

Original citation:

Zbyszewska, Ania. (2016) Reshaping EU working-time regulation : towards a more sustainable regime. *European Labour Law Journal*, 2016 (3).

Permanent WRAP URL:

<http://wrap.warwick.ac.uk/81715>

Copyright and reuse:

The Warwick Research Archive Portal (WRAP) makes this work of researchers of the University of Warwick available open access under the following conditions.

This article is made available under the Creative Commons Attribution-NonCommercial-ShareAlike 4.0 (CC BY-NC-SA 4.0) license and may be reused according to the conditions of the license. For more details see: <http://creativecommons.org/licenses/by-nc-sa/4.0/>

Publisher statement

2016 *European Labour Law Journal*, Intersentia,

Link to the journal's individual webpage: <http://www.ellj.eu/>

Link to Intersentia's website www.intersentia.com

A note on versions:

The version presented in WRAP is the published version, or, version of record, and may be cited as it appears here.

For more information, please contact the WRAP Team at: wrap@warwick.ac.uk

Reshaping EU Working-Time Regulation: Towards a More Sustainable Regime

Ania Zbyszewska*

Abstract

The European Commission's 2015 Roadmap on work-life balance urges a comprehensive policy and regulatory approach as essential to addressing the interrelated goals of reconciling work and family, sharing of care work between women and men, and attaining substantive gender equality. However, the EU's key instrument setting 'normal' hours of work standards, the Working Time Directive, is absent amongst the measures identified as central to such a comprehensive approach. Attributing this omission in part to the Directive's historic evolution, its controversial and unsettled status, and its apparent gender 'neutrality', this article argues that work-life balance strategies must incorporate standard working-time considerations if they are to be effective; likewise, a more meaningful engagement with and the advancement of work-family reconciliation and equality goals is crucial for the Working Time Directive's continued relevance. Failing such a more obvious articulation between the two sets of policies, a number of goals currently on the EU agenda will be difficult to attain, as supporting caregivers and redistributing unpaid work between women and men, but also objectives of active aging and Europe's long-term social sustainability require the development of more sustainable work and working-time practices.

Keywords

Work-life balance, hours of work, Working Time Directive, gender equality, policy coherence, legal reform

1. Introduction

On 11 November 2015, the European Commission issued its first phase consultation of the social partners "on the possible action addressing the challenges of work-life balance faced by working parents and caregivers."¹ The consultation follows up on the Roadmap for the initiative "A new start to address the challenges of work-life balance faced by working families"², which the Commission introduced in August to replace the 2008

* Postdoctoral Research Fellow, University of Warwick School of Law.

¹ Consultation document of 11 November 2015, C(2015) 7754 final.

² http://ec.europa.eu/smart-regulation/roadmaps/docs/2015_just_xxx_maternity_leave.en.pdf.

proposal to revise the Maternity Leave Directive.³ As the consultation document elaborates, this new initiative aims to address women’s continually low labour market participation and proposes to do so “by modernizing and adapting the current EU legal and policy framework to ... allow for parents with children or those with dependent relatives to better balance caring and professional responsibilities, to encourage a better sharing of care responsibilities between women and men and to strengthen gender equality.”⁴ To achieve these interlinked objectives, the Commission advocates a “comprehensive” approach that encompasses “mutually reinforcing measures... in all relevant areas to improve work-life balance for women and men”, including, inter alia, “leave policies, flexible working arrangements, childcare and long-term care, and tax-benefit disincentives.”⁵

At first sight there is much to celebrate here. An acknowledgment that women’s continued labour market disadvantage (exclusion or marginalization) stems in part from the unequal sharing of paid and unpaid work, and that this disadvantage can only be addressed through the adaptation of the legal and policy framework to support the needs of *all* caregivers, as opposed to simply accommodating women, are both significant signs that the policymakers have heard the feminist message. At the same time, there is much here to suggest instrumentality, not least the fact that the goal of increasing women’s employment rates is so firmly tied to economic growth objectives. Moreover, despite its call for a comprehensive approach, in taking stock of the currently existing legislation and policy that addresses or otherwise affects the issue of work-life balance, the Commission omits to include the Directive concerning certain aspects of the organization of working time (Working Time Directive, or the Directive, 2003/88/EC)⁶ – the key EU instrument that governs regulation of work hours by setting minimum standards for maximum hours of work and mandatory periods of rest. Admittedly, as a health and safety instrument, the Working Time Directive is not directly concerned with balancing work and private life, reconciliation of work and caregiving, or gender equality per se. Nonetheless, its absence among the instruments identified as relevant for meeting these goals is striking because it is this Directive that regulates those patterns of work which are still deemed to be “male” patterns, as men are still more likely than women to engage in full-time work or work in excess of what are considered “normal” work hours. Since excessive work hours can interfere with more active assumption of responsibility for the provision of care, it is presumably in the context of full-time work that changes or modifications are needed if the goal of encouraging men to shoulder a more equal share of care work and that of enabling women’s access to a broader range of jobs (including those that are full time) are to succeed. Yet, neither the Roadmap nor the consultation make a single reference to how the Directive could be modernized and adapted to also reflect these goals and to be a part of the “comprehensive” approach.

³ The proposal was dropped following the Commission’s regulatory fitness exercise (REFIT).

⁴ *Supra* note 1 at 2.

⁵ *Ibid.*

⁶ Council Directive 93/104 EC concerning certain aspects of the organization of working time, [1993] OJ L307/18 (repealed) 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] OJ L 299/9.

The absence of the Working Time Directive among the list of work-life balance related instruments is likely indicative of its own unsettled status. Adopted in 1993, the instrument has been steeped in ongoing controversy, and while a broad consensus that the Directive needs to be revised has existed ever since the Commission undertook the first mandated review of the Directive in 2003, all efforts to do so have been unsuccessful. The expanding list of practical problems related to the Directive's national transpositions, the interpretation of its various provisions by the Court of Justice of the European Union (on call work, and in relation to sick leave or, most recently, travelling time, among others), and a growing range of policy considerations that ought to be taken into account is unlikely to make the revision process easier in the future. Such a state of affairs raises a possibility that the Directive may be deemed no longer relevant. Indeed, the fact that the instrument's traditional regulatory approach is out of step with contemporary realities – both, the current business practices and the needs of workers many of whom no longer follow standard work patterns – has been brought forth by those critics who regard such standards as an unnecessary hindrance on business efficiency, as well as those who are “friendly” to labour law and maintenance of protective standards, even if they are critical of the standards currently enacted.⁷

As I will argue in this contribution, the Directive is indeed problematic, yet its framing should not be seen as something that is inevitable – and beyond change – but rather as a historically contingent compromise. There is no doubt that the rights that the Directive enshrines are important, and that it should continue to play a role in setting common standards at the EU level. However, the Directive's continued relevance in the contemporary labour market depends on a revision that meaningfully engages with and advances the policy objectives of work-family reconciliation and substantive equality that have been too often invoked in the discourse on working time in an instrumental manner. While this requires a substantial shift in the assumptions about the normative standard worker whose time the Directive regulates as well as the appropriate balance between the instrument's protective and organizational functions – a tall order indeed – failing to do so will make the goals of supporting caregivers and redistributing unpaid work between women and men difficult to attain. Indeed, absent this sort of rethinking, it will also be hard to support other objectives currently on the EU's agenda, such as sustainability of work and long-term sustainability more broadly conceived.

To make this argument, I begin in section two with a brief history of the Directive that focuses on how issues of work-family reconciliation and the gendered impacts of standard hours of work were subordinated in the context of the Directive, with the result of decoupling and work-family issues from regulation of “normal” working hours. Next, section three examines the consequences of the current “bifurcated” approach to working time and working-time flexibility and makes the case for a Working Time Directive as an integral component of the “work-life balance” and equality strategies. I conclude by

⁷ See Alain Supiot (ed), *Beyond Employment: Changes in Work and the Future of Labour Law in Europe* (OUP 2001). More recently, Davies observed that in its focus on limiting excessive work the Directive no longer represents a coherent approach to the problem of hours regulation in the modern world: Anne Davies, ‘Regulating Atypical Work: Beyond Equality’ in Nicola Countouris and Mark Freedland (eds), *Resocialising Europe in a Time of Crisis*, 230-249 (OUP 2013).

arguing that, beyond their family and care benefits, limitations on work hours and better control over working time are also crucial to support sustainable work patterns for all.

2. Background

Originally adopted in 1993, the Working Time Directive⁸ was considered a significant victory for “social” Europe. In reality, it represented a rather unsatisfactory compromise from the start, given the awkward balance between its protective (health and safety) and organizational objectives.⁹ As the Directive’s history attests, the tensions between these two functions have fueled nearly constant legal and political controversies; crucially, they have also made it difficult to adapt and modernize the Directive to be more consistent with a range of policy goals that have become significant since its adoption, and to reflect contemporary developments in the organization of work and structure of labour markets.

Both the Directive’s enactment and how it came to be framed, as well as the way in which it articulates with other instruments that regulate different aspects of working time, such as part-time work¹⁰ or parental leave,¹¹ were contingent on the development of the Community’s institutional architecture, allocation of power between the different Community bodies and actors, and the gradual expansion of supranational regulatory competences over social policy, including regulation of employment. It is known that it was new Community competences in the area of health and safety and the working environment (Art. 118a) introduced by the 1986 *Single European Act*¹² and incorporated into the 1989 *Social Charter*¹³ that provided the Commission with a basis on which to propose a binding Directive on working time, while the application of the QMV rule to matters within Art. 118a helped to overcome the political limitations (i.e. the UK veto) that beset the Commission’s efforts to regulate in this area since the 1970s. Similarly, it is

⁸ Council Directive 93/104 EC concerning certain aspects of the organization of working time, [1993] OJ L307/18 (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] OJ L 299/9.

⁹ The Directive’s health and safety function was significantly circumscribed by the amount of flexibility that was introduced into it over the course of inter-governmental bargaining period preceding its adoption. Exclusion of a number of sectors and a range of derogations from its key provisions, that could be introduced through legislation or collective agreements, or individually agreed to. As noted by a number of commentators at the time noted this internal dissonance rendered the Directive a bizarre compromise. See Catherine Barnard, ‘The Judgment of the ECJ in United Kingdom vs. Council – The Working Time Directive’ in Catherine Barnard, Alan Dashwood, and Bob Hepple (eds), *The ECJ’s Working Time Judgment: The Social Market Vindicated* (1997) Centre for European Legal Studies (CELS) Occasional Paper 1; Jeffrey Kenner, ‘Re-evaluating the Concept of Working Time: An Analysis of Recent Case Law’ (2004) 35(6) IRJ 588.

¹⁰ Council Directive 96/34/EC of 3 June 1996 on the Framework Agreement on Parental Leave Concluded by UNICE, CEEP and the ETUC, [1996] OJ L145/4, amended by Council Directive 97/75/EC of 15 December 1997, [1998] OJ L 10/24.

¹¹ Council Directive 97/81/EC of 15 December 1997 on the Framework Agreement on Part-time Working [1998] OJ L14/9, amended by Council Directive 98/23/EC of 7 April 1998, [1998] OJ L 131/10.

¹² [1987] OJ L 169/1 (hereinafter *SEA*).

¹³ Commission of the European Communities, *Charter of the Fundamental Social Rights of Workers*. Luxembourg: Office of the Official Publications of the European Communities, 1990) (hereinafter *Social Charter*).

clear that despite the health and safety framing, the needs related to the organization of work and the productive process, and particularly the pursuit of organizational flexibility, also contributed to the instrument's final form, as evidenced by the range of exceptions and derogations that were included in its final text.¹⁴ Indeed, scrutiny of debates that preceded the Directive's adoption, as well as those that have taken place since, suggests that productivity, efficiency, and the needs of firms (or national budgets) have been always paramount in the context of working time. That the fundamental conflicts over the Directive's legitimacy centered on the issue of how these needs ought to be best served (through a regulated flexibility approach preferred by continental governments, or a non-interventionist deregulatory one preferred by the UK), rather than on whether or not they were important (this was not disputed)¹⁵, tends to confirm this. This organizational and economic aspect of the Directive, and particularly the degree to which it conflicts with the primary (protective) purpose of the instrument, has fueled much of the impasse over the Directive's future direction.

What has attracted less attention, on the other hand, is how the choice of health and safety as a regulatory rationale, while undoubtedly a reference to traditional reasons for regulation in this area,¹⁶ nevertheless narrowed the Directive's scope in a way that ultimately excluded other rationales for setting common working-time standards. This is the aspect of the Directive's history which is of importance for the argument I wish to make, and so it is worth to recall it briefly. As just noted, the efforts to introduce common working-time standards at the Community level date back to the 1970s, but lack of

¹⁴ Indeed, the inclusion of wide-ranging derogations and exceptions from the Directive's protective standards – all in the interest of flexibility – had some even suggest that the key impetus behind the instrument was deregulatory: Graham Moffat, 'Competition, Competitiveness and Re-Regulating the Labour Market: The Working Time Directive' (1997) 6 (1) *NLJ* 46. The fact that several Member States subsequently re-regulated their national working-time regimes by drawing on the Directive's flexibility provisions tends to support such a claim, albeit the fallout of the European Court of Justice (ECJ) rulings on the scope of "working time" certainly contributed to this process. See: Wiebke Düvel, 'New Times for the Working Time Directive?' (2003) *ETUY* 2003/2004 177; Steven Hardy, 'Harmonising European Working Time in an Enlarged EU: A Case of Failed "Humanisation"?' (2006) 22 (4) *IJCLLR* 563; Ania Zbyszewska, 'The European Working Time Directive: Keeping the Long Hours with Gendered Consequences' (2013) 39 (1) *WSIF* 30; Ania Zbyszewska, *Gendering European Working Time Regime: The Working Time Directive and the Case of Poland* (CUP 2016 forthcoming).

¹⁵ Bob Hepple, 'The Implementation of the Community Charter of Fundamental Social Rights' (1990) 53 *MLR* 643; Simon Deakin and Frank Wilkinson, 'Rights vs. Efficiency' (1994) 23 (4) *ILJ* 289; Moffat 1997, *ibid.*

¹⁶ There is no question that the Directive inscribes itself into a longstanding regulatory tradition, with International Labour Organization conventions setting one precedent for working-time limits as a matter of health and safety and protection of rest time. In the European context, the importance of this rationale has been also confirmed by the European Social Charter and the Charter of Fundamental Rights of the EU. Much like the Directive, Charter of Fundamental Rights, binding since December 2009 with the coming into force of the Lisbon Treaty, recognizes a right of all workers to "working conditions which respect...health, safety and dignity" and a right to "limitation of maximum working hours, to daily and weekly rest periods and to an annual period of paid leave" (Art. 31, paras 1 and 2, respectively). Finally, the Court of Justice of the EU, in a number of its rulings, has affirmed health and safety is an appropriate legal basis and confirmed that the Directive's provisions concerning maximum working time, paid annual leave, and minimum rest periods "constitute rules of Community social law of particular importance, from which every worker must benefit."

competence and political will meant that little could be achieved in this area.¹⁷ Interestingly, absence of a concrete legal peg meant that during the 1980s, the Commission advocated reregulation and modernization of working time organization (its reduction along with flexibilization) by reference to a fairly broad range of social goals, including those of reconciliation of work and family or more equal distribution of paid work and care between “marriage partners.”¹⁸ However, as I show in more detail elsewhere,¹⁹ the shift to health and safety as the basis for action led to these various rationales being “filtered out” of the discussion surrounding the Working Time Directive and from the instrument itself. Not only did the Directive’s 1990 draft proposal²⁰ or its 1993 final version no longer contain any provisions or references to those other social goals, the forms of flexibility that the Directive ultimately sanctioned were likely to undermine them.

Interests of balancing work and family responsibilities, and to a lesser extent the objective of redistributing unpaid care work between “marriage partners”²¹ did of course find their way into other Community instruments addressing aspects of working time. By contrast with the Working Time Directive, the subsequent instruments on part-time and parental leave fairly directly addressed both concerns, the first as a common family-friendly form of flexibility, while the second as a way to accommodate parents (of both genders) in order to help them balance the demands of care work during the early phase of a child’s life.²² Nonetheless, the characteristic “bifurcation”²³ or fragmentation of the various elements of the Community working time regime did little to meaningfully challenge the gendered nature of the standard organization of work, since the “core” standards enshrined in the Working Time Directive remained untouched by any consideration of their gendered impact. Provided that certain agreed upon health and

¹⁷ Lack of competence meant that only non-binding actions could be taken, such as the Commission’s Recommendation affirming the 40-hour workweek and a four-week annual leave as social standards which was adopted by the Council in 1975.

¹⁸ This was clear from the European Commission’s 1982 Memorandum on the Reduction and Reorganization of Working Time, Information Memo, P-77/82 (December 1982), and the draft Council Recommendation prepared by reference to it: Draft Council Recommendation of 23 September 1983 on the reduction and reorganization of working time COM (83) 543 final, [1983] OJ C 290/4. Also, Voluntary Part-time Work. Communication from the Commission. COM (80) 405 final (hereinafter Voluntary Part-time Work Communication).

¹⁹ Zbyszewska 2013 and 2016 *supra* note 14.

²⁰ Proposal for a Council Directive on the Organization of Working Time, [1990] OJ C 254/4.

²¹ Voluntary Part-time Work. Communication from the Commission. COM (80) 405 final, 1.

²² Although also dating back to the 1980s, these two Directives were subject to a different process of adoption – by way of social partner-negotiated framework agreements – and a distinct ideological and political context, including a friendlier UK administration and a new emphasis on working-time flexibility as a vehicle to enhanced equal opportunities and social inclusion.

²³ Deborah Figart and Ellen Mutari, ‘Europe at a Crossroads: Harmonization, Liberalization, and the Gender of Work Time’ (2001) 8 (1) SP 36, 53.

safety limits are observed, the Directive took entirely for granted that employees were available for full time work or extended hours of work.²⁴

Much has changed since the Directive's original adoption in 1993 as gender mainstreaming has become a legal principle with horizontal application (Art. 8 TFEU) and work-family reconciliation has emerged (and then receded) as a key EU strategy for facilitating employment participation and promotion of equality. In practice, however, efforts to mainstream gender into the Working Time Directive or to incorporate a broader range of social concerns into the discussion surrounding it have been only partially successful. The Directive's first review, which began in 2003 and ended with an unsuccessful attempt at conciliation in 2009, indeed saw the expansion of the discussion on the instrument to encompass work-family reconciliation. The Commission's 2004 consultation documents,²⁵ and its subsequent proposal for a new Directive,²⁶ referred to the issue of work-family reconciliation as one of the significant considerations in rethinking the approach that the Directive adopted a decade earlier. The reconciliation of work and family responsibilities was also taken up by social partners and the European Parliament, with a range of proposals for inclusion of more or less robust binding provisions within the Directive that would help to facilitate these goals.²⁷ To overcome the limitations imposed by the health and safety legal basis, the ETUC, for example, made its case for a more expansive casting of the Directive by proposing to tie work-family reconciliation to a definition of health. Indeed, such a reading has some support in Court of Justice of the European Union (Court of Justice, or the Court) rulings on on-call

²⁴ The traditional organization and regulation of working time involved a series of gendered assumptions about ideal-typical workers and their lives, which stemmed from what was regarded to be the appropriate relationship between, and allocation of responsibilities for, the processes of production and social reproduction. In effect, while the standardized hours and patterns of work represented historically significant social settlements, and served to protect workers' leisure time and shield them from risks involved in excessive work, the normative model these hours and patterns of work engendered tended to have an unequal impact on men and women's respective labour market opportunities to the extent that they failed to account for the time required for provision of unpaid care work. See Jill Rubery, Mark Smith, and Colette Fagan, 'National Working Time Regimes and Equal Opportunities' (1998) 4 (1) FE 71, 23; Supiot 2001, *supra* note 7; Joanne Conaghan, 'Time to Dream? Flexibility, Families and Working Time' in Judy Fudge and Rosemary Owens (eds) *Precarious Work, Women, and the New Economy: The Challenge to Legal Norms*, 109 (Hart 2006); Judy Fudge, 'The New Dual-Earner Gender Contract: Work-life Balance or Working-time Flexibility?' in Joanne Conaghan and Kerry Rittich (eds) *Labour Law, Work and Family*, 261, 267 (OUP 2005).

²⁵ 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 Community level, COM (2003) 843 final/2; Second Phase of Consultation of the Social Partners at Community level concerning the revision of Directive 93/104/EC concerning certain aspects of the organization of working time (hereinafter Second Phase Consultation).

²⁶ 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 final - COD (2004) 0209.

²⁷ The Commission's legislative proposal, as well as those adopted by the co-legislators all included provisions on work-family reconciliation of varying content.

work, particularly *SIMAP*²⁸ and *Jaeger*,²⁹ where the Court adopted a broad conceptualization of health and safety which it construed to include one's ability to engage in the life of the community and family. It was on this basis that the Court found that on-call work arrangements that required an employee to remain at the workplace deprived them of effective control over time and interfered not only with their ability to rest, but also to participate in family life and/or engage in social activities.³⁰ These broadly conceived protective goals were so important, according to the Court, that they could not be "called in question by the objections based on economic and organizational consequences,"³¹ or be "subordinated to purely economic considerations."³² As Kenner points out, this expansive vision of what was at stake in protecting a worker's health was in line with how health has been defined by the World Health Organization.³³ Less visible in these discussions was the issue of how working time and work-family reconciliation could contribute to more gender equality, although the ETUC had referred to it in its position on the Directive's review, tying it specifically to the issue of long-work hours enabled by the Art. 22 opt-out.

While the impasse between the social partners, and subsequently between the Community co-legislators (the Council and the Parliament), meant that the revision attempt ultimately failed for a number of other reasons, it was evident over the course of the 2004-2009 consultation and review process that the inclusion of robust or effective reconciliation provisions would have been unlikely in any case. Some of the key actors (primarily on the employer-side) openly contested its addition on the basis that it did not comply with the narrower legal basis on which the instrument continued to be justified.³⁴ Moreover, the Council and the employers lobby's insistence on the retention of the Art. 22 opt-out provision made plain that even if binding work-family reconciliation provision were incorporated, its effect would have been largely undermined by simultaneous sanctioning of long hours of work.

Following the collapse of the conciliation between the Council and the European Parliament in April 2009, the Commission initiated the fresh review process in 2010. Its

²⁸ Case C-303/98 *Sindicato de Medicos de Asistencia Publica v Consellaria de Sanidad y Consumo de la Generalidad Valenciana* [2000] ECR I-7963 [*SIMAP*].

²⁹ Case C-151/02 *Landeshaupstadt Kiel v Norbert Jaeger* [2003] ECR I-8415 [*Jaeger*].

³⁰ *Ibid.*, para. 65.

³¹ *Ibid.*, para 66.

³² *Ibid.*, para 67.

³³ Kenner 2004, *supra* note 9, 594-595.

³⁴ While *BUSINESSEUROPE* agreed that work-family reconciliation agenda was important, in contrast with ETUC, the organization opposed discussing work-family reconciliation in the context of the Working Time Directive on the basis that its promotion is better served by instruments on part-time work, temporary work, and parental leave. See: Second Phase of Consultation of the Social Partners at Community level concerning the revision of Directive 93/104/EC concerning certain aspects of the organization of working time.

Communication on the first phase consultation of the social partners³⁵ underscored the dramatic changes in the world of work that have taken place since the Directive's original adoption, as well as the broader social and economic circumstances, as a backdrop against which to assess the Directive's continued relevance and consider ways in which the review can be used to adapt it to this new context.³⁶ Significantly, the consultation document maintained focus on the relationship between organization of working time and family time, with a clear connection to gender equality:

In parallel with these business-led transformations, there is a growing awareness that working-time flexibility can help workers to reconcile their work and private life. Now that we have a more diversified EU workforce, flexible work schedules may provide workers with more opportunities to adapt working time to individual needs. Under certain circumstances, it may also enhance equal opportunities for employment and career progress, and facilitate access to employment for disadvantaged categories of job seekers.³⁷

The double round of consultation with the social partners that followed revealed a consensus on the need for change, but also a support for maintaining common minimum working-time standards, with only BUSINESSEUROPE expressing principled opposition to standard setting at the EU level. Nonetheless, subsequent negotiations between social partners did not yield an agreement and the responsibility for putting forth a revision proposal shifted once again to the Commission. The Commission's ongoing regulatory fitness exercise (REFIT), which seeks to simplify and streamline EU legislation means that the Directive will be modified to keep it up to date.³⁸ As no revised proposal has been yet issued it is difficult to anticipate what this modification might entail. Nonetheless, absence of any references to the Working Time Directive in the Commission's aforementioned "work-life balance" Roadmap and consultation document suggests that the issues concerning accommodation of care and its redistribution between women and men are unlikely to be integrated into the Directive, and that they are probably going to remain decoupled from discussion of "normal" and excessive working hours. In the remainder of the paper, I wish to explore why such a decision would be problematic and to suggest why, on the contrary, a much clearer articulation between working time limits in the context of full time work and the work-life balance and/or work-family issues is

³⁵ Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of Regions on Reviewing the Working Time Directive COM(2010) 106 final.

³⁶ The Commission asks (2010: 5): "has regulation of working time kept pace with [the] developments? Or are reforms needed to adapt the current rules to the needs of companies, workers and consumers in the 21st century?"

³⁷ 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.

³⁸ http://ec.europa.eu/smart-regulation/refit/index_en.htm.

necessary to achieve both, a modernized and relevant Working Time Directive and a successful work-life balance strategy.

3. A Care-Friendly and Egalitarian EU Working-Time Regime

As noted at the outset, part of the impetus for the recent “work life balance” initiative is the fact that women’s labour market participation has not reached the desired levels, and that men’s share of unpaid work thus continues to lag behind. Flexible forms of work and leave for caregivers are among the measures identified as essential to work-family reconciliation and women’s labour market activation; while promotion of leaves among men especially is identified as one way of ensuring that a larger share of unpaid care work becomes redistributed thus facilitating both women’s employment and equality. Gender and comparative institutionalist research has indeed for some time suggested that both, flexible work arrangements have an important role to play in helping women into work,³⁹ confirming the emphasis placed on working-time flexibility in EU policy as of mid 1990. However, research on working-time regimes has also pointed out that while flexible forms of work may be conducive to supporting women’s employment, not all are simultaneously favourable to equality.⁴⁰ Rather, more egalitarian social relations would be most likely to emerge in institutional contexts where work arrangements and social norms support low polarization between hours spent by women and men in paid work.⁴¹

As noted already, however, the current EU working-time regime does not necessarily eradicate polarization between women’s and men’s working hours, because it tends to promote or enable different forms of flexibility through different instruments, with potentially distinct consequences for the types of workers who can enter particular types of jobs.⁴² The possibility that a job might entail long hours of work – even if temporary – might deter some potential employees, and indeed, the requirement to be available for such extended work periods on occasion might act as a gatekeeper to their

³⁹ Pascal Vielle and Pierre Walthery, *Flexibility and Social Protection* (European Foundation for the Improvement of the Living and Working Conditions 2003); Dominique Anxo, Colette Fagan, Sangheon Lee, Deirdre McCann, and Jon Messenger, ‘Implications for Working Time Policies’ in Jon Messenger (ed) *Working Time and Workers’ Preferences in Industrialized Countries: Finding the Balance*, 195-211 (ILO 2004); Janneke Plantenga and Chantal Remery (eds), *Flexible Working Time Arrangements and Gender Equality: A Comparative Study of 30 European Countries*. EU Expert Group on Gender and Employment Report (European Commission: Directorate General for Employment, Social Affairs and Equal Opportunities 2009).

⁴⁰ Dominique Anxo, Colette Fagan, Sangheon Lee, Deirdre McCann, and Jon Messenger, ‘Introduction: Working Time in Industrialized Countries’ in Jon Messenger (ed) *ibid.*, 60-107; Anxo et al. 2004 *ibid.*

⁴¹ Colette Fagan, ‘Gendered Time Schedules: Paid Work in Great Britain’ (1996) 3(1) SP 72; Deborah M. Figart and Ellen Mutari, ‘Degendering Work Time in Comparative Perspective: Alternative Policy Frameworks’ (1998) 56 (4) RSE 460; Deborah M. Figart and Ellen Mutari, ‘Work Time Regimes in Europe: Can Flexibility and Gender Equity Coexist?’ (2000) 34 (4) JEI 847; Figart and Mutari 2001 *supra* note 23; Dominique Anxo, ‘Working Time Patterns Among Industrialized Countries: A Household Perspective’ in Jon Messenger (ed.) *supra* note 39, 60.

⁴² I.e. the need to at times work long hours in the context of full time work in order to ensure organizational flexibility vis-à-vis flexibility offered to primarily women employees and employers through part-time work.

entry. Likewise, irregular schedules or periods of intensive and long hours – even if balanced with adequate periods of rest – can prevent a worker from being present for their other non-work life duties. When viewed from this perspective, even the most standard forms of flexibility in work organization, such as those that enable arranging and calculating average hours of work over an extended period of time (or without a limit, as in case of the opt-out) are problematic. While they can certainly help businesses and save labour costs, and indeed, might be suitable to some workers as well, they nonetheless do have consequences for labour market segmentation and the division of labour in the home.

While there is evidence that average hours of work have continued to decrease in Europe, this decrease can be attributed primarily to the proliferation of part-time work and other types of reduced work arrangements, including both “substantial part time” (between 21 and 34 hours per week) and “short part time” (20 hours per week or less).⁴³ Importantly, men have increasingly found themselves in that group due to a decline in their paid working hours resulting from the many post-crisis schemes aimed at preserving jobs. Nonetheless, even with reduction in average hours worked by men, the gender gap in weekly paid working hours has remained significant, with men on average working 39 hours and women 33 hours a week in their main paid job. Moreover, there is still a significant portion of employees who work more than the standard 40 hours work week (with one in four men and one in ten women), and very significant portions of self-employed men and women who work in excess of 48 hours per week (62 % and 41% of men and women who employ others, and 38% and 27% of men and women without employees). A third of all employees (32%) work long days of 10 hours or more at least once a month. In the UK context, the Trade Union Congress (TUC) also reported that following a period of gradual reductions in one of Europe’s famous long hours cultures there has been again a significant upswing in the number of workers clocking in over 48 hours per week.⁴⁴ And similar increases have been reported in some “new” member states. Thus, there is still some evidence that long hours of work, and gendered working-time polarization patterns, continue to exist throughout Europe, which may partially explain why we have not seen a more substantial redistribution of unpaid work.

It is not only the duration of working hours that constitutes a problem for workers seeking to combine work with family life, or other non-work responsibilities. As already observed, evidence shows that more flexible organization of working time can be very beneficial in this regard, although it is widely accepted that some forms of flexibility are more conducive to work-family reconciliation than others. Regularity, predictability, and some degree of control or say over one’s work schedule tend to be features of flexible arrangements that are most beneficial. By contrast, frequent schedule changes or changes on short notice, or work during asocial hours are likely to have a negative impact on work family and work life balance, because they undermine control and predictability. The

⁴³ All statistical evidence in this section draws on Eurofound analysis of the 6th European Working Conditions Survey.

⁴⁴“15 per cent increase in people working more than 48 hours a week risks a return to ‘Burnout Britain’, warns TUC.” Available online: <https://www.tuc.org.uk/international-issues/europe/workplace-issues/work-life-balance/15-cent-increase-people-working-more>

good news is that more EU workers (58%) are reported to be satisfied with their working time arrangements than not. And yet, recent findings also show that despite promotion and proliferation of various forms of working-time flexibility,⁴⁵ a significant proportion of Europeans still work in ways that are likely to put strain on the balancing of their various social roles, and especially care provision. For example, nearly a third (30%) of employees still report considerable irregularity in their jobs. Also, although an increasing number of workers do have access to forms of flexibility that give them some autonomy in organizing their time (i.e. 20% of workers are free to adapt their starting and finishing time through “flexitime” schemes), survey evidence shows that in most cases it is still the employers who decide working schedules without significant employee input, while a third of employees report that changes in their schedule often occur on a short notice. As many as 64 percent of employees report having no say in their schedule, while only 10 percent can choose between different schedules set by the company; only six percent of employees can determine their own working hours.

If the above statistics and the Commission’s recent initiative on “work-life balance” are a sign that the current working-time model promoted at the EU level has not managed to facilitate a widespread proliferation of family-friendly flexibility and has only partially succeeded in reducing working-time polarization, the question remains: What would a working-time model that supports objectives set out by the “work-life balance” Roadmap look like? As noted earlier, while the Commission’s Roadmap and the follow up consultation do not include references to the Working Time Directive, it is my contention that such an improved model ought to tackle the current fragmentation or bifurcation in the EU working-time regulation framework. And doing so requires also adapting the Working Time Directive so that it can form part of a coherent regulatory and policy strategy. This is not necessarily novel, as concerns of work-family reconciliation have been present in the context of discussions over the Directive for a long time, and previous proposals for its revision have already identified the sorts of provisions that could – as part of the Directive – support the balancing between work and family life and enhance equality. A right to request reduced work, for example, is, as Barnard notes, a “lacuna” in current EU social *aquis*,⁴⁶ that should be addressed, although she does not go on to suggest that the Working Time Directive is an appropriate place for introduction of such a right. In my view, however, it is precisely the Directive that sets standards for maximum work hours, but also provides ways in which to exceed them, that is the appropriate place for inclusion of such a right. Similarly, employee rights to request

⁴⁵ Interestingly, recent comparative research on working-time flexibility measures adopted during the crisis demonstrates that those most advantageous from the perspective of employees have been achieved in institutional contexts where the statutory framework interacts with negotiated bargains. This suggests that looking to legislated standards – especially those set at a minimum level and at the supranational level – is not the most optimal way in which to promote employee friendly work practices. Nonetheless, as this research confirms standards still matter because they act as a framework against the background of which social partners can negotiate and, where collective actors are weak, they protect individual workers who may not have the strength to negotiate with their employers: Angelika Kummerling and Steffen Lehdorff, *The Use of crisis-related working time response measures during the Great Recession*. Conditions of Work and Employment Series No. 44 (ILO 2014).

⁴⁶ Catherine Barnard, ‘EU Employment Law and the European Social Model: The Past, the Present and the Future’ (2014) 67 CLP.

flexible work arrangements, to be informed of schedule changes, or to refuse overtime without recrimination could also be included and would go some way to making work more adaptable to people's needs. As the ETUC recently suggested, expansion of the principle of "adaptability" of work to worker (Art. 13 of the Directive) is one way in which such rights could be brought into the scope of the Directive. And while some of these rights might already exist in national legislation in a number of EU member states or have been introduced into workplaces through collective bargaining in others, their sanctioning at the EU-level is essential for the same reason that national statutory standards are still important even where collective bargaining is strong. Not all workers or even trade unions have the same capacity to negotiate, particularly in these austere times; and industrial dialogue is not well developed in all parts of Europe, especially in the "newer" member states of Central Eastern Europe.

In addition to a range of employee rights noted above, a more controversial step, yet one which would be required for a deep gender mainstreaming of the Directive, would entail that its most contested provisions, the Art. 22 opt out, but also the extensive reference periods for averaging of weekly working time (some of which can only be introduced through collective bargaining), be reconsidered from the perspective of their actual or potential impact on balancing paid work with unpaid care obligations; as well as their gendered consequences. Granted, the organizational rationale behind these provisions has been deemed important enough to suspend the protective health and safety objectives, the latter of which have been affirmed as of fundamental importance by the Charter of Fundamental Rights and Court of Justice jurisprudence.⁴⁷ Thus, it is unlikely that the new egalitarian and "work-life balance" rationales can pose a challenge to them either. At the very least, however, these problematic provisions should be accompanied by qualifications that require employers to consider how schedules organized over very long reference periods might affect work-life balance and work-family reconciliation.

I am of course aware that these proposals are rather far-fetched given the Directive's contested past, the current political climate, and the Commission's commitment to simplifying regulation. Indeed, the simultaneous operation of these factors is most likely to yield actions that, even at their most progressive, seek to preserve rather than expand what is already there. Yet, as I have argued here, without a coherent and more thoroughly gendered framework for regulation of working time – especially "normal" and extended work hours – it is unlikely that the employment objectives set out by policy can be accomplished. Even the instrumental, economic case for supporting work-life balance and redistribution of unpaid work between women and men – in so far as they are to increase women's employment – may fail if the asymmetry and the fragmentation of the current working-time regime are not addressed.

The case for the re-regulation of Working Time Directive and the working-time regime as a whole should, however, go beyond the instrumentality of the current discourse surrounding women's labour market inclusion. Rather, what it should center on is the recognition that the work of care, much of which is still carried out on an unpaid

⁴⁷ See *supra* note 16.

basis within homes, often by women, is an essential activity that is “as valuable as paid labour to individual and social development”⁴⁸, and that everyone should have an opportunity and a right to engage in it.⁴⁹ Such recognition would in turn necessitate that we redesign organization of paid work – and its regulation – with a different normative standard worker in mind, one that is presumptively encumbered. In that world, “employers would not be able to design jobs based on the assumption that it is the worker’s private and individual responsibility to adapt their caring responsibilities to the temporal requirements of the job. Instead, working-time norms would be designed on the assumption that all workers engage in domestic labour for others and women would no longer be expected to shoulder the economic burden of unpaid care work”.⁵⁰

4. Conclusion: Towards a Sustainable EU Working-Time Regime

Even beyond the urgency to recognize the need to create a more predictable, care and family-friendly working-time regime, and the potential long-term social and economic benefits that such a regime might facilitate, policymakers will have to come to terms with broader issues associated with organization of work, whether or not these issues are instrumental to achieving an economic bottom line. A change in our work and economic practices is urgently needed for other reasons as well, and the time to begin the shift is now. The notion of sustainability – of economic growth and key institutions such as pension systems and welfare states, for example – has become quite prevalent in EU policy discourse. Promotion of active aging, particularly as it ties in with the objective of extending working lives, is one context in which sustainability is often invoked, as it ties in with the EU’s broader efforts to support long-term sustainability of European economy and the European social model(s) through increasing employment.

However, work practices themselves have to be sustainable to support active lives. A recent European Foundation paper “Sustainable work over the life course”, explores how the conception of sustainability could be usefully applied to developing work conditions that support people in engaging and remaining in work throughout an extended working life.⁵¹ Drawing on ecology literature⁵² and on Scandinavian research on “intensive” versus “sustainable” work systems,⁵³ the paper proposes a multidimensional concept of work sustainability as one that combines characteristics of the work (or job) and the characteristics of the worker, with sustainability determined by the degree to

⁴⁸ Judy Fudge, ‘Feminist Reflections on the Scope of Labour Law: Domestic Work, Social Reproduction, and Jurisdiction’ (2014) 22(1) FLS 1, 28.

⁴⁹ Nicole Busby, *A Right to Care?* (OUP 2011).

⁵⁰ Fudge 2014, *supra* note 48.

⁵¹ Eurofound, *Sustainable Work Over the Life Course: Concept Paper*, 2 (Eurofound 2015).

⁵² Defined as the ability of life systems to develop and sustain themselves over time.

⁵³ Docherty and colleagues define “intensive work systems” as those that, in the long run, have damaging effects on individuals and the quality of products and services, with “sustainable work systems” that aim to “regenerate human and social resources”: Peter Docherty, Mari Kira, A.B. (Rami) Shami, *Creating Sustainable Work Systems: Developing Social Sustainability*, 2-3 (Routledge 2009).

which the two sets of characteristics align with each other. As the paper explains, both of these dimensions – the work and the worker – are subject to and affected by institutional and regulatory variables, arrangements, and possibilities. However, it is possible to distil key job characteristics that would be more or less conducive to sustainability, with quality of work being crucial and the quality of working-time arrangements the job offers (duration, scheduling, flexibility, and a degree of control over how time is arranged all crucial variable) being particularly determinative in so far as job sustainability. 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 for reconciliation of work and non-work life.⁵⁴ The key to sustainable work lives, according to the Foundation, is to match the quality of a job with the personal needs, characteristics and circumstances of the individual. While needs will ultimately differ from person to person as well as over life course, some are common, with rest, the need to provide care to others, to retrain or continue education being key amongst them. Accommodation of these needs should be regarded as a crucial component of ensuring sustainable working lives and a step that can help increase labour force participation rates.

The notion of work sustainability then also supports the case for rethinking working-time regulation, and especially the regulatory model that underpins the Working Time Directive, which at the moment is not particularly “sustainability proofed”. Indeed, there is yet another way in working-time regulation, particularly regulation of “normal” and excessive hours, is significant from the perspective of sustainability. Far from being deemed a relic of the past, progressive reduction of work hours is still being proposed as a measure of social progress to which the EU should aspire⁵⁵ and as a prudent way to not only improve people’s life quality and promote more egalitarian social bonds, but also to curb consumption and its consequences for ecological sustainability.⁵⁶ Given the growing emphasis on long-term sustainability in the EU policy discourse, it may be worth to also consider whether the current approach to regulation of work hours that is promoted at the EU level, particularly that which the Working Time Directive engenders, “measures up” in light of the challenges posed by climate change. If the value and a common goal of long-term sustainability – social, economic and ecological – were to guide our process of

⁵⁴ Eurofound 2015 *supra* note 51, 6

⁵⁵ Nicola Countouris and Mark Freedland, *Resocialising Europe in a Time of Crisis*, 499 (OUP 2013).

⁵⁶ See Christoph Hermann, *Capitalism and the Political Economy of Work Time* (Routledge 2014); Kyle Knight, Eugene A. Rosa, and Juliet. B. Schor, ‘Reducing Growth to Achieve Environmental Sustainability: The Role of Work Hours’ Working Paper Series, Nr. 304 Political Economy Research Institute, University of Massachusetts; Kathi Weeks, *The Problem with Work: Feminism, Marxism, Antiwork Politics, and Postwork Imaginaries* (Duke University Press 2011); and proposals of policy think tanks such as the New Economics Foundation or the Tellus Institute.

rethinking the Directive, perhaps we could also move past the current stalemate in the debate on working time.