

THE REVIEW OF THE EU WORKING TIME DIRECTIVE—MEDIATING FLEXIBILITY AND SECURITY: THE DIALOGUE OF THE EUROPEAN LEGISLATOR, THE ECJ AND THE SOCIAL PARTNERS

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1. Introduction

At present, within the EU and at EU level, the debate on labour law and employment policy has its focus on the economic need of enterprises for flexibility in the work organisation, on the one hand, and its consequences for the workers' security, on the other hand. For example, in the EU Green Paper on labour law of 2006, it is stated that European labour markets face the challenge of combining greater flexibility with the need to maximise security for all.¹ The flexible work organisation is expected both by EU policymakers and national governments to be successful in the perspective of competitiveness. It is hoped that this subsequently will lead to stable or higher employment rates and heightened welfare.

With regard to the flexibility and security debate about reviewing the present Directive 2003/88/EC on working time, "on-call work", the exclusions and opt out from the maximum weekly working time, and, to a lesser extent, the related aspect of work-life balance are key legislative issues that have arisen. Over the past years, this debate has unfolded as a "dialogue" between the European legislator, the ECJ and the (European) social partners, and contrasting views as regards the aim of worker protection and the employers' need for working time flexibility have come to the fore. Nevertheless, at the end of 2010, the European Commission consulted the social partners at EU level in the second round of consultation in order to readdress negotiations on the draft Working Time Directive. The aim is to establish a new Directive, based on a social

¹ European Commission. 2006. *Modernising Labour Law to Meet the Challenges of the 21st Century, COM(2006) 708 final*. Brussels: European Commission.

partners' agreement, which like the present one ensures minimum protection, whilst providing for flexibility "to cope with particular circumstances of countries, sectors and workers". The Commission considered several developments to justify reason for the review. It points out, in its communication about the first phase consultation of the social partners from 2010,² that the development of the knowledge-based economy, and the autonomy that "knowledge"-workers have with regard to the organisation and location of their work might be a reason to reconsider the application of the provisions of the Directive with regard to these workers. On the other hand, the group of workers that do repetitive work experience strain and stress, especially where there is a shortage of workers. For all workers it holds that working more hours is attractive from the point of view of their income. Within undertakings working time management has become more important. For instance, the costs and adjustment to the demand lead, in the service sector to extended production time and for other sectors to another spread of the production time. Flexible schedules and shifts are utilised in this respect. Optimistically, the Commission then states the benefits of these developments. Flexible working time might also be to the advantage of the worker who wishes to combine his work with his private life and for weaker groups in the labour market who would like to increase their opportunities for work and career. The primary aim of the envisaged new Working Time Directive would still contain the protection of health and safety of workers. However, according to the Commission, in light of the developments, other aims should be considered as well. Working time flexibility seems to be expressed as a possible second goal and perhaps the improvement of work-life balance could be a third one.

However, despite the Commission's intentions, so far the contrasting views of the European social partners have resulted in a deadlock on the review. A common position has not been found yet, in particular on the important legislative matters of on call work, the individual opt out and—in the Commission communication somewhat suppositious—the matter of work-life balance.

In this paper the question that will be addressed is whether the dialogue over the past few years has only resulted in opposite points of

² European Commission. 2010. *Communication from the Commission to the European Parliament, The Council, The European Economic and Social Committee and the Committee of the Regions, Reviewing the Working Time Directive, COM(2010), (First-phase Consultation of the Social Partners at European Level under Article 154 of the TFEU), 106 final*. Brussels: European Commission.

view on different aspects of the regulation of flexible working time.³ This paper argues for the contrary: based upon a close examination of the dialogue between the EU legislator, the ECJ and the social partners—at European and decentralised level—legal solutions for the impasse can be drawn from the interim outcomes of the dialogue between the various actors at different levels. Further, it will be argued that some issues about working time flexibility and protection as it is currently regulated are not fully explored in the dialogue between the actors yet. Certain aspects of protection in the provisions of Directive 2003/88/EC are still open to interpretation by the ECJ.

Firstly, this paper presents an overview of the current EU working time Directive from 2003 considering aspects on security and flexibility. Secondly, the dialogue between the European legislator, the ECJ and the social partners at European and decentralised levels on such aspects of the Working Time Directive will be scrutinised. The research will show that the different actors take different positions towards the related flexibility-security nexus and each utilise distinctive legal techniques in order to achieve aims of protection and/or flexibility on the topics of on call work, the opt out and work-life balance. Thirdly, whether certain legal outcomes of the dialogue would suit the goals of security and flexibility sustained in the new draft Directive on working time and could serve as solutions for the current legislative impasse will be tested.

2. Security and Flexibility in Directive 2003/88 on Working Time and its Review

In 1993, the first general EU Directive on Working Time was enacted. Its, contested,⁴ legal base was Art. 118a EC on health and safety (now Art. 153 TFEU). The goals of the latter were to provide minimum standards for the protection of the health and safety of the worker in relation with

³ The theme of annual leave will be left out here. The focus is on the utilisation of flexible working time in a strict sense of the word.

⁴ ECJ Case C-84/94 United Kingdom / Council OJ 1994 C 120/13. See Gray, M. 1998. "A Recalcitrant Partner: The UK Reaction to the Working Time Directive," in *Yearbook of European Law 1997*, eds. Barav A., and D.A. Wyatt, (Oxford: Clarendon Press), 323-362; and Barnard, C. 1997. "The Judgment of the ECJ in United Kingdom v Council: The Working Time Directive," in CELS Occasional Paper No. 2; Dashwood, A. A. 1997. "The Working Time Judgment in a Wider Perspective," in CELS Occasional Paper No. 2; and Hepple, B.A. "Commentary," in CELS Occasional Paper No. 2.

working time. Subsequently, in 2003, the Directive was amended in order to give a clear overview of the interim amendments of the 1993 Directive⁵, which were to adjust the provisions to the need for flexible working time arrangements. Consequently, Directive 2003/88/EC was enacted. With reference to the organisation of working time in an undertaking, its expressed aim is to provide for ensuring a better level of protection of the health and safety of the worker in the work environment (Art. 1 par. 1 Directive 2003/88/EC). Central to this aim is the general principle of “humanisation of work”: adapting the work to the worker (Art. 13 Directive 2003/88/EC), the limits of the daily, weekly (48 hours) and annual hours worked, for night work, and the entitlements to rest and annual leave. However, security aspects are key in the development of working time flexibility in the working time in undertakings. Recital 15 of the Directives’ preamble states that it is

desirable to provide for flexibility in the application of certain provisions of this Directive, whilst ensuring compliance with the principles of protecting the safety and health of workers.

Flexibility is incorporated in the Directive via the following legal techniques:

- the use of reference periods, allowing for surpassing the maxima at the short term, provided that the extra hours will be compensated within the given reference period (Art. 16);
- exclusions or derogations of the key provisions of the directive for unmeasured or predetermined working time of certain type of workers (Art. 17 par 1 Directive 2003/88/EC, Art. 20 and 21⁶), for certain work, workers or sectors (Art. 17 par 3-5 and Art. 19 Directive 2003/88/EC);
- options to derogate from several provisions by collective agreements of the social partners at the appropriate level in the Member State (Art. 18 and 19 Directive 2003/88/EC);⁷

⁵ European Commission. 2002. *Directive 2000/34/EC, Proposal for a Directive of the European Parliament and of the Council Concerning Certain Aspects of the Organisation of Working Time (Codified Version), COM(2002), 336 final*. Explanatory Memorandum. Brussels: European Commission, 2.

⁶ Directive 1999/63/EC on the working time of sea farers.

⁷ The Directive further allows the MS extensive legislative derogation for several types of workers and activities with regard to the daily and weekly rest periods, annual leave, the maximum length of night work and, to a limited extent, with regard to the maximum reference periods (Art. 17 and 19). Derogation is also allowed by collective agreements at national or regional level, or, in conformity with the national or regional rules, at decentralised level. MS may lay down rules

- the individual option to opt out from the maximum working week of 48 hours (Art. 22 Directive 2003/88/EC).

Thus, the Directive seems to permit for ample working time flexibility strategies, whenever the national legislation or collective agreements authorise these strategies. The hazards inflicted upon the health and safety of workers are considered to be tolerable and adequately limited and—in reference to night work and health problems—countered by specific rights to health surveillance and to a transfer to day work, respectively, as laid down in chapter three of the Directive

Hereafter, in sections 3 to 5 the paper will explore the dialogue between the legislator and the ECJ leading to the debate on the review of Directive 2003/88/EC and the current debate. The focus will be on three related important legislative topics: on-call work, the derogations and individual opt out from the maximum working time, and the issue of the work-life balance.

3. On-call Work

In 2003, the ECJ defined in the *Simap* and *Jaeger*-judgments⁸ on-call work as working time as meant in Directive 2003/88/EC. The Directive only gives the definition of “normal” working time: “any period during which the worker is working, at the employers’ disposal and carrying out his activity or duties, in accordance with national laws and practice (Art. 2 par 1 Directive 2003/88/EC). Although the definition in the Directive refers to the national laws and practice, the definition of working time is not left to these Member States. As it is a Community concept, it must be autonomously interpreted.”⁹

Working time, as defined in the Directive, is posed opposite to rest period, defined as any period which is not working time (Art. 2 par. 2 Directive 2003/88/EC). These two are mutually exclusive notions.¹⁰ On-call work as such is not defined in the Directive. According to the ECJ the Directive must be interpreted as meaning that on-call duty

for derogation by collective agreement and for the extension of these agreements (Art. 18).

⁸ ECJ 3 October 2000, case No. C-303/98 (*Simap*, hereafter: *Simap*) and ECJ 3 September 2003, No. C-151/02 (*Jaeger*) (hereafter: *Jaeger*). See for an overview of the judgment: Nowak, T. 2008. “The Working Time Directive and the European Court of Justice,” *MJ*, 447-471.

⁹ Par. 48 and 50 *Simap* and 58 *Jaeger*.

¹⁰ Par. 47 *Simap*.

(*Bereitschaftsdienst*) performed by a worker where he/she is required to be physically present at the work place must be regarded as constituting in its totality working time for the purposes of that directive. This holds even where the person concerned is allowed to rest at his place of work during the periods when his/her services are not required. The ECJ reasons that workers on call are required to be present at the place determined by the employer and to be available to the employer in order to be able to provide their services immediately in case of need.

(...) those obligations, which make it impossible for the doctors concerned to choose the place where they stay during waiting periods, must be regarded as coming within the ambit of the performance of their duties.

(an employee, CR) on-call duty is subject to appreciably greater constraints since he has to remain apart from his family and social environment and has less freedom to manage the time during which his professional services are not required. Under those conditions an employee available at the place determined by the employer cannot be regarded as being at rest during the periods of his on-call duty when he is not actually carrying on any professional activity.¹¹

The ECJ adds “that interpretation cannot be called in question by the objections based on economic and organisational consequences (...)”.¹² Further, the ECJ states that derogation from the definitions of working time and rest period are not allowed for.¹³ The judgment is that Directive 2003/88/EC precludes legislation of a Member State which classifies employee’s periods of inactivity in the context of such on-call duty as rest periods.¹⁴ The fact that the total amount of on-call time constitutes working time does not, however, preclude national laws or collective agreements to differentiate between time actually worked or on-call time during which the worker is at rest with regard to the payment for the shift.¹⁵ Therefore, differences in payment between active and inactive hours of the on-call service are permitted.

The “black and white” approach of the ECJ in sectors where use of on-call work is made led to problems. With on-call work, the limits of the

¹¹ Par. 63 Jaeger.

¹² Par. 66 Jaeger.

¹³ Par. 91 Jaeger.

¹⁴ Confirmed in; ECJ 1 December 2005, nr. C- 14/04 (Dellas).

¹⁵ ECJ 11 January 2007, nr. C-437/05 (Vorel/ Český Krumlov).

weekly working time were now trespassed.¹⁶ When the weekly working times were adjusted to the new way of counting hours when on-call, the workers would face a reduction in payment since they would make less (fully) paid hours. In the Netherlands and ten other Member States, the solution has been to fully count the on-call work as working time and to introduce the individual opt out of the maximum weekly working time.¹⁷ In several other Member States, despite the Courts rulings, on-call work is still not fully treated as working time. This means non-compliance with the Directive. From the European Commission's report on the implementation of the Working Time Directive, it is now clear that 14 Member States and the employers call for a more flexible approach in the Directive towards the definition of working time in case of on-call work.¹⁸ The European trade unions, however, do not accept that the implementation of the Simap-Jaeger judgments would suffer "insuperable obstacles" and are only prepared to seek a way out when the relevant definitions remain unchanged and the use of the opt out will be restricted.¹⁹ They refer to the protection of the Directive as based on fundamental social rights that must be respected and built upon.

The contrasting views between the European social partners, however, obscure the fact that the problem of on-call work is not new at all. Since the first occurrence of on-call work, at a decentralised level in the Member States, the social partners have concluded provisions to regulate this form of employment, the count of active and inactive hours as working time and the payment for these active and inactive hours. Usually a fixed percentage of the on-call hours calculates as working time and the active and inactive hours are pro rata being paid for. Where the un-nuanced approach of the legislator and ECJ has caused the social partners to take diametrically opposed points of view, the actors at European level could learn from their own old school results of the social dialogue at sectoral level within the

¹⁶ It causes problems with the minimum rest as well: European Commission. 2010. *Report from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions on the implementation by Members States of Directive 2003/88/EC ("the Working Time Directive")*, COM (2010) 802 final. Brussels: European Commission, 2.

¹⁷ *Ibid.*, 4.

¹⁸ *Ibid.*, 8-9.

¹⁹ European Commission. 2010. *Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, Reviewing the Working Time Directive (Second-phase Consultation of the Social Partners at European Level under Article 154 TFEU)*. Brussels: European Commission, 4.

Member States. A proposal for a draft new Directive on working time could just like the 2005 proposal of the Commission²⁰ include “adding a shade of grey”: a definition of on-call work, where the actual differentiation is left to the social partners at the appropriate level within the Member States. A point of reference would be to stipulate that all of the actively worked time on-call would count as working time.

4. Maximum Weekly Working Time, Derogations and Opt-out

In order to allow for flexibility in the application of certain provisions of the Directive 2003/88/EC, the Directive permits several types of derogations. First of all, Art. 17 declares derogation possible from the maximum weekly working time and minimum rest, the length of night work and the reference periods for the so-called unmeasured working time and for “autonomous” workers (Art. 17 par 1 Directive 2003/88/EC). The latter refers to workers who can determine their working time for themselves. Barnard, Deakin and Hobbs warned earlier that whenever flexibility in the Directive is restricted, the derogation of the unmeasured working time and/or the autonomous worker will be the next escape employers would want to utilise.²¹ The European Commission now proposes to avoid abuse by specifying that this derogation only applies to senior managers and other workers with “genuine and effective autonomy over both the amount and the organisation of working time”.²² A remark here would be that the demarcation between dependant and autonomous workers is always a problem. The Commission’s suggestion still leaves ample leeway for interpretation of specific cases at hand. The additional specification of autonomous workers will be most helpful for the courts in deciding on such cases.

Art. 17 par. 3 allows for derogations of the minimum rest, length of night work and reference periods²³ (but not the maximum weekly working time!), for certain activities:

²⁰ European Commission, 31 May 2005, COM(2005)246 final.

²¹ Barnard, C., S. Deakin, and R. Hobbs. 2003. “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,” *Industrial Law Journal*, December.

²² COM(2010) 801 final, 13.

²³ Art. 19 gives further limitations on the derogation of the provisions about the reference periods of Art. 17 par. 3 Directive 2003/88/EC.

- that are at distance of the workers home (off shore work, for instance);
- that require permanent presence to protect property of persons;
- that need continuity in service or production;
- and where there is a foreseeable surge in production (agriculture or tourism, for instance).

Another type of derogation is regulated in Art. 17 par. 3 as well: the derogation for workers in railway transport. Further, the Directive builds in Art. 17 par. 3 the option to limit or exclude from application of the Directives' provisions where occurrences are due to unusual and unforeseeable circumstances, beyond the employers' control, or to exceptional events, the consequences of which could not have been avoided despite the exercise of all due care (par. 2 f) or in case there is an accident or imminent risk of accident (par. 2 g). Next, in case of shift work, certain derogations from the provisions on daily and weekly rest are allowed for (Art. 17 par. 4 Directive 2003/88/EC). Lastly, ample derogations are possible for doctors in training (Art. 17 par. 5 Directive 2003/88/EC).

For all of these derogations, it holds that in case of derogation by national law or collective agreement, the worker is entitled to equivalent periods of compensatory rest, or, in exceptional cases where that is not possible for objective reasons, workers are afforded appropriate protection. This "safety net" is one example of an unexplored element in the dialogue. In the Jaeger-case the ECJ has explained that the compensatory rest should follow immediately after the extended working time. Compensatory rest that is not immediately linked with the period of work extended does not adequately take into account the general principles of protection the safety and health of workers.²⁴ The Court states in *Isère*²⁵ that it only allows for alternative protection in entirely exceptional cases where granting compensatory rest is not possible for objective reasons. It is clear the ECJ interprets the provision in strictly in light of the aim of protection, and refers to "objective reasons" or justification. It would be interesting to see in future when alternative protection is allowed and when it is not.

In Art. 18 yet another type of derogation is to be found. Derogations of the minimum rest, length of night work and reference periods²⁶ (but again not from the maximum weekly working time!), can be made by collective agreement between the two sides of industry at national or at the

²⁴ Par. 94 and 97 Jaeger.

²⁵ Par. 54 and 55 ECJ 14 October 2010, Case nr. C-428/09 (*Union syndicale Solidaires Isère v Premier Ministre and others*, hereafter: *Isère*).

²⁶ Art. 19 Directive 2003/88/EC applies here as well.

appropriate decentralised level. Again, in such a case, the worker is granted equivalent periods of compensatory rest, or, in exceptional cases where that is not possible for objective reasons, workers are afforded appropriate protection.

The articles on minimum rest and the length of night work do not apply to mobile workers, and off shore work (Art. 20), and those provisions, plus the provision on the maximum weekly working time, do not apply to workers on board of seagoing fishing vessels (Art. 21 Directive 2003/88/EC).

Apart from the national or collective options to derogate from the Directive, according to Art. 22 it is possible to opt out at individual level from the maximum weekly working time. After fierce opposition of the UK that resisted the enactment of the (1993) Working Time Directive, an individual option to “opt-out” on the maximum working week of 48 hours was incorporated in the Directive (Art. 22 par. 1 and 2 Directive 2003/88/EC).

At national level, the Member State can allow for this individual opt-out. If that is the case, the general principles of the protection of the health and safety of workers should be respected. This is another example of the protective nature of the Directives’ provision, whose meaning is not clearly known yet. The Directive requires then that the employer obtains the worker’s consent to work more than the maximum of 48 hours. In an attempt to empower the worker as much as possible with regard to the acceptance, the ECJ has interpreted this requirement of consent rather strictly.²⁷ The consent must be “expressly and freely” given by each worker individually in order for the 48-hour maximum period of weekly working time to be validly extended. Whenever an employee decides not to consent, the ECJ states that in order to ensure the useful effect of the Directive, the worker in such a case is protected against victimisation.²⁸

According to the ECJ, such an extension is not valid when the employment contract refers to a collective agreement which permits such an extension. Flexibility with regard to the maximum working time thus is possible, although procedurally strictly regulated. One could wonder if here the legislator and the ECJ rely too heavily on the procedural limits with regard to the opt-out and neglect the reality that an employee often will be confronted with a “*standard take it or leave it form*” at the moment

²⁷ ECJ, 5 October 2004, cases C-397/01 to C-403/01 (Pfeiffer/ Deutsches Rotes Kreuz).

²⁸ ECJ 14 October 2010, case C-243/09 (Fuss/ Stadt Halle), The ECJ relates its judgment to the fundamental right to effective judicial protection (Art. 47 of the Charter of Fundamental Rights of the European Union).

of formation of the contract²⁹ or faces the risk that a temporary contract would not be extended. The approach of both the legislator and the ECJ and the impact the opt-out has on the worker's protection seem to call for additional collective protection. The European Commission wishes the social partners to agree upon (the limitation of) the opt-out in the review of the present Directive. Business Europe wants to keep the opt-out underlined, CEEP and UEAPME are reserved about any changes towards the opt out, although CEEP "*regrets its rapid spread in public services*".³⁰ The trade unions ETUC and EPSU take the opposite standpoint: the opt-out should be put to an end.³¹ The problem of *de facto* "unfree" individual consent and the impasse between the social partners perhaps could be solved by at least temporarily, by finding "a middle way". That would mean upholding the opt-out, but adding security at the collective level. An idea would be to demand that, before the recourse to the opt-out at an individual level, the collective agreement between the sectoral social partners would have to permit the option to use the individual opt-out.

5. Flexible Working Time and Work-life Balance

The current working time Directive does not include any provisions on work-life balance. To support the arguments in favour of working time flexibilisation, the European Commission reasons as mentioned before that this type of flexibilisation suits the needs for flexibility in light of private care duties as well. However, that assertion seems to be rather generalising, as the concurrence of the need for and realisation of the employers' wish for working time flexibility, alongside the need for and realisation of combination security, will only take place for certain workers at a certain time. Since the interests of the workers with regard to combination and income security are diversified and will probably vary even further over time, it seems to be of utmost relevance to enhance the workers' information on and say over his or her working time. Communication with the employer over working time is thus essential.

Since the Directive on working time neglects the issue of combination security, there seems to be a task left for the EU to further these matches between the employers' and the employees' demands. The European

²⁹ Collins, H., 2005. "European Social Policy and Contract Law," *ERCL* 2005/1, 123.

³⁰ COM(2010) 801 (final), 4.

³¹ *Ibid.*

Commission indeed has put the item on the legislative agenda. The Commission proposes that the social partners pay attention to this issue since the lack of protection (the lack of information rights about time schedules and lacking rights with regard to requests to individual changes of the time schedules in particular), “creates a serious challenge for reconciling work with family life and for general work/life balance”.³² The Commission suggests including in the envisaged review of the Directive:

- encouragement for the social partners to agree at the appropriate level aimed at supporting reconciliation of work and family life;
- a right to information well in advance about substantial change to the pattern of work;
- an employers’ obligation to examine workers’ requests to change their working hours and patterns, in the light of each other’s needs for flexibility, and to give reasons for refusing such requests.

The aim to improve the work-life balance suits to Art. 3 TEU. Within the context of a single EU market, the Community has set the social objectives to:

(...) promote throughout the Community a harmonious, balanced and sustainable development of economic activities, **a high level of employment and of social protection**, equality between men and women, sustainable and non-inflationary growth, a high degree of competitiveness and convergence of economic performance, a high level of protection and improvement of the quality of the environment, **the raising of the standard of living and quality of life**, and economic **and social cohesion** and solidarity among Member States. (Art. 3 par. 3 TEU, bold font added).

The question is, however, whether the current legal base of the Directive (Art. 188a EC, now Art. 153 par. 1 sub a TFEU) could serve as the legal basis for such provisions? In the Jaeger-judgment the ECJ states:

In that regard it is clear from paragraph 15 of the judgment in *United Kingdom v Council* that the concepts of “safety” and “health” as used in Article 118a of the Treaty, on which Directive 93/104 is based, should be interpreted widely as embracing all factors, physical or otherwise, capable of affecting the health and safety of the worker in his working environment, including in particular certain aspects of the organisation of working time. At the same paragraph of that judgment the Court further noted that such an interpretation derives support in particular from the preamble to the Constitution of the World Health Organisation to which

³² COM(2010)801 final, 12.

all the Member States belong. Health is there defined as a state of complete physical, mental and social well-being that does not consist only in the absence of illness or infirmity.³³

Although the ECJ interprets the “health and safety” ground extensively, evidence that the work-life balance directly influences worker health or safety is lacking. Therefore, it is doubtful whether Art. 153 par 1 sub a can serve as a legal basis. In the author’s view, the legal basis should be broadened, to, for instance, sub b, the working conditions. If a problem in political terms, the alternative seems to be to encourage the social partners to take on the topic and agree upon a social partner agreement (as in Art. 155 TFEU). The prospect of such happening seems bleak, according to the Commission’s Communication about the second-phase review, only the European Trade Union Confederation (ETUC) shows an interest in the topic. Again, legislative results at national level are discarded: for instance in the Netherlands and Germany far-reaching legislation on work-life balance and workers’ requests with regard to change to working time or pattern is already in place. Perhaps the dialogue on this issue could be stimulated by Member States who have already enacted legislation on the work-life balance bottom up via the national social partners.

6. Conclusion

The question addressed in this paper is whether or not the dialogue in the past few years on different aspects of the regulation of flexible working time has resulted only in opposing views. A close examination of the dialogue between the EU legislator, the ECJ and the social partners— at European and at a decentralised level—has showed that, despite the expressed contrasting views, existing results of the dialogue between (sectoral) social partners within the Member States or national legislation might give clues for breakthroughs with regard to the contested legislative topics of on-call work, derogations, opt-out and work-life balance. With regard to on-call work, the black and white approach of the legislator and the ECJ towards the definition of working time should be more nuanced. A proposal for a draft new Directive on working time could include a definition of on-call work, where the actual differentiation is left to the social partners at the appropriate level within the Member States. The

³³ Par. 93 Jaeger.

point of reference would be to stipulate that all of the actively worked time on-call would count as working time.

With regard to the derogations for the so-called autonomous worker it is noted that, in general, the demarcation between dependant and autonomous workers, in the light of protection of the former, is a well known and persisting problem in labour law. The Commission's suggestion to specify the characteristics of the autonomous worker still leaves ample leeway for interpretation of specific cases at hand. The suggested additional specification of autonomous workers will be at maximum helpful for the courts in deciding on such cases.

For most derogations in the Directive it holds that, in case of derogation by national law or collective agreement, the worker is entitled to equivalent periods of compensatory rest, or, in exceptional cases where that is not possible for objective reasons, workers are afforded appropriate protection. This "safety net" is one example of an as yet unexplored element in the dialogue. It is clear that the ECJ interprets the provision strictly in the light of the aim of protection and demands for alternative protection "objective reasons" or justification. It would be interesting to see in future when alternative protection is allowed and when it is not. With regard to the opt-out provision in the dialogue the ECJ has interpreted the provision on the opt-out strictly with regard to its procedural aspects. However, the problem of *de facto* "unfree" individual consent and the (severe) effects on worker protection remains. Currently, the social partners express contrasting views with regard to the question whether or not to keep the opt-out in place. Here, perhaps meeting "half-way" would lead to, at least a temporary solution. This would mean upholding the opt-out, but adding security at the collective level. In this paper, an idea is suggested to only allow for individual opt-out when the collective agreement between the (sectoral) social partners permits that. Finally, with regard to the issue of work-life balance, the Commission has made cautious suggestions to improve work-life balance. However, the legal base for such provisions in a health and safety Directive might be contested. The prospect of actually realising improvement in this area seems bleak, since only the ETUC shows an interest in the topic. Again, existing legislative results at the national level are disregarded at the European level. The Member States who have already enacted legislation on the work-life balance could perhaps step forward and stimulate via the national dialogue with the social partners the debate between the social partners at European level on this matter.

The dialogue on the regulation of working time will continue and will remain an interesting matter for legal debate.

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