to advocating flexibility*

The question is, whether the above-mentioned risks oppose advocating flexibility in the employment relationship, per se. As presented, prima vista, working time flexibility carries the risk of employees being disadvantaged, since they are considered the weaker party to an employment contract. However, at least in theory, there is actually no room for disadvantage given there are limitations to the autonomy of both parties. Not only Austria, but virtually all national jurisdictions know the concept of good faith, which comprises the employer’s duty to care and the employee’s duty of loyalty. Employers are limited by their duty of care when it comes to determining how much and when the work is carried out. The extent of the employers’ duty of care is equivalent to the safety and health that the WTD requires. At the same time employees are required to act according to their duty of loyalty which carries an obligation of self-responsibility. If the duty of

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46. G. Davidov, *Who is a Worker*, 34 *Industrial Law Journal* 57, 62 (2005).

47. At issue are occupational health and safety standards that generally apply to the employer’s premises but do not cover work when carried out remotely; see E. Ahlers, *Flexible and Remote Work in the Context of Digitalization and Occupational Health*, 8 *International Journal of Labour Research* 85, 92 (2016).

48. Compare Ales, *supra* n45 at 65-69; M. Pallini, *Towards a New Notion of Subordination in Italian Labor Law*, 12 *Italian Labour Law* 1 (2019); B. Waas, *The Legal Definition of the Employment Contract in Section 611a of the Civil Code in Germany: An Important Step or Does Everything Remain the Same?* 12 *Italian Labour Law e-Journal* 25 (2019).

49. T. Warren, *Work–life balance/imbalance: the dominance of the middle class and the neglect of the working class*. 66 *The British Journal of Sociology* 691 (2015); L. William, *Poor Women’s Work Experiences: Gaps in the ‘Work/Family’ Discussion*. (Conaghan, J. and Rittich, K. eds., OUP 2005). See also Chierigato, *supra* n12, citing further references.

50. Van Echtelt et al., *supra* n23 at 188–210; Fudge, *supra* n14, at 170; I. Sabelis et al., *Editorial: Questioning the Construction of ‘Balance’: A Time Perspective on Gender and Organization*, 15 *Gender, Work and Organization* 423 et seq. (2008).

51. Fagan et al., *supra* n18 at 38, citing further references.

52. Van Echtelt, Glebbeek, Lewis & Lindenberg, *supra* n23, at 209-210.

loyalty is taken seriously, there is no need for strict control measures on flexibility. In return, employers must provide more protection (e.g. protection against mental stress) as part of their duty of care. This obligation is not rigid. It rather evolves in line with the changes that drive the world of work (e.g., globalisation and digitalisation), for example, technology that evolves to serve as a means of safeguarding employees (e.g., using a depression detector test via voice). This also reflects on working time regulations being part of occupational safety and health (OSH). The latter does not require the counting of hours just for the sake of counting – as some might interpret the *CCOO* ruling –, but rather, for the sake of making sure that employees are safe. It appears very questionable that setting limits to working hours serves the intended purpose, given the vast diversity of applications. Serving the purpose of OSH does not require setting strict thresholds, especially when the stress on finishing a task in a given timeframe might be more detrimental to health than staying half an hour longer. Setting strict limitations is also problematic when it comes to fragmentation of employment, or when a worker performs more than one job. Instead, a duty of specific care that takes characteristics of individuals into account would suffice. Therefore, the legal measures to balance flexibility are there; it is just a matter of enforcement. In any case, means of enforcement must be bidirectional.

Putnam et al.<sup>53</sup> argue that there is a need to reframe the relationship between work and life to facilitate work-family enrichment, instead of treating the two as being in conflict. This requires the initiation of changing the mind-set of the (soon-to-be) working population standardising on best practice examples, instead of legally ‘cementing in’ the outdated, autonomy-limiting understanding of working time in the manner of a 9-to-5 system. With regard to de-solidarisation, carried out properly, it might have the complete opposite effect, seeing as flexibility of singulars requires resilience and adaptability of the group. Risks accompanying working time flexibility such as restrictions of personal freedom due to non-stop tracking must be taken seriously. Here, the GDPR could have a model function. With regard to the angst of de-personalisation of authority, in fact Article 22 GDPR provides protection against automated decision-making.<sup>54</sup> Thus, employees shall have the right not to be subject to a decision based solely on automated processing, including profiling, which produces legal effects concerning them.<sup>55</sup> So basically, there needs a human in the loop.

When it comes to the current concept of subordination undermining the definition of employee, the following criteria will gain in importance in the differentiation between self-employed and employed persons, namely economic dependency, which places limits on the substitution right,<sup>56</sup> and the personal obligation to work. For example, under Austrian law, an employee is not only obliged to perform, but is also obliged to fulfil this obligation to work personally. Furthermore, the agreement of on-call duty also appears suitable for assessing whether there is a relationship of subordination. If nothing else, it reflects a restriction with regard to the use of time. Yet, the CJEU

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53. Putnam et al., *supra* n37 at 433.

54. L. Feiler, N. Forgo & M. Nebel, *The EU General Data Protection Regulation (GDPR)* (Surrey UK: Globe Law and Business 2018).

55. See also F. Hendrickx, *From Digits to Robots: The Privacy-Autonomy Nexus in New Labor Law Machinery*, *Comparative Labor Law & Policy Journal* 40 (3), 365, 383 et seq (2019); M. Kullmann, *Platform Work, Algorithmic Decision-Making, and EU Gender Equality Law*, 34 *Journal of Comparative Labour Law and Industrial Relations*, 1-21 (2018).

56. C. Inversi, *Exploring the Concept of Regulatory Space: Employment and Working Time Regulation in the Gig-Economy* 203-208 (2018).

has never made it clear that the concept of an employee under EU law also depends on these criteria. According to the CJEU, the possibility of employing assistants or personnel speaks for economic independency and thus against a qualification as an employment contract,<sup>57</sup> however, it should not exclude it per se. Nevertheless, from a practical point of view, it appears rather challenging to determine whether a person is economically dependent, especially ex-ante. So far, economic dependency alone does not legitimise the applicability of working time regulations. In Austria, some employment regulations apply to persons, who are personally independent, but economically dependent (so-called employee-like persons); however, the Working Time Act is not part of these applicable regulations.

Granting rights to working time limitations, thus safeguarding health and safety, might depend on the insecurities attached to particular jobs more so than on the legal classification of their relationship.<sup>58</sup> Kullmann advocates a work-related securities approach as an alternative to the employment contract as a means to determine eligibility for a range of social goods that individuals need in order to lead a decent life.<sup>59</sup> These approaches would effectively entitle workers to working time protection regardless of how the relationship is legally classified. However, where flexibility means there is no obligation to comply with directives in terms of time and place, the extent to which the intent of the WTD would be realised is questionable. In this case the work-related securities approach does not seem to be useful in terms of working time regulation.

At the same time, the concept of autonomy that empowers workers will not fit all branches and constellations; there simply is no 'one size fits all' solution. If there were, there would be no need for security measures to ensure the effectiveness of the overall principle and to safeguard different approaches (see V.C). However, the chance to make flexible working arrangements is, objectively speaking, more favourable to inflexible working hours. Moreover, it is a broad concept that acknowledges working 9-to-5 as part of autonomy, without 'cementing it in'. Therefore, strengthening flexibility in working time arrangements has potential to improve WLB not differentiating between white-collar and blue-collar workers per se. However, it is more likely to affect higher-skilled knowledge-based jobs earlier than others.

With regard to gender imbalances, one can refer to Zbyszewska,<sup>60</sup> who calls for a more gender-sensitive model of working time regulation at the EU level. She denounces part-time and temporary contracts as ubiquitous forms of flexibility that primarily target women to work in jobs characterised by insecurity, low wages, and lack of career advancement opportunities.<sup>61</sup> On the contrary, women's employment participation should be increased. Therefore, the Directive on Work-Life Balance for Parents and Carers (EU) 2019/1158 introduces a set of legislative actions designed to modernise the existing EU legal and policy frameworks, with the aims of better supporting a work-life balance for parents and carers, encouraging a more equal sharing of parental

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57. C 270/13, *Haralambidis v. Calogero Casilli*, ECLI: EU: C:2014:2185 para 33 (CJEU 10 Sept. 2014); C-3/87, *The Queen / Ministry of Agriculture, Fisheries and Food, ex parte Agegate*, ECLI: EU: C:1989:650 para 36 (CJEU 14 Dec. 1989).

58. <https://www.etuc.org/sites/default/files/publication/file/2018-09/Voss%20Report%20EN2.pdf> (last visited 3 Sept. 2019).

59. Kullmann, supra n40, forthcoming.

60. A. Zbyszewska, *Gendering European Working Time Regimes: The Working Time Directive and the Case of Poland* 221-225 (2016); A. Zbyszewska, *The European Union Working Time Directive: Securing Minimum Standards with Gendered Consequences*, 39 *Women's Studies International Forum* 30 (2013).

61. Zbyszewska, supra n60 at 85.

leave between men and women, and addressing women's underrepresentation in the labour market. Achieving these objectives requires, above all, progress in cultural roles of men and women in terms of sharing of family responsibilities. Unfortunately, this does not happen overnight. In the meantime, it seems important to improve the availability and functioning of care infrastructures rather than introducing new leave options that encourage parents and carers not to work, thus stigmatising women for being more likely to take leave of absence.

Concluding, none of the above-mentioned risks excludes flexibility in the employment relationship per se. On the contrary, fluidity as opposed to rigidity can work both ways in that it also allows employees to pursue their private interests during working hours (e.g. social media, browsing, shopping, booking flights, etc.). Additional positive impacts might include a positive mood spill over and useful synergies.<sup>62</sup>

## V Integration of flexibility into working time regulation

### A Molecularisation of working time

As confirmed again by the CJEU in the *Matzak* ruling, the WTD is premised on a strict dichotomy between 'working time' and 'rest time', which does not allow for any intermediate category.<sup>63</sup> There is no limitation to the daily working time, just a minimum daily rest period of 11 consecutive hours per 24-hour period needs to be observed. Strangely enough, there is only a negative definition of 'rest time', meaning any period which is not working time. According to the three-limb test established by the CJEU,<sup>64</sup> working time is considered to be any period during which the worker is working, at their employer's disposal, and carrying out their activities or duties in accordance with national laws and/or practice. Working time thus appears to be activity primarily conducted to the benefit of the employer.<sup>65</sup> According to Mummé, the 'idea that the employment contract is a purchase of working time is what allows for a distinction between workers' own time, and the time they owe their employers. Such a distinction is vital to create a legal distinction between the sale of oneself, and the sale of one's labour power.'<sup>66</sup> Labour power, however, involves both clock time and task time. As such, selling one's labour power does not necessarily mean selling a specific amount of time, otherwise the implication would be that idle time spent on

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62. S. Kaiser et al., *Creating Balance? International Perspectives on the Work-Life Integration of Professionals*, vii (2011).

63. *Supra* n9; C-303/98, *Sindicato de Médicos de Asistencia Pública (Simap) v Conselleria de Sanidad y Consumo de la Generalidad Valenciana*, ECLI: EU: C:2000:528 para 47 (CJEU 3 Oct. 2000); C-14/04, *Abdelkader Deltas et al v Premier ministre und Ministre des Affaires sociales, du Travail et de la Solidarité*, ECLI: EU: C:2005:728 para 43 (CJEU 1 Dec. 2005); Leccese, *supra* n5 at 1293; D. McCann, *The Role of Work/Family Discourse in Strengthening Traditional Working Time Laws: Some Lessons from the On-Call Work Debate*, 23 *Law in Context: A Socio-Legal Journal* 127, 128 et seq. (2005); E. Rose, *The New Politics of Time*, 34 *International Journal of Comparative Labour Law and Industrial Relations* 373, 374, 392 (2018); Genin, *supra* n33 at 280, 28197.

64. At the European level, the debate on the concept of working time was triggered by challenges related to the interpretation of the Directive. The 'three-limb test' is closely linked to the *SIMAP* (*supra* n63) case, in which a group of doctors challenged the compatibility of Spanish legislation with Article 2 WTD. Rodgers, *supra* n6 at 81.

65. Comp Barnard, *supra* n4 at 547 et seq.; Risak, *supra* n4 at 390 et seq.

66. C. Mummé, *Property in Labour and the Limits of Contract*, in *The Handbook on Political Economy and Law*, 400, 416 (U. Mattei & J. Haskell 2014). See also Kullmann, *supra* n40, forthcoming. According to Advocate General Sharpston (CJEU C 188/15, *Bouagnaoui*, para 73) '[w]hen the employer concludes a contract of employment with an employee, he does not buy that person's soul. He does, however, buy his time'.

the job should be part of the equation. Emily Rose rightly states that ‘the concept of working time may lose any analytical utility if nearly all time could potentially be included within it’.<sup>67</sup>

Nevertheless, according to the ‘ban on atomisation’, as it is referred to in Austria, some activities, that are clearly not covered by the three-limb test and technically interrupt working time seeing as they are attributable to the private sphere (such as yawning, scratching, coughing, dressing up, picking up fallen objects, etc.), must not be deducted from working time. Sticking to the terminology, I am advocating a molecularisation of working time as a means to make the WTD more flexible, where the rest period or break may be deducted if the interruption reaches a certain intensity (e.g., long smoking break taken outside). Whether a (smoking) break, which is accompanied by a discussion on work legitimises being counted as working time depends on the specifics of the working relation. With regard to CJEU ruling, it is important to stress, that being at the employers disposal should not count as working time if employees are entitled to refuse to work when the employer asks them to; e.g. this applies to the newly introduced Austrian § 7 (6) AZG which serves the principle of voluntariness. In view of reciprocity, the same must apply to interruptions of rest periods: they shall only count if they reach a certain intensity e.g. by means of a certain regularity or frequency.<sup>68</sup> In this case, it is only the duration of working time, not the exact when or situation of working time that is considered relevant.

I view the concept of molecularisation as compatible with the WTD per se, in that the latter neither specifies maximum working time limits except for the maximum working week nor prohibits frequent interruption. Quite contrarily, frequent breaks serve the health and safety aspirations of the WTD,<sup>69</sup> and allow for the above-mentioned example of working time ‘rag rugs’ that serve to improve WLB. However, where the employee starts their day at 7 am by checking and answering emails, they would not be allowed to read some files after having put the children to sleep at 8 pm. Otherwise they would be in breach of the rule providing for a daily rest period of 11 consecutive hours, if they wanted to start the next day again at 7 am. Therefore, I believe the WTD needs to be changed in order to accommodate working time ‘rag rugs’ and to establish definitions that are institutionally and practically useful. In fact, it appears sufficient to the health and safety aspirations of the WTD to limit itself to enforce the maximum working time of 48 hours per week on average, thus not only enabling daily working time ‘rag rugs’ but longer time-outs. The concept of molecularisation can be made more concrete by specifying minimum durations. With regard to the Austrian WT Law, the limit can be drawn at 10 minutes.

From a practical point of view, molecularisation can be easily monitored using ICT algorithms. Katsabian asserts that ICT should be used to count every actual working time unit, thus, serving not only as a means to conduct work but also as a regulation tool.<sup>70</sup> In this way, technology can serve as a means to improve working relations rather than posing a threat to them. At the same time, I view this compatible with the already-mentioned *Syndicat* ruling of the CJEU regarding the necessity of

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67. Rose, *supra* n63, at 392.

68. Comp, with regard to the rest time pursuant to §5(1) of the German Time Hours Act (*Arbeitszeitgesetz – ArbZG*), U. Baeck & M. Deutsch, *Arbeitszeitgesetz*, §5 para14 (3th ed, CH Beck 2014); R. Anzinger & W. Koberski, *ArbZG*, §§2, 5 para 13 and 56 (4th ed 2014); R. v. Steinau-Steinrück, *Smartphone versus Arbeitsrecht*, NJW-Spezial, 178, 179 (2012); M. Jacobs, *Reformbedarf im Arbeitszeitrecht*, NZA 733, 736 et seq. (2016).

69. Rodgers, *supra* n6 at 82 referring to C-151/02, *Landeshauptstadt Kiel v Norbert Jaeger*, EU: C:2003:437, (CJEU 9 Sept. 2003).

70. Katsabian, *supra* n21, forthcoming.

track working time, and in line with the GDPR where it concerns ensuring that the labour laws are complied with.

### *B Consideration of work intensity as a qualitative dimension*

Moreover, observing maximum working time and minimum rest periods could be made depend-able on intensities and levels of obligation.<sup>71</sup> De Groof<sup>72</sup> suggests that modern working time law must acknowledge that the regulation of availability can no longer be measured through a quanti-tative time dimension only. She suggests that alternatives such as Supiot's call for a shift from working time to worker time,<sup>73</sup> and Genin's<sup>74</sup> concept of 'time porosity' which captures the time in between personal time and working time, offer a conceptual framework that integrates objective and subjective time. A solely quantitative dimension (objective time) means that an hour is always an hour, and that no distinction is made regarding what is done during that time. A qualitative dimension (subjective time) on the other hand could come from considering the constraints that one life sphere places on the other.<sup>75</sup> This could help resolve cases where the three-limb test does not suffice, for example, when an employee is provided with a flat on the employer's premise and is on-call 24/7.<sup>76</sup> It would also account for the third shift, where employees work in the evening after having finished their 'normal' work during the day.<sup>77</sup> Therefore, I believe WTD should deviate from the strict dichotomy between 'working time' and 'rest time' and introduce an inter-mediate category which allows to take the intensity of work, or interruptions, as qualitative dimensions of the concept of working time or rest periods respectively into account.

In the long run basing on qualitative dimensions might lead to a complete turn away from the principle of time-based salary,<sup>78</sup> in favour of an output-based remuneration; from clock time to task time, where performance and/or results determine the amount paid (performance or success-based remuneration or Total Quality Management, New Way of Working (NWW), Results-Only Work Environment (ROWE)).<sup>79</sup> Admittedly, this will likely affect higher-skilled knowledge-based jobs earlier. Moreover, it is important to take into account the accompanying threat to the employment contract as we know it, since the work relation may come to be interpreted more so as self-employment than an employment relationship. Another downside may be that job security will depend more heavily on performance, and that predictable career paths will give way to more uncertain and competitive promotion systems.<sup>80</sup>

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71. See the cases of *Burrow Downs Support Services Limited v. Mr E Rossiter*, UKEAT/0592/07/LA and *Mrs S J Hughes v. Mr Graham and Mrs Lynne Jones t/a Graylins Residential Home*, UKEAT/0159/08/MAA, at the British Employment Appeal Tribunal; Rodgers, supra n6 at 80; Inversi, supra n56 at 102.

72. S. De Groof, Working Time in Modern Law, in *Work-Life Balance and the Economic Crisis* 172, 184 et seq. (L. Mella Méndez & L. Serrani 2015).

73. A. Supiot, *Beyond Employment: Changes in Work and the Future of Labour Law in Europe* 60, 84 (2001).

74. Genin, supra n33 at 284-285.

75. De Groof, supra n72 at 184 et seq.

76. See case discussion by Rodgers, supra n6 at 83.

77. É. Genin, *The Third Shift: How Do Professional Women Articulate Working Time and Family Time?* in *Work-Life Balance in the Modern Workplace* (De Groof 2017).

78. Katsabian speaks about abolish working time altogether, supra n21, forthcoming.

79. Van Echtelt et al., supra n23 at 191-194. See also P. Peters et al., *Enjoying New Ways to Work: An HRM-Process Approach to Study Flow*, 53 *Human Resource Management* 271, 272 (2014).

80. Id at 192.

### C Security measures (aka the 'rules of the game')

To begin with, it should be recalled that the WTD covers only a very limited part of the working time problem. Its aim is to improve the safety, hygiene and health of workers at work. Therefore, it deals exclusively with the establishment of maximum working hours and minimum rest periods. Other aspects of working time, such as the definition of normal working hours or the nature and extent of the remuneration of working time, are not covered by the WTD. WLB is therefore not an explicitly stated objective of the WTD, that is unless one argues that a good balance is conducive to health protection. This implies, however, that leisure time is less stressful and poses less health risks. However, most accidents happen at home. If the argument shifts to the tension associated with performing the job, then we need to consider how this tension can be reduced. One approach is flexibilisation, namely the autonomy of the worker to compress or stretch the time frame within which a task is performed. Equally beneficial is the right of the worker to introduce regular or irregular breaks according to individual needs, e.g. to molecularise work as much as possible. This is also beneficial to the duty of care as an element of WLB.

Zbyszewska<sup>81</sup> advocates for a more egalitarian and socially sustainable model of working time regulation,<sup>82</sup> stressing the urgency to recognise the need to create a more predictable care and family-friendly working time regime. Undoubtedly, this goes along with security as to when and where to work as well as the quality and the level of income of work. In the long run, a reconciliation of employer-led and employee-led flexibility is the way to get there. To strike a balance that actually serves to improve WLB, flexibility must be voluntary. Flexible working arrangements do not serve everyone equally well.<sup>83</sup> Bird<sup>84</sup> stresses that a critical reason why flexitime programmes fail is that the employer retains primary or sole control over flexitime. Fudge<sup>85</sup> concludes that greater control over working time through legislative mandates would make a major contribution to the recognition of the interdependence of employment, family, and life. I do not believe this necessitates introducing a unilateral right for employees, though. Unilaterality, from either perspective, is a short-sighted solution. If awarded to employees, it carries the risk of being less attractive on the job market. Employers fear changes to employment contract details that have long-term repercussions, without their consent. This might explain why flexible working time

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81. Zbyszewska, *supra* n60, at 228-234; A. Zbyszewska, *Reshaping EU Working-Time Regulation: Towards a More Sustainable Regime*, 7 *European Labour Law Journal*, Volume 331, 345 et seq. (2016).

82. According to the European Foundation for the Improvement of Living and Working Conditions, the key to sustainable work lives is to match the quality of a job with the personal needs, characteristics, and circumstances of the individual. The Foundation posits that the quality of working time affects sustainability of work in two ways. Firstly, it is a measure of time-intensity of the work effort, and as such has an impact on the long-term sustainability of work itself, with more intensification making work less sustainable. Secondly, working time quality also determines the amount of time available for non-work activities, which makes it the most important dimension of the reconciliation of work and non-work life. Eurofound, *Sustainable Work Over the Life Course: Concept Paper*, 2 (2015).

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84. R. C. Bird, *Why don't more employers adopt flexible working time?* 118 *W VA L REV* 327, 329-331 (2015).

85. Fudge, *supra* n14, at 191.



arrangements seem to more so look good in theory than to actually be implemented by employers. Psychologists have identified two directions of motivation: towards the desired objective or away from the result one is seeking to avoid. Building on this, there are two approaches to rectify the shortcoming of flexible working time arrangements: forcing their adoption (e.g., introducing unilateral rights), or making the adoption appear favourable by introducing incentives (e.g., fiscal). In my view, the latter is preferable because incentives do not force parties to the employment contract to take flexible working time arrangements into consideration. In the end, if both parties are well served, the results will speak for themselves: increased productivity, reduced absenteeism, improved customer satisfaction, greater retention of talent, stronger employee loyalty, lower costs and therefore higher profits, improved morale, higher job satisfaction and better WLB.<sup>86</sup>

Nonetheless, employees need to be protected against the unilateral introduction of flexible working time arrangements against their will, in order to facilitate a balance between flexibility and security. This security measure tackles risks rather associated with lower-skilled jobs and/or in low-wage economic sectors and/or those who lack the bargaining power for other reasons, such as difficulties related to unpredictable schedules and the impossibility to control their working time.<sup>87</sup> Bird<sup>88</sup> stresses that unless employees have substantial control over their working time, the benefits to flexible working time arrangements disappear. Therefore, the necessary involvement could be secured via veto power regarding certain forms of flexibilisation. A default rule could be applied to reinstate previously agreed upon fixed working patterns if the employer infringes flexibility.<sup>89</sup> Katsabian rightly stresses that due to the inherent power dynamic in the workplace the default elements in the mechanism should be written from a pro-employee perspective.<sup>90</sup>

Employee involvement could be delegated to an institutionalised works council in order to guarantee that their weaker position is safeguarded. Katsabian also finds the role of employees' representatives crucial, since they can ensure that the employees' rights (especially health, well-being, and dignity) are protected, and can guarantee enforcement and compliance.<sup>91</sup> Austria might serve as a best practice example seeing as it collectively secures employee rights on both company and intercompany levels.<sup>92</sup> The question that arises in this context, however, is how much collective influence is needed.<sup>93</sup> The answer likely depends on the particular characteristics of each sector of activity concerned, or the specific characteristics of certain undertakings with regard to, *inter alia*, their size. Collective agreements could, e.g., be authorised to define maximum deficit hours or even prohibit the extension of hours during certain periods of the day or the week.

Initiation and refusal – independent if directly by workers or their works councils – must also be secured via a non-discrimination clause that offers protection against adverse treatment or consequences. For example, in the context of the latest amendment to the Austrian Working Time Act, it

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86. Bird, *supra* n84 at 361-366.

87. See also Cheriegato, *supra* n12, citing further references.

88. Bird, *supra* n84 at 329-330, 343.

89. I have been advocating this default for the Austrian flexitime arrangement according to §4b AZG if the employer specifies either the beginning or the ending of the workday without leaving the employee any autonomy. See Glowacka, *Die Rolle der BV im Zusammenhang mit Überstunden*, ZAS, 203, 206 et seq. (2019).

90. Katsabian, *supra* n21, forthcoming.

91. *Ibid.*

92. Labour Constitution Act (*Arbeitsverfassungsgesetz, ArbVG*).

93. P. Berg et al., *Work-Life Flexibility Policies: Do Unions Affect Employee Access and Use?* 67 *Industrial & Labor Relations Review* 111, 133 (2014).

was standardised that employees can reject having to work the eleventh or twelfth hour of day, or the fifty-first hour of a week for no reason and without sanctions. Also, the Directive on Transparent and Predictable Working Conditions (EU) 2019/1152 might serve as a reference. It obliges Member States to introduce the measures necessary to protect workers, including those who are workers' representatives, from any adverse treatment by the employer, and from any adverse consequences resulting from a complaint lodged with the employer or resulting from any proceedings initiated with the aim of enforcing compliance with the rights provided in the Directive.

For the same reasons, especially to safeguard the weaker party to an employment contract, it could also be argued that flexible working time arrangements should be restricted to permanent employees. Thus, they would not be applicable to fixed-term contracts and temporary agency workers, especially seeing as atypical and precarious work arrangements are predominantly used for lower-skilled workers.<sup>94</sup> Alternatively, one might advocate introducing more favourable conditions for non-permanent employees to outweigh potential disadvantages<sup>95</sup>

Obviously, predictability and transparency play an important role.<sup>96</sup> On the one hand, to avoid discrimination between permanent and non-permanent employees, and on the other, to maintain periods of daily rest, breaks, weekly rest, maximum weekly working time etc. Remarkable in this context is the recent *Syndicat* ruling of the CJEU<sup>97</sup> which states that in order to ensure the effectiveness of the rights provided for in the WTD and the Charter, Member States must require employers to set up an objective, reliable and accessible system to measure the hours worked each day by each worker. When it comes to transparency, the state could be involved since both parties to the employment contract need concrete guidance.<sup>98</sup>

Strengthening flexibility as part of autonomy appears as one means to strengthen the workers' position through increasing importance (via functional flexibility), bargaining power, and trust. This goes hand-in-hand with performance-related evaluation of work and profit-sharing schemes as a financial incentive. A degree of financial flexibility – the level of reward varying depending on the workforce's performance – is seen as a necessary ingredient to achieving broader organisational flexibility.<sup>99</sup> However, depending on economic dependency, there needs to be a limitation on the amount of pay that is allowed to be flexible, and thus to a certain extent unpredictable. The absolute threshold is the point at which the employee is burdened with the entrepreneurial risks of the employer.

Finally, the question of an independent right to disconnect is one that receives a great deal of attention,<sup>100</sup> some countries have even taken legal measures.<sup>101</sup> An upside to these measures is that

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94. Rose, *supra* n63 at 375; M. White et al., 'High-Performance' Management Practices, Working Hours and Work-Life Balance, 41 *British Journal of Industrial Relations* 41 175 (2003).

95. Comp Robert C. Bird, *Precarious Work: The Need for Flextime Employment Rights and Proposals for Reform* Berkeley 37 *Journal of Employment and Labor Law* 1 (2016).

96. Inversi, *supra* n56 at 228-231.

97. See *supra* n10.

98. Bird (*supra* n84 at 366-367) stresses that '[t]he benefits of flextime are not sufficiently widely known. Flextime gains may be less visible than flextime costs. Capital markets do not respond to flextime initiatives. Managers may fear employee shirking'.

99. Dastmalchian & Blyton, *supra* n28, at 3.

100. Hendrickx, *supra* n55, at 382 et seq; P. Hesselberth, *Discourses on disconnectivity and the right to disconnect*, new media & society 20 (5) 1994-2010 (2018); Kullmann, *supra* n40, forthcoming; P. Secunda, *The Employee Right to Disconnect*, *Notre Dame Journal of International & Comparative Law* 9 (1), Article 3 (2018).

101. In Europe, France provides a statutory right to disconnect. Italy requires employers to clarify their employees' need to be responsive outside of normal working hours. Belgium obliges the employer to negotiate with worker

they trigger transparency, since the parties to the employment contract must at least consider, if not agree on the details of time-porosity.<sup>102</sup> Nevertheless, I believe that this issue can already be resolved with existing instruments. The right to be inaccessible outside working hours is not really a right, but a simple non-existence of work obligations. If an obligation to be available has not been agreed upon, there is no breach of contract, that could be sanctioned. Whereas if availability has been agreed upon, it is probably to be qualified as on-call duty, the limits of which are already secured either by explicit regulation or settled case law. In both constellations, the following applies: if the employee performs work activities that interrupt the rest period, this is working time, which is limited by law and usually has to be compensated (not only with surcharges, but also with additional free time in the form of substitute rest). However, as a means of enforcement, employers could be obliged to explicitly inform employees when they are not required to be on-call. It appears that the new Directive on Transparent and Predictable Working Conditions (EU) 2019/1152 only obliges employers to inform employees about their obligation to be on-call at some point but does not require specifying exactly when and for how long, for example, in Austria, on-call duty outside working hours may be agreed upon for only ten days per month.<sup>103</sup> However, the discussion about an independent right to disconnect could be revived, if the WTD were to deviate from the strict dichotomy between ‘working time’ and ‘rest time’.

## VI Conclusion and outlook

Flexible working arrangements can serve the needs of both parties to the employment contract, so long as there is a balance between their individual flexibility interests on the one hand and security on the other, hence a ‘double balance’. It presupposes that flexibility that leads to improved WLB meets workers’ needs, albeit it does not have to be exclusively employee-led. An imbalance in employer-led flexibility or employee-led flexibility is destined to fail in the long run. In one case, it can lead to work-life incompatibility, and in the other, to the termination of the job contract or radical changes to it. Reciprocity also plays an important role. Workplace flexibility is more than simply providing a flexitime policy, or the option to work from home every once in a while – it is a mutual sense of trust and respect between employer and employee, a supportive workplace culture, and an optimal sense of control over one’s job and working conditions.<sup>104</sup>

Risks to working time flexibility such as restrictions of personal freedom due to non-stop tracking, must be taken seriously. In terms of the current definition of subordination posing a threat to the employment contract, I believe that two criteria will gain in importance in the differentiation between self-employed and employed persons, namely economic dependency and the personal obligation to work. The problem is that the CJEU has not made it clear that the concept of an employee under EU law anywhere depends on these criteria. When it comes to the

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representatives on the use of digital means of communications and disconnecting from it (Kullmann, *supra* n40, forthcoming). In Germany some companies have adopted company-level agreements to disconnect workers from work. In Austria, *de lege lata*, works council agreements are authorised according to § 97 Abs 1 Z 6 Labour Constitution Act (Arbeitsverfassungsgesetz, ArbVG) to regulate measures for the appropriate use of operating equipment and resources provided by the employer. However, if it comes to the usage of internet and the computer off the site, which is not provided by the employer the Labour Constitution Act lacks a legal basis.

102. Katsabian, *supra* n21, forthcoming.

103. § 20a Working Time Act (Arbeitszeitgesetz, AZG).

104. Hill et al., *supra* n29 at 160.

classification of on-call time, I am convinced that the focus on physical presence in the workplace will give way to requirements for behaviour or powers of control that speak more so to personal dependence. In today's almost limitless networked world, it no longer makes sense to rely on physical presence in a given place.<sup>105</sup> The duration for the assessment of the immediacy of the performance of the work will remain relevant here however, whereby it will no longer be a question of the physical accomplishment of distances, but the question of how many minutes will elapse before logging in.

In the existing regulatory framework, there is a fairly clear distinction between working time and rest periods. In view of changes deriving from globalisation and digitalisation, the question arises as to whether there is a need to adjust the prevailing definitions. I believe WTD should deviate from the strict dichotomy between 'working time' and 'rest time' and introduce an intermediate category which allows to take the intensity of work, or interruptions, as qualitative dimensions of the concept of working time or rest periods respectively into account. Moreover, the molecularisation of working time, with its definition dependant on the intensity of interference and the possibility to use working time otherwise, serves as a means to make the WTD more flexible. It presupposes changes to the regulation of rest periods (especially Art 3). Nevertheless, it appears sufficient to the health and safety aspirations of the WTD to limit itself to enforce the maximum working time of 48 hours per week on average, thus not only enabling daily working time fragmentation but longer time-offs.

Sooner or later, working time regulation is undoubtedly going to change – especially as digital nomads and working time 'rag rugs' proliferate. In terms of how it will change, a glass-half-full perspective serves the original aim of labour law, while strengthening the workers' position as a party to the employment contract. A prerequisite is that both parties, not just the employer, need to adapt to the changes. However, in order to safeguard employees as the weaker party to the employment contract, flexible working (time) arrangements must be, above all, voluntary, secured via a non-discrimination clause, transparent and collectively secured. Whereas technology is often presented as a threat to labour, it may actually provide solutions to deal with expected changes to time regulation. It may also serve as a means to include informal workers (or employees who choose to work from a hammock in Bali) in labour law, by offering a platform for collective organising, for example, via instant messaging tools.

To the extent that labour law is obliged to level the duty of loyalty and duty of care, the legal measures to balance flexibility are already in place; it is just a matter of enforcement. The question of an independent right to disconnect as a means of enforcement receives a great deal of attention, but can already be resolved within existing instruments. There are those who argue that from the employee's perspective, autonomy might be more of a curse than a gift, and that labour law must not promote autonomy because of all the risks involved. However, fear of potential risks should more so inspire safeguards, than be the driver for limiting development. Perhaps strengthening the enforcement of already existing rights, rather than introducing new ones, is the way to go. The recently introduced European Labour Authority that shall safeguard posting of workers might become an inspiring best practice.

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105. Bird, (supra n84, at 330-331) stresses, that in general, the notion of working time as that of physical presence would have been sufficient for pre-modern societies.


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