

Gendering the European Working-Time Regimes –
The Universe of Political Discourse, Working-Time Regulation, and Gender Equality
in the Wider European Union and in Poland

by

Ania Zbyszewska
LL.B., University of Windsor, 2005
B.A., University of Toronto, 2001

A Dissertation Submitted in Partial Fulfillment
of the Requirements for the Degree of

DOCTOR OF PHILOSOPHY

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Supervisory Committee

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Supervisor

Dr. Oliver Schmidtke, Departments of Political Science and History
Outside Member

Dr. Amy Verdun, Department of Political Science
Outside Member

Abstract

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This dissertation examines the discursive, political, and legal context of the European Union's (EU) *Working Time Directive*, beginning with the history of its adoption and ending with its unsuccessful revision attempt in 2009. It also analyzes the Directive's influence on the working-time regime in Poland, and considers whether or not it advances gender equality. A feminist, socio-legal perspective that is attentive to multiple levels of governance is used to analyze the Directive, the Polish *Labour Code* provisions, and their interaction.

The dissertation illustrates how standard working-time norms both assumed and institutionalized an unequal allocation of paid and unpaid work between men and women, which either constrained women's employment opportunities or, in Poland's case, penalized women with a double burden of paid and unpaid work. It shows how a contextual analysis of the EU and Polish working-time instruments allows us to evaluate whether the norms they set embody and reproduce, or challenge and move beyond, these gendered assumptions. The focus is on changes in the political, economic, and social milieu, developments in policy discourses and institutional architecture, and the role of actors influencing the evolution of these instruments. Emphasis is given to Poland's post-1989 transition and EU accession processes, the expansion of the EU competences, and the influence of broader transnational trends.

The study reveals that the current regulatory approaches to standard work-time promoted in the EU and Poland are unlikely to facilitate equal re-distribution of work-time between men and women because equality and work-family reconciliation have

been either absent as potential regulatory rationales or subordinated to the dominant pursuit of labour market flexibility and efficiency. In the EU, this subordination stemmed from institutional, legal, and political constraints existing at the time of the Directive's adoption and subsequent review. In Poland, domestic and external pressures also privileged economic discourses and the adoption of EU norms enabled progressive flexibilization of the Polish working-time regime, while preserving opportunities for long work-hours. Although recent policy emphasis on equality and the promotion of work-family reconciliation for all workers is promising, curbing long hours and better incorporation of care work are required for socially sustainable and equal working-time regimes.

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Dedication

To my parents, Bogumiła and Bogdan, for their love, unconditional support, and giving me the world of possibilities.

To Marc-Oliver, for inspiring me every day.

In the memory of my grandmothers, Stasia and Irena, at whose kitchen tables anything seemed possible and from whom I learned the value of all that “other” work.

Abbreviations

AWS: Electoral Action Solidarity

CBOS: Public Opinion Research Centre

CEE: Central and Eastern Europe

CEEP: European Centre of Employers and Enterprises providing Public services

CJEU: Court of Justice of the European Union

EC: European Communities

ECJ: European Court of Justice

EEC: European Economic Community

EESC: European Economic and Social Committee

EIRO: European Industrial Relations Observatory

EIRR: European Industrial Relations Review

EMU: Economic and Monetary Union

ECSC: European Coal and Steel Community

ETUC: European Trade Union Congress

EPSU: European Federation of Public Service Unions

EU: European Union

EWL: European Women's Lobby

GDP: gross national product

GIP: Central Workplace Inspection

GUS: Central Statistical Office

IMF: International Monetary Fund

KKP: Polish Employer's Confederation; Employers of Poland

LPR: League of Polish Families

NSZZ: Independent Self-governing Worker's Association

OECD: Organization for Economic Cooperation and Development

OPZZ: All-Poland Alliance of Trade Unions

PiS: Law and Justice

PIP: National Workplace Inspection

PKPP: Confederation of Polish Private Employers "Lewiatan"

PLC: Polish Labour Code

PO: Civic Platform

PRL: People's Republic of Poland

PSL: Peasant Party

RP: Republic of Poland

SER: standard employment relationship

SME: small and medium enterprises

SLD: Left Democratic Alliance

UNICE: Union of Industrial and Employers' Confederation of Europe

UP: Union of Labour

UW: Freedom Union

WTD: Working Time Directive

Note: Some abbreviations and acronyms have been left in Polish, with the nomenclature being translated into English

Introduction

Regulation of working time is a crucial issue on the European Union's (EU) agenda, with EU policy prescriptions emphasizing its modernization as essential to the achievement of a wide range of social and economic policy goals. Yet nearly two decades since the adoption of the EU's first instrument on working hours, the 1993 *Directive concerning certain aspects of the organization of working time (Working Time Directive)*,¹ the development of a coherent Community-wide approach to working time remains elusive and contested. Instead, the highly polarized and, at the time of writing, still unresolved debate on the *Working Time Directive*'s revision evidences a profound lack of consensus on what the EU's approach should be and whether the many goals that the regulation of working time is expected to facilitate are, indeed, fully compatible with each other.

While much has been made of the controversies surrounding the EU's first working-time instrument, one of its aspects that has not attracted significant attention is its apparent gender neutrality. Adopted as a health and safety measure, the *Working Time Directive* sets the basic, minimum working-time standards for the EU Member States to adhere to. Furthermore, it contains various exceptions and derogations that enable significant working-time extensions. However, neither the standards the Directive prescribes nor the forms of working-time flexibility that it promotes are in fact gender neutral. Indeed, since the Directive's adoption, the potential of more flexible working-

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

time organization and regulation in alleviating the “clash” between “work” and “family” and in promoting gender equality has received increased attention in the EU policy discourse. Given the EU’s competence in this area, the extent to which the *Working Time Directive* and the working-time regime for which it sets a foundation can facilitate these objectives in the individual Member States, and particularly in Poland, is the subject of this dissertation. As I will elaborate, Poland’s relatively recent EU accession, historically long working-time norms and an enduring and pervasive long-hours culture,² high levels of work-family conflict, and significant labour market inequality, make it a particularly good case for examination of the Directive’s influence.

This introduction poses the key questions guiding my research and explains how the conceptual and methodological approaches adopted herein will help to answer these questions and contribute to the debates on working time, gender equality, and the role of EU regulation in shaping domestic policy discourses and legal orders. I begin by more precisely identifying the problem and the questions guiding my study, after which I identify my aims, situate this study within the broader literature on working time, and explain the conceptual and methodological approach. Finally, I conclude with a brief outline of the subsequent chapters.

Working Time as a Gendered Issue

Women’s mass influx into the labour markets of developed Western economies in the last several decades made apparent that working time is a gendered issue. Among others, persistent inequalities in the distribution of working hours between men and

² According to recent literature and statistics, Poland is among those EU Member States with, consistently, some of the longest working hours in the EU (Carley 2004; Parent-Thirion 2007; Czarnasty 2009). Pascall and Lewis (2004, 387) note that average hours of work are longer (by about 5 hours) in Central and Eastern European than in Western European Member States.

women and the rapidly escalating work-family conflict drew attention to the challenges inherent in combining full labour market engagement with care-giving obligations. Both these enduring inequalities and the difficulties in balancing work and family also made obvious that the traditional approach to working-time regulation³ fails to correspond with the needs of many workers, in part, because it takes for granted the unpaid work of care. Much as other components of the standard employment relationship (SER) that became dominant during the post-WWII period in many industrialized economies, traditional organization of working time and the associated legal norms developed in reference to gender contracts based on various incarnations of the male breadwinner-female housewife model of the family. Thus, these norms rested on the assumption that workers are mostly male, fully available for paid work, and largely unencumbered by other obligations. Given the more recent changes in workforce composition, the adequacy of this regulatory approach *vis-à-vis* contemporary workers' needs and interests has been questioned by scholars and some policymakers (Supiot 2001; Conaghan and Rittich 2005; Fudge 2005; Conaghan 2006; Vosko 2010; Busby 2011).

Contrary to the model adopted in Western countries, the assumption of women's full employment and more extensive accommodation of care-giving work was one of the

³ Regulation of the hours and patterns of work through statutory means and/or collective bargaining is one of the oldest and most established forms of labour and employment regulation, dating from the beginning of the Industrial Revolution. Its pinnacle, the quintessential standard of a 40-hour workweek and an eight-hour workday (37 or 35 hours, in some cases), constituted a key element of the normative employment pattern that was developed in reference to the Fordist mode of production and became dominant in the industrialized economies of the post-WWII era. Cycles of economic recession, profound changes in the global political-economy, organization of the productive process and the composition of labour markets over the course of the late 20th century have challenged the continuing viability of this archetype. On the one hand, neoliberal reformers and business lobbies eager to ensure more deregulated and flexible markets and more adaptive, responsive enterprises have critiqued working-time standards as unnecessarily "rigid" and unaffordable. On the other hand, as I will explore in Chapter 1, feminist scholars have critiqued the gender bias underlying these regulations, particularly the assumptions about "model" workers who are available and exclusively engaged.

distinguishing characteristics of the industrialized command economies of Central and Eastern Europe (CEE). There too, however, workers struggled with balancing full-time employment with family obligations (Strzemińska 1970). These challenges became ever more apparent with the retrenchment of public-care provision and other public services resulting from the structural adjustment and political-economic transition beginning in the late 1980s. In Poland, for instance, the heightened work-family conflict that followed the imposition of economic reforms in the 1990s also exposed the traditional gender contracts that existed beneath the official edifice of socialist egalitarianism. As labour market inequality increased in the wake of transition, and Polish women workers were left to bear heavy double burdens of paid employment and unpaid care work, many faced a more or less temporary labour market exit, while others, postponed, or opted altogether to forego, parenthood (Women's Rights Centre 2000; World Bank 2004, Fodor 2005; Sztanderska 2006; Graff 2008; Desperak 2009; Lisowska and Sawicka 2009).⁴ Together, these post-transition phenomena drew attention to the latent inequality and the profound social unsustainability of Poland's traditional working-time approach.

In response to these trends, the promotion of diversified and flexible working-time arrangements that better accommodate caregiving or facilitate the reconciliation of people's labour market engagement with responsibilities for their dependents, be they children or dependent adults, became important features of policy and regulation at most levels of governance. Within the EU, active steps were taken to promote working-time flexibility and, since the mid-1990s, to improve the quality of part-time (Jeffery 1998; Sciarra, Davies, and Freedland 2004; Vosko 2007, 2010) and other forms of flexible or

⁴ Matysiak reports, based on Poland's Central Statistical Office (GUS) statistics, that the Polish fertility rate dropped from 2.09 at the start of transition in 1989, to 1.22 by 2003 (Matysiak 2009, 201).

atypical work (Jeffery 1998; Vosko 2010) by extending to them some of the legal protections typically associated with standard employment.⁵ With the more recent recognition that the persistent, albeit slowly changing gendered inequalities in the hours and patterns of work⁶ continue to have concrete consequences for the labour market access, career trajectories, and advancement opportunities available to men and women (Fagan 1996, 2001; Rubery, Smith, and Fagan 1998; Perrons 1999; Perrons et al. 2005), the issue of working time has also made it onto the EU's gender equality agenda.⁷ Taking a cue from feminist scholarly research and political lobbying (Fraser 1997; Figart and Mutari 1998, 2000, 2001; Gornik and Myers 2003; Fagan, Grimshaw, and Rubery 2006; see also Lewis and Guillari 2005), the European Commission now also acknowledges that advancing equality demands more than simply accommodating women and facilitating their employment through non-standard forms of work. Instead, keeping in

⁵ In an effort to improve the conditions of part-time, fixed-term, temporary and atypical workers, the EU adopted several Directives, some based on framework agreements between representatives of trade unions and businesses operating at the EU level. Directives such as *Council Directive 97/81/EC concerning the Framework Agreement on Part-time Working concluded by UNICE, CEEP and the ETUC*, [1998] O.J. L14/9, amended by *Council Directive 98/23/EC of 7 April 1998 amending Directive 97/81/EC concerning the Framework Agreement on Part-time Working*, [1998] O.J. L 131/10, made provisions for equal treatment of part-time and full-time workers and encouraged the creation of opportunities for workers to move between part and full-time status. Levels of part-time work and welfare state policies to encourage/support it vary across Europe. Despite some exceptional cases (i.e. the Netherlands) and efforts to normalize part-time work and make it more secure, this employment pattern continues to be highly gendered and "marginalized" in many contexts (see for example, Yerkes and Visser 2006).

⁶ Notwithstanding some national variations, patterns of working time in most EU Member States have remained unequal, with women's hours of paid work being almost universally shorter than those of men (Fagan 1996, 2001; Rubery, Smith, and Fagan 1998), although their total hours of work (including unpaid work) are often on par.

⁷ The promotion of gender equality has been a long-term component of the European Union's social policy agenda, most recently encapsulated in the European Commission's *Roadmap to Equality Between Men and Women 2006-2010* (COM/2006/92 final). In addition, the objective has been mainstreamed throughout all of the EU's policy fields. In recent years, the emphasis on equality has been urged as a matter of Europe's long-term sustainability. For instance, in its 2010 Communication on the *Strategy for Equality Between Men and Women 2010-2015* (COM/2010/0491 final), the European Commission urged that going beyond the interests of social justice, inequality, and work-family conflict are also costly in economic terms and potentially a threat to long-term social and economic sustainability.

mind that individual choices and preferences do matter,⁸ advancing gender equality requires a more equal allocation of time between paid and unpaid work among men and women, and fostering a policy climate in which men are also given opportunities to embrace more actively caregiving roles (*Strategy for Equality between Men and Women 2010-2015*).⁹ Since regulation of working time is one of the essential elements required to enable such redistribution of responsibilities, it follows that it is also crucial to gender equality.

The fact that the contemporary EU policy discourse more often presents working-time regulation in terms of its egalitarian potential is an important development, which, given the EU's regulatory competences in this area, may be also crucial for endorsing positive changes in the working-time regimes of its individual Member States. However, a key question is whether and, if so, how, the EU's gender equality rhetoric translated into legislative practice? Keeping in mind that flexible working-time arrangements and work-family reconciliation strategies can support the objective of equality only in so far as they are promoted for *all* workers, this dissertation examines whether the EU approach to working time challenges the traditional model on which working-time regulation

⁸ See Hakim (1997; 2000). For a good discussion of some problematic aspects of the preference or choice theory in working time, see Fagan (2001). For a move towards a more meaningful iteration of the preferences that accounts for the relational nature of choices and preferences see the “working time capability” approach developed by Lee and McCann (2006). See also Lewis (2006c; 2007) and Lewis and Guilliari (2005) for discussion of what it means for men and women to have genuine choices with respect to their involvement in paid and unpaid care work and other work.

⁹ These assumptions underlie models such as the universal citizen/carer (Fraser 1997) or equal carer/equal worker (Gornick and Myers 2003), that have been deemed by feminist scholars to be the ultimate policy choices for the most egalitarian distribution of responsibilities for work and family responsibilities between men and women. Similarly, Figart and Mutari (1998; 2001) propose that a working-time regime that provides those working-time arrangements that facilitates the most egalitarian distribution of time between work and care, paid and unpaid employment and between men and women, are those that are most likely to advance gender equality.

historically has been based. It also analyzes whether this approach has the potential to advance a more egalitarian and socially sustainable working-time regime in Poland.

Poland's unique path from a centrally-planned socialist state to a liberal market democracy, and its recent EU accession, make it a particularly interesting case for analyzing regulatory developments *vis-à-vis* changing institutional arrangements and political discourses. Concentrating on the key instruments and rules that prescribe the basic standards for “normal,” full-time hours of work – the EU *Working Time Directive* and the working-time provisions of the Polish *Labour Code*¹⁰ – this dissertation asks: What rationales have informed the regulation of working time at the EU level and in Poland, and to what extent have gender equality concerns figured in the conceptualization of working-time measures proposed and implemented therein? In order to consider specifically the *Working Time Directive*'s impact on the Polish regulations, this dissertation also examines how the broader political discourse within which the Directive has been embedded and the norms and forms of flexibility that it prescribes have influenced the developments in the working-time discourse and regulation in Poland over the course of, and subsequent to, Poland's accession to the EU. Given the post-transition increase in labour market inequality, the country's culture of long work hours,¹¹ problems with work-family reconciliation experienced by workers¹² (Gender Index 2007;

¹⁰ *Act of 26 June 1974 concerning the Labour Code*, (1974) Journal of Laws, No. 24, item 141 (hereinafter Labour Code).

¹¹ Supra note 2.

¹² As I will discuss in more detail in Chapters 4 and 5, problems with reconciling work and family in Poland stem from the insufficient infrastructure of care services – an ongoing consequence of the transition-era restructuring, as well as still insufficiently developed “family-friendly” working time arrangements. Whereas promotion of part-time and flexible work is one of the key elements of the EU working-time and work-family reconciliation agenda, in Poland the prevalence of part-time or other reduced-time work continues to be relatively insignificant although non-standard, temporary and insecure employment is on the rise (Głogosz 2007; Kulpa-Ogdowska 2006, 49-50). Significantly, part-time work tends to be poorly

Balcerzak-Paradowska 2008; Płomień 2009; Borkowska 2011), and the severe post-transition drop in Polish fertility rates,¹³ this dissertation also questions whether the EU regulatory approach to working time has contributed to resolving, or, alternatively, to exacerbating these problems. It also analyzes whether this approach has the potential to promote the development of a more egalitarian and socially sustainable¹⁴ working-time regime in Poland.

The Aims of this Study

As the above questions suggest, the key aims of this study are: understanding and evaluating comprehensively the foundations of the EU and Polish working-time regimes, examining how they relate to each other, and assessing their potential to promote better work-family reconciliation and a more equal allocation of paid and unpaid work between women and men. I propose to undertake this task by: 1) making more apparent the normative assumptions about the model workers and their lives that have informed traditional organization of working time and the standard working-time norms; and 2) analyzing the key EU and Polish working-time instruments in order to determine the extent to which they embody and perpetuate, or, alternatively, move beyond these traditional assumptions.

remunerated, low skilled and mostly available within the private sector. According to a recent study (Kulpa-Ogdowska 2006, 50), even those Polish women on “part-time” contracts tended to work fairly long hours leading researchers to conclude that the part-time designation is used by employers to avoid certain legal entitlements associated with full-time work and to ensure flexibility.

¹³ Supra note 4.

¹⁴ By social sustainability, I mean that a working-time regime enables people to distribute their time between employment and a variety of other essential tasks, but particularly those that are involved in the process of social reproduction, i.e. the provision of care. As Chapter 1 explains in more detail, a socially sustainable working-time regime is also necessary for long-term economic sustainability as the spheres of social reproduction and economic production are intertwined and co-dependent.

The first of these objectives will be accomplished at a conceptual level by tracing a historical trajectory along which standard working-time norms have developed. In the tradition of feminist scholarship, my aim is to make more apparent the way in which these norms are gendered and embody the historic subordination of the essential process of social reproduction to the requirements of the productive process. As explained by legal scholar Jo Shaw, a feminist perspective is characterized by a focus on gender as a central organizing principle of social life and “a concern to challenge the perceived gender neutrality of legal theories, practices or institutions”, so as to “acknowledg[e] and destabiliz[e] the power of law, brin[g] politics of law to the fore, and address questions of reform” (Shaw 2000, 411). In the words of another legal scholar, Nicole Busby, such a feminist perspective is also guided by the “commitment to include the hitherto excluded voices of women in accounts and explanations of the past with a view to advocating suitable political and legal reform for the future” (Busby 2011, 32). Thus, through a feminist analysis of standard working-time norms I hope to expose what these norms presume about their subjects and about the gendered division of responsibility for social reproduction and production among different institutions and between men and women. Uncovering these underlying gendered processes and assumptions is also crucial from a political perspective, as it is necessary to move beyond them to develop working-time norms that are more egalitarian and more responsive to *all* workers’ needs.

Although a number of feminist labour law scholars have employed this type of analysis (Conaghan and Rittich 2005; Fredman 2005; Fudge 2001, 2005, 2008; Conaghan 2006), such feminist approach nonetheless remains on the fringe of contemporary labour law studies. As feminist legal scholars Joanne Conaghan and Kerry Rittich (2005, 2)

point out, "... while work remains a deeply gendered activity with systemic adverse distributional outcomes for women, gender is assigned little analytical significance in conventional labour law discourse." Thus, in taking up a gender-focused analysis my research contributes to the efforts of other scholars hoping to move it "from the margin to the mainstream of labour law debate" (Conaghan and Rittich 2005, 2) and joins the feminist agenda of (re)thinking and (re)considering labour law norms (Conaghan 2005).

Second, instead of taking the more common critical approach to the study of gender and working time, which tends to focus on its regulation through atypical forms of work (e.g. part-time, fixed-term or temporary work), my empirical analysis centres on the "core" working-time norms which are associated with standard employment. While regulations that diverge from this "core," and instruments or rules explicitly designed to provide accommodations for working parents are also addressed here, I do so in a more limited manner so as to highlight the discrepancies in the approaches adopted and the rationales employed to justify them. Hence, in the EU context, the focus of my analysis is the *Working Time Directive* and the universe of political discourse within which it has been embedded, *vis-à-vis* Directives on part-time work, fixed-term and temporary work, and parental leave.¹⁵ As I explain in more detail below and in Chapter 1, examination of the political discourse provides an opportunity to study in detail how the changes in institutional architecture, allocation of power between various actors, and the key discourses in regulating working time came to shape the increased competences and the development of the EU working-time regime, particularly the *Working Time Directive*.

¹⁵ Supra note 5; Council Directive 99/70/EC of 28 June 1999 concerning the Framework Agreement on Fixed-term Work concluded by UNICE, CEEP and the ETUC, [1999] O.J. L 175/43; Council Directive 96/34/EC of 3 June 1996 on the Framework Agreement on Parental Leave concluded by UNICE, CEEP and the ETUC, [1996] O.J. L 145/4, amended by Council Directive 97/75/EC of 15 December 1997 amending Directive 96/34/EC of 3 June 1996 on the Framework Agreement on Parental Leave, [1998] O.J. L 10/24.

Given the increased importance of gender equality and work-family reconciliation goals in the EU policy, following the ongoing revision of the Directive also provides an excellent method for tracing the trajectory of change and continuity in the EU working-time regime. Thus, by examining the rationales behind this instrument I wish to make more apparent the assumptions on which it rests, better understand how it articulates with other working-time instruments adopted at the Community level, and discover what this means for the overall shape of the EU working-time regime.

Similarly, an analysis of the historical developments in working-time discourse and regulation in Poland and examination of the manner in which gender and the process of social reproduction were accommodated through the distinct periods of Polish post-WWII history – state socialism, transition to a liberal market democracy, the process of accession to the EU, EU membership – will provide important insights about the normative assumptions underlying the successive Polish working-time regimes and shed light on the processes of continuity and change within the country's institutional path. Given Poland's accession to the EU in May 2004, and the lengthy period of pre-accession negotiations and legal adjustment to the *acquis communautaire*¹⁶ (beginning in 1998), the Polish case provides an excellent opportunity to assess how the EU and Polish working-time regimes interact and influence each other, how the implementation of the *Working Time Directive*'s norms and other working-time instruments affected the norms of the Polish *Labour Code*, and whether there is any convergence between the EU and Polish regimes. Finally, given Poland's significant size and, at the moment, relatively stable economy, as well as its alliances with key actors such as the UK, investigating Poland is

¹⁶ *Acquis communautaire* is a term (French) which refers to the cumulative body of European Community law. It includes the objectives of the EC, substantive rules, policies, and the primary and secondary legislation (all treaties, regulations, directives) and judgments laid by the European Court of Justice.

also important for the future, as the country's political influence within the EU will likely grow and, with it, its role in shaping the EU working-time policy.

Working-time Research and Scholarly Contribution

My study draws on contributions of other scholars interested in the relationship between working time and gender, as well as those scholars studying EU labour law and policy, and particularly how working time and gender interact with domestic legal orders. In recent years, the interest in working time has experienced a particular revival given the profound changes in the organization of productive activities and the needs of firms, changes in the composition of labour markets, and the challenges that both of these phenomena have posed to the traditional approach to working-time regulation.¹⁷ I have primarily drawn on legal and socio-legal studies on working time, specifically in the EU context and in Poland, as well as feminist (and non-feminist) literature in sociology, policy studies, and comparative institutionalism, which emphasizes the gender aspects of working-time regulations.¹⁸

Despite wide scholarly engagement with working time, relatively few *legal* studies have focused solely on the subject of EU working-time regulation. The most notable exception is a 2004 collection on part-time work co-written and co-edited by prominent labour law scholars Silvana Sciarra, Paul Davies, and Mark Freedland, who undertook an analysis of EU regulation of part-time work from a comparative perspective. While the collection engages with the issue of gender, it is not, however, an attempt at analyzing the EU approach to part-time work from a gender perspective. Instead, its key contributions

¹⁷ See note 3.

¹⁸ As much of this research informs my integrated conceptual framework, Chapter 1 will also discuss this literature. Discussing it here is intended to contextualize my study and highlight its contribution *vis-à-vis* the work that has already been done.

lie in the rich conceptual and empirical analysis of the development of EU's approach to regulating part-time work *vis-à-vis* particular Member States, with emphasis on the reflexivity of the regulatory process.

In terms of a more explicitly gendered analysis, a select number of legal scholars have begun to develop a conceptual approach to the study of working time that places gender and the process of social reproduction at its centre (Fredman 2005; Fudge 2005; 2008; Conaghan 2006), and from which the framework adopted herein takes its key inspiration. Moreover, within the EU regulation and policy context, legal scholars have addressed specific aspects of working time and accommodation such as night work (Kilpatrick 1998), part-time work (Jefferey 1998), temporary work (Murray 1999), parental leave (McGlynn 2005; 2006), and work-family reconciliation (McGlynn 2001; Rittich 2005; Masselot and Di Torella 2010). EU working-time regulations have also been considered in the context of broader comparative studies on decent working-time (Boulin et al. 2006), and workers' preferences in industrialized countries (Messenger 2004; see McCann 2004) and around the world (Lee, McCann, and Messenger 2007).

Likewise, studies in feminist political economy, comparative institutionalism and policy studies, and sociology have addressed, directly or as part of larger projects, EU working-time norms and gender. My study can draw on scholarly contributions to the conceptualization of working-time regimes (Figart and Mutari 1998, 2000, 2001; Rubery, Smith and Fagan 1998, 1999), comparative studies on working-time trends (Golden and Figart 2000, 2002; Rubery, Ward, and Grimshaw 2005; Tang and Cousins 2005; Strzemińska 2008; Plantenga, Remery, and Mairhuber 2010), research on the working-time aspect of work-family reconciliation policies (Perrons 1999, 2000a), as well as

regulation of non-standard work and forms of working-time organization (Fudge and Vosko 2001a; Fudge 2006; Vosko 2007, 2010).

While the *Working Time Directive* attracted significant attention as a result of the political and legal controversies related to its adoption in 1993 and the legal challenges that were filed with the European Court of Justice (ECJ) (now called the Court of Justice of the European Union) in its aftermath (Hepple 1990; 1996; Barnard, Dashwood, and Hepple 1997; Moffat 1997; Barnard 1997b; Barnard, Deakin, and Hobbs 2002, 2003a; Kenner 2004; Hardy 2005), the Directive has not been evaluated comprehensively *vis-à-vis* other instruments regulating working time,¹⁹ nor has there been significant interest in the Directive's gender "neutrality". An important exception is the discussion of the Directive by the French legal scholar Alain Supiot. In his report on the future of labour law in Europe, for instance, Supiot (2001) emphasized that some aspects of the EU's approach to working time, such as aspects the *Working Time Directive*, are out of step with the living and working realities of European women and men. Supiot highlighted certain assumptions underlying traditional regulation of working time, particularly the juxtaposition of work and leisure, or work and "free" time. English feminist labour law scholar Joanne Conaghan (2005) takes this analysis of working time further, stating that it is not only the juxtaposition of work and leisure that is problematic, but also the fact that the very ability to organize the productive process, and thus, the working-time norms, in

¹⁹ An important exception is the 2010 book by Annick Masselot and Eugenia Caracciola Di Torella, *Reconciling Work and Family Life in EU Law and Policy*, wherein the authors examine working-time policies, including the *Working Time Directive*, as well as leave provisions and the care strategies, as essential to work-family reconciliation. The authors' treatment of the *Working Time Directive*, however, is fairly limited, nor do they problematize the Directive's gender neutrality. My approach here differs in that I argue that since the Directive sets the foundation of the EU working-time regime, understanding the limitations of the approach adopted therein is crucial to understanding the overall shape of this regime.

this way, rests on inherent gendered assumptions about work and a worker. The approach that I adopt here, builds, among others, on Conaghan's insights.

Although scholars from various disciplines have explored the relationship between working time and gender equality, as the above suggests, a vast majority of this work has been done either outside the discipline of law, or with the focus on those aspects of working-time regulation which address atypical working-time patterns and forms of accommodation, such as parental leave. A more comprehensive analysis of the *Working Time Directive*'s gender neutral framing is necessary in order to see whether it obscures a deeper gendering process. This kind of analysis is important because as this Directive articulates with other working-time instruments, its inherent gender dynamics can, and indeed do, have a profound effect on the Community's overall approach to working time. Given the EU's competences in this area, the gender dynamics of the EU working-time approach also affect the potential of this approach to transform working-time regulation in those Member States, such as Poland, where, as this dissertation will show, the working-time regimes are particularly unsustainable.

The Approach

Departing from traditional legal scholarship, my study is more appropriately situated in the socio-legal realm. A socio-legal approach analyzes the nature, operation and impact of law in the broader context. Beyond studying law as a self-referential system, socio-legal scholars are interested in its relationship to society and the State, and view it as a force constitutive of social relations. As such socio-legal approach is more compatible with that adopted in feminist legal scholarship, which also seeks to destabilize the view of law as an autonomous, objective, and politically neutral structure (Lacey

1998, 186), and to expose the gendering process which underlies it and which law tends to (re)produce.

Combining empirical and theoretical approaches, socio-legal scholarship is by nature inter-disciplinary and the study of the EU law is particularly well suited to such an approach. According to Francis Snyder, EU law “represents, more evidently perhaps than most other subjects an intricate web of politics, economics and law” and “virtually calls out to be understood by means of a political economy of law or an interdisciplinary, contextual or critical approach” (Snyder 1987, cited in Shaw 1996, 234). Likewise, “the conceptualization of European labour law is ... influenced by the interaction of law and context” (Bercusson 1995, 9). The study of working time is particularly well suited to this kind of inter-disciplinarity because its economic, social, and legal aspects are closely intertwined and are all ultimately relevant to a deeper understanding of this subject matter. Indeed, even beyond the context of working time, understanding how legal norms operate, how they embody and reproduce certain assumptions, including those about gender difference, requires that they be examined in their historical, political, economic, and social contexts. Similarly, analysis of interactions between various supranational and domestic regulations, and the multiple actors who operate at each level, requires going beyond the orthodoxies of traditional legal analysis.

Thus, following in the tradition of socio-legal and feminist scholarship, the approach I take in this dissertation is also one that is inter-disciplinary as it integrates concepts developed in a variety of disciplines including feminist political economy, gender theory, comparative institutionalism and policy studies, sociology, political science, and labour law, and one which combines theoretical and empirical aspects.

While Chapter 1 develops my conceptual framework, I wish here simply to highlight the three complimentary lenses I use: 1) the “universe of political discourse”; 2) multiple levels of regulation; and 3) a gender-based perspective on working-time norms.

The first lens builds upon the work of Canadian political scientist Jane Jenson, particularly the way in which she conceptualizes policy development as a product of the interactions that take place within the “universe of political discourse” (1986; 1989). As I explain in Chapter 1, Jenson’s conceptual device – the universe of political discourse – allows one to highlight simultaneously the importance of structural arrangements and institutional architecture, *and* the significance of agents and actors in delineating the universe of political possibility and action. Moreover, this perspective enables the conceptualization of law as a dynamic product of the universe of political discourse, a universe where different rationales and objectives compete and where some dominate, while others often remain marginalized or entirely filtered out, thus making more apparent *what* and *who* has influenced regulation.

Second, given the parallel emphasis on supranational working-time norms developed at the level of the EU and those adopted in Poland, this dissertation also focuses on the interactions between actors and discourses operating at different levels. The primary reason for this multi-level emphasis is to capture better the regulatory and political *context*, as well as to highlight the dynamism (Ashiagbor 2004, 3) and the sources of tension and disjuncture in the making and remaking of working-time norms through the EU and in the Polish labour law. Moreover, given the EU’s competence in this area, it is crucial to investigate and to analyze the changes in Polish working-time discourse and regime in light of the country’s 2004 EU accession.

Finally, through a critical feminist analysis of the historical development of working-time norms and an emphasis on the inherently gendered assumptions on which these norms have traditionally rested and which they reproduce (Fredman 2005; Fudge 2005; 2008; Conaghan 2006), this dissertation seeks to question their supposed neutrality and incorporate the focus on gender and social reproduction, particularly its unpaid forms, into mainstream labour law analysis. This gender lens is crucial for interpreting the different rationales for regulation of working time that vie for attention within the EU and Polish universes of political discourse, and which ultimately inform legal norms. Indeed, the assessment of the EU and Polish working-time regimes, and of their egalitarian potential, is undertaken from the perspective of their openness to questioning and rethinking these supposedly “neutral” standards.

While each of these lenses alone is capable of providing significant insights about the regulatory reality of the EU and Poland, together they capture the gendered dynamics of law, its constitutive operation at many scales and levels, along with the influence of various social, political and institutional actors.

In applying this integrated framework to the empirical portion of the dissertation, which follows in Chapters 2 through 5, and which focuses on the analysis of the EU and Polish working-time regimes, my approach combines traditional legal methods of textual and case analysis with a critical reading of legal instruments and policy documents and an interpretative study of the discursive context, or the universe of political discourse, in which the instruments in question have been conceived and adopted. As already explained, this context is made up of various, often competing discourses that include understandings and normative assumptions about social reproduction, production, and

gender, as they relate to regulation of work generally and working time in particular. As Chapter 2 demonstrates, this context also includes understandings about the purpose of EU integration project and the tension between its social and economic aspects as reflected in the political negotiations and conflicts over the meaning and objectives of flexibility and the role and legitimacy of working-time instruments, particularly the *Working Time Directive*, which is the focus of Chapter 3. In the case of Poland, addressed in Chapters 4 and 5, the universe of political discourse on working time has been shaped also by broader discourses of socialist egalitarianism, as well as flexibility, neoliberalism, and social conservatism, particularly during the country's political-economic transition and EU accession.

The key sources of data in Chapters 2 and 3 are various legal instruments, including the major Treaties, the Directives (on working time, part-time work, parental leave), preparatory documents, Recommendations and drafts, and the framework agreements between social partners. In addition, I consulted various White and Green policy papers issued by the European Commission, other strategic documents including its *Roadmaps to Equality*, and the reports prepared by various groups of experts constituted by the Commission. Communications of the European Commission, the Council of Europe and the European Parliament pertinent to the *Working Time Directive* and its ongoing revisions were also consulted, as were the position papers and official consultation submissions of major social partner organizations, European Trade Union Congress (ETUC), BusinessEurope (formerly Union of Industrial and Employers' Confederations of Europe, UNICE), and European Centre of Employers and Enterprises providing Public

services (CEEP). Finally, the European Commission's reports on Poland's progress during the process of accession were also reviewed.

In the Polish context, addressed by Chapters 4 and 5, the key sources of evidence are the statutes amending the *Labour Code*, drafts of legislative bills and amendment proposals that were unsuccessful or subject to further amendments, published opinions of various parliamentary committees, the European Integration Committee and the Office of the President, and transcripts of pertinent parliamentary proceedings. In addition, I reviewed reports of the Workplace Inspection Agency and the Central Workplace Inspectorate (Państwowa Inspekcja Pracy, PIP and Główny Inspektorat Pracy, GIP, respectively), and the published proposals of the Labour Law Reform Commission. I also consulted websites of the major organizations representing Polish enterprise and trade unions, as well as women's organizations (Foundation Feminoteka, Women's Rights Centre, Karat Coalition), the survey reports of the Public Opinion Research Centre (CBOS), and the archives of two major Polish daily newspapers, *Gazeta Wyborcza* and *Rzeczpospolita*.

In addition, statistical data on working hours, men and women's employment rates, unemployment, and economic performance (among other data) are used to supplement the portraits of the historic and contemporary working-time regimes in Poland. Specifically, I draw on the statistical information gathered by the International Monetary Fund (IMF), Organization for Economic Cooperation and Development (OECD), Eurostat, and the Central Statistical Office of Poland (Główny Urząd Statystyczny, GUS). I also rely on secondary sources that have analyzed and synthesized available statistical information.

Given my objective of examining the universe of political discourse and the role of various social and political actors, my textual research and critical legal analysis are also complemented with data from a series of qualitative interviews with key informants involved in the negotiation, lobbying, drafting, and implementation of the *Working Time Directive* and related instruments at the EU level and in Poland. These field-research interviews, 19 in total, provide valuable insights and clarifications about the different rationales for working-time regulation and the discourses used/supported by various social and political actors in shaping the debate on working time, particularly on the *Working Time Directive* and its implementation in Poland. The interviews were conducted in Poland and Belgium in January, February, and March 2010. In Brussels, I interviewed three members of the European Commission, two members of the European Parliament, as well as representatives of the ETUC, the European Federation of Public Service Unions (EPSU) and BusinessEurope (formerly UNICE). In Poland, I interviewed three officials from the Ministry of Labour and Social Policy, (two from the Labour Law Department and one from the Department of Family Policy), one member of Sejm (the lower house of the Polish Parliament) and a former Minister of Labour and Social Policy, representatives of two major trade union confederations in Poland, the Independent Self-Governing Trade Union “Solidarity” (Niezależny i Samorządny Związek Zawodowy, NSZZ “Solidarność”) and the All Poland Alliance of Trade Unions (Ogólnopolskie Porozumienie Związków Zawodowych, OPZZ), as well as representatives of two of the major national employers’ organizations, the Polish Confederation of Private Employer’s (“Lewiatan”) and Employers of Poland (previously the Confederation of Polish Employers, KPP). I also interviewed a former Polish Member of the European Parliament

who was an important Polish player in the working-time debate, and representatives of two different women's advocacy groups.

Chapter Outline

To provide the frames of reference and to anchor the analysis and interpretation of this rich data, Chapter 1 elaborates more fully the conceptual framework introduced above. This framework is composed of three complimentary lenses: the universe of political discourse, multi-level regulation, and the gendered analysis of working-time.

Chapters 2 through 5 engage in the empirical portion of this dissertation, with Chapters 2 and 3 focusing on the transnational level, the EU, and Chapters 4 and 5 examining the case of Poland. Before providing more detail on the specific chapters, it is helpful to comment on how and why the dissertation is structured in this way. First, the division of each “case” – EU and Poland – into two distinct chapters reflects the objective of examining regulations within their discursive and political context. Thus, two of these chapters examine the universe of political discourse (Chapters 2 and 4) and two focus on the development of specific working-time instruments (Chapters 3 and 5). As, will become apparent, however, law and politics (or political discourses) are interwoven and thus, elements of both are present in all of the chapters. Similarly, although the cases of EU and Poland are presented in separate chapters, the influence of the EU in the Polish context, pre and post-accession, has been marked and so EU discourses and policies are also discussed in the chapters dealing with Poland (Chapters 4 and 5). Likewise, as Chapters 2 and 3 suggest, the issue of the EU's Eastern enlargement, and thus, Poland's accession, figured as one of the many regulatory rationales in the context of the *Working Time Directive's* revision. Since 2004, Poland's role in shaping the universe of political

discourse surrounding the *Directive* has also become more prominent. This cross-referencing and mutual influence stem from the multi-level nature of the EU context, as well as the influence of other overarching discourses that shape policy and regulation at both levels, such as those promoted in by international financial and economic institutions like the IMF, the OECD, or the World Bank.

To provide the backdrop against which to examine and assess the *Working Time Directive* (which I do in Chapter 3), Chapter 2 examines the EU universe of political discourse concerning working time. The chapter begins with a brief reflection of the discourse of flexibility, the dominant discourse in contemporary labour regulation, and one that is particularly pertinent to the regulation of working time. Before turning to the examination of how the flexibility discourse has been deployed in EU policy, the chapter sets out to “unpack” flexibility. It does so by defining it, identifying its different types, and problematizing its political embeddedness in the discourse of deregulation. Turning to the development of the EU universe of political discourse, the chapter first examines changes in the Community’s institutional architecture, allocation of power between the different institutional actors that comprise the EU, and the expansion of its regulatory competences over social policy, including working-time regulation. This discussion is followed by a detailed examination of working-time discourses operating at the EU level, tracing their historic evolution, and mapping them onto major political and economic developments, the progressive expansion of competence for working-time described earlier, and broader developments in EU policy. This examination makes more evident why the *Working Time Directive* constituted a watershed in working-time regulation at the EU level, and why the subsequent working-time instruments have been rationalized

so differently than this Directive. Tracing the flexibility discourse also makes apparent its gradual rise as the dominant discourse in the context of working time, and a gradual shift away from sole emphasis on the achievement of the economic efficiency rationales, towards inclusion of working-family reconciliation and gender equality as other potential objectives which flexibility could serve. In the last part of this chapter, I assess this shift by drawing on feminist critiques of gender mainstreaming.

Chapter 3 continues with the focus on the EU, but turns more explicitly to the working-time instruments. The key focus is on the EU *Working Time Directive*. Drawing on the insights from Chapter 2, I provide a careful analysis of the development and the revision of the Directive, illuminating how the tensions between flexibility and security/health and safety rationales have shaped this particular instrument, and how they have continued to confine the Directive's scope despite the more recent broadening of the discourse on working-time. As this chapter shows, efforts to incorporate the language and goals of work-family reconciliation and gender equality into the Directive have not been entirely successful. This chapter suggests potential explanations for this failure. The approach of the Directive is then juxtaposed with that taken by the instruments regulating other aspects of working time, in order to highlight the particular gender dynamic, or bias, of the EU working-time regime.

The discussion in Chapter 3 provides a transition into the discussion of Poland. Chapter 4 focuses on the historic developments in the Polish universe of political discourse and regulation of working time. The chapter begins with an overview and discussion of Polish working-time norms enacted since the end of WWII and highlights both the political discourses used to rationalize these norms and the institutional

arrangements that helped to reconcile full-time work and the process of social reproduction in the context of an adult-worker model. Drawing on feminist literature, the chapter also examines the tension between the official discourses of egalitarianism and the latent inequality of the Polish working-time regime pre-1989. Poland's pervasive long-hours culture, as well as the country's cultural specificity and its unique gender contract, are identified as some factors explaining this inequality. In the second part of the chapter, I examine the impact of Poland's transition on the broader universe of political discourse, organization of working time, and regulatory reform, noting some remarkable continuities – both, discursive and regulatory (at least with respect to work hours) – despite the profound changes in Poland's political economy. Finally, I consider the negative effects of the structural adjustment program adopted by Poland in the early 1990s; particularly how it affected the ability of workers to balance their long hours of work with care-giving obligations, and what impact it had for labour market access, equality, and viability of Poland's social reproduction. The chapter wraps up with a look at the key discourses of the transition era – neoliberalism and social conservatism – against which further changes in the Polish working-time regime will be assessed.

The examination of the discursive and legal changes in the Polish regulation of working-time is continued in Chapter 5, which picks up the story at the turn of new millennium and carries it through its first decade. This period saw the most legislative activity, partially as a result of Poland's impending EU accession and the need to adopt the *acquis communautaire*. Both the impact of EU discourses and EU law, as well as the more general impact of the accession conditionality, are explored with reference to the successive amendments of the working-time rules in the Polish *Labour Code*. The

importance of the key discourses of flexibility and economic efficiency and, later, work-family reconciliation and gender equality are examined, and their respective influence on the Polish working-time regulations is assessed. At the same time, the chapter also considers the importance of home-grown discourses and pressures for more employer-friendly flexibility, and reflects on the extent to which the process of EU accession merely exacerbated existing tendencies and provided rationales for Polish lobbyists and politicians to push for a more flexible legal framework. Finally, the “promise” of the EU discourse and policy on work-family reconciliation and gender equality is explored.

In the last chapter of this dissertation, I take stock of the key findings, reflect on the research questions posed at the outset of this dissertation in order to suggest some answers, identify new avenues for research and thinking on this topic, and re-emphasize the political importance of lobbying for a more transformative approach to working time as an essential element of gender equality strategies.

Chapter 1

Theorizing the Gendered Politics of Working-Time Regulation in Multi-level Contexts

1.1 Introduction

The purpose of this chapter is to provide a conceptual framework for the empirical discussion of working-time regulation at the European Union (EU) and Polish level that follows in Chapters 2 through 5. One of the key points of departure is that the analysis of working-time regulations and the working-time regimes¹ requires a conceptual “toolkit” that is broader than traditional statutory analysis. Although also crucial to my project, statutory analysis alone is in itself insufficient to capture the multifaceted, relational, and embedded quality of these regulations. First, the normative assumptions and shared meanings on which legal rules are based and the constitutive role of law (but also its transformative potential) can only be made more explicit by analyzing specific regulations in the context of the institutional structures, the political discourses in which they are embedded, and the complex interactions and struggles that (re)produce them. Moreover, as Diamond Ashiagbor (2004) has shown in her work on EU employment policy, capturing the dynamism and the multi-level nature of EU regulation (and its interaction with regulations of particular Member States) requires a more diversified conceptual approach than that which can be provided by traditional legal inquiry. In order to assess critically the existing working-time regulations from a perspective that places

¹ I am interested in analyzing the legal content of these working-time regimes, the extent to which each engenders and promotes a particular set of gender relations and is conducive to gender equality, and the interaction between these regimes. For the definition and elaboration on the concept working-time regime, see section 1.3.2 of this chapter.

gender and the processes of social reproduction at the centre of labour law analysis, it is necessary to unpack legal norms associated with the standard employment relationship (SER) and examine how the assumptions that underlie them have contributed to perpetuating particular gender inequalities (Conaghan 2005; Fudge 2005). This exercise, too, requires going beyond orthodox legal analysis. Consequently, the framework which I have assembled to understand, analyze, and critically assess the working-time regulations in question draws on conceptual tools from a variety of disciplines, including gender relations theory, feminist political economy, comparative institutionalism and policy studies, political science, and labour law. The purpose of this chapter is to identify the key concepts that inform my thesis, to explain how they illuminate different aspects of my study and how they work together as a theoretical lens through which to view and critically analyze the EU and Polish working-time regulation.

This chapter proceeds in three sections. As I noted above, working-time regimes – their emergence, institutionalization, and ways in which they have simultaneously persisted and changed – must be considered in the context of the political discourses and the complex interactions between various social and institutional actors which help to (re)produce them, but also to resist and/or challenge them. Thus, the first section of this chapter conceptualizes these processes and interactions at the broadest level of abstraction by drawing on the concept of the “universe of political discourse” (Jenson 1986; 1989; Bourdieu 1991). This conceptualization of the political and policy-formation processes, with its focus on the role of social actors – their agency and its limits – in shaping dominant societal paradigms and, through them, the associated legal norms, will provide a continuous thread linking my analysis of the historic and contemporary

working-time regimes operating at the EU and the national levels, as these are discussed in the subsequent chapters of this thesis.

Section two, shifts to consider the multi-level character of EU labour and employment regulation, drawing on European labour law scholarship, particularly the work of Brian Bercusson (1995), Diamond Ashiagbor (2004) and Silvana Sciarra, Paul Davis, and Mark Freedland (2004). It is also attentive to the broader context of transnational governance, particularly the norms and dominant discourses promoted by the international financial institutions and their impact on the framing of issues regarding labour market regulation and equality at other regulatory levels (Rittich 2002b; 2006; 2009; Vosko 2007). Importantly, as these scholars, and my own research, demonstrates, these multi-level interactions not only take place in the spheres of law and policy, but also in the inter-related spheres of political discourse, institutional arrangements, and social norms.

Finally, section three comprises the most substantial portion of this chapter as it draws on the concepts of “social reproduction”, “gender order”, “gender regime” and “gender contact”, working-time regime, and the “standard employment relationship” (SER), to set out a theoretical framework for a gender analysis of working-time standards and regulations, one of the key subjects of this thesis. Building on the work of other feminist legal scholars, this framework aims at providing a contribution to socio-legal and labour law scholarship. Its goal is not only to unpack the gendered nature of labour and employment standards, including those governing working time, but also to provide the tools needed to analyze critically the contemporary working-time regimes from the perspective of equality and social and economic sustainability more broadly. In doing so,

this work responds to the call for legal scholarship that “(re)views and (re)considers” and challenges the existing standards (Conaghan 2005, 19; Conaghan and Rittich 2005; Fudge and Owens 2006) and makes the space for new visions of labour law to emerge (Conaghan 2005, 19). From the strategic perspective, this type of critical analysis and assessment also constitutes an important step towards moving beyond gendered labour law standards and fashioning standards and policies that more meaningfully respond to the living and working realities of women and men.

1.2 Contextualizing Legal Norms in the Universe of Political Discourse

My focus in this dissertation is on particular legal standards concerning working time; their operation, interaction, and impact. However, I am equally interested in the historicity of these legal standards, how they have evolved, changed or persisted, and how they embody and help to reproduce particular gender relations or, alternately, how they can help to transform them by taking account of the differences between workers and responding to their varying needs. At a conceptual level, a particularly instructive framework for understanding the relational and constitutive role of politics, and law, and their transformative potential, is that developed by Jane Jenson (1986; 1989) in her work on political discourses and historic social policy developments. Specifically, Jenson provides important conceptual tools for addressing the role of social actors and their competing claims in shaping the political discourses and, in turn, the process of social policy (and law) formation.²

² I focus more specifically on the process of gendering and gender relations in part 1.4 of this chapter. Although Jenson’s conceptualization of the universe of political discourse is provided here as a general frame of reference for situating/contextualizing policies, norms, and regulations, with particular attention to the role of social actors in shaping these discourses, the process of gendering (of people or policies) occurs in a similar manner. In fact, Jenson (1986;1989) uses the concept of universe of political discourse specifically for the purpose of demonstrating specific and contextually distinct instances of gendering.

Legal rules, much like other norms and institutional structures, emerge out of the complex interactions between social actors, and the struggles over meaning, representation, power, and legitimacy. These struggles take place within the “universe of political discourse” – the universe of thinkable political possibilities delineated by the “political field” (Bourdieu 1991) – and (re)produce specific social (gender) relations. Both the social relations and the “thinkable possibilities” are dynamic, always in the state of flux, but can nonetheless take on stabilized forms during certain historical periods, and can be reproduced over time (Jenson 1986; 1989, 236). According to Jenson, such stabilization occurs as a result of compromises reached within the universe of political discourse (Jenson 1989, 238-239). Specifically, when the emergent “societal paradigms”, defined as sets of inter-connected premises or meaning systems, become widely shared among social actors, these paradigms become *hegemonic* (Jenson 1989, 239). Although social actors are always central to this process, their struggles over meaning are fraught with inequalities in access to power and influence. Consequently, hegemonic paradigms necessarily subordinate or exclude some identities and alternative competing meanings which too are present within the universe of political discourse. As Pierre Bourdieu (1991) explains, this happens in part due to the fact that participation in the political field or the political process requires knowledge of this field. Thus, knowledge, social position, money, and wealth all have an impact on one’s ability to participate in the political process (Bourdieu 1991). Through this requirement of knowledge, the political field “produces the effect of censorship by limiting the universe of political discourse, and thus of what is politically thinkable, to the finite space of discourses capable of being

produced or reproduced within the limits of the political problematic” (Bourdieu 1991, 172).

Nonetheless, as Jenson posits, the dynamism of the process of political participation means that opportunities do arise for the temporarily subordinated identities to extend their representational reach and strength. Such opportunities, according to Jenson, surface particularly during periods of “crisis”, which occur when the dominant/hegemonic paradigm’s ability to absorb its internal contradictions becomes compromised. Moments of crisis, therefore, are the “moments of efflorescence in the universe of political discourse”; they can lead to a shift in the dominant/hegemonic paradigm and enrich it by contributions from the actors who gained “new representational strength” during crisis (Jenson 1989, 239). Jenson’s insights are crucial because they highlight human agency and subjectivity while also acknowledging the importance and materiality of institutional structures, norms, and legal rules, which are always open to being challenged and transformed given the right historical circumstances and strategic alliances. Jenson’s own research on historical institutionalization of distinct gender regimes in various national contexts demonstrates this dynamic very well.³

The concept of the universe of political discourse provides a useful framework for understanding the historical processes through which certain rationales, such as those that justify policy choices and legislative activities, become dominant or hegemonic, and why others remain subordinated. Through this lens, we can view discourses surrounding the role of law, organization of production activities, and regulation of working time that dominate the EU or Polish debates as negotiated settlements that reflect historically and

³ Jenson has used the concept of universe of political discourse in her comparative studies of historic protective labour legislation in US and France (Jenson 1989), and historic constructions and accommodations of motherhood in Britain and France (Jenson 1986).

contextually specific power dynamics, which can nonetheless be destabilized over time.

In the same way, the extent to which concerns about gender equality, assumptions about the appropriate division of responsibilities for production and social reproduction (at the state, society, market, and family levels), or the need better to support women and men in balancing their participation in employment with unpaid family obligations have been incorporated within the EU and the Polish universes of political discourse, reflects these dynamics, and it too is subject to change.

Who are the actors most pertinent to shaping the working-time discourse? At the EU level, the universe of political discourse is first and foremost established by the Member States of the EU and the major EU institutions – the European Commission, the Council, the European Parliament, the European Council, and the European Court of Justice (now called the Court of Justice of the European Union, although I will refer to the court by its pre-December 2009 name)⁴ – that are responsible for setting the EU agenda (long and short-term), proposing and overseeing EU law and policy, the legislative process, and the Treaty interpretation and application. A second set of actors are the European “social partners”. At the EU level they consist of key organizations representing employers and business on the one hand and the labour movement and employees on the other. In the first category we find umbrella organizations such as Business Europe (formerly Union of Industrial and Employers’ Federation of Europe (UNICE)) and the European Centre of Employers and Enterprises Providing Public

⁴ The term European Court of Justice (ECJ) that is used throughout this dissertation reflects the name of the EU’s highest court prior to the coming into force of the Treaty of Lisbon on 1 December 2009. The Treaty of Lisbon altered the nomenclature; pursuant to Article 19(1) of the Treaty on European Union, the ECJ is now subsumed under the broader term “Court of Justice of the European Union,” which also includes the General Court, the successor to the Court of First Instance, and specialized courts, a new name for the previous judicial panels.

Service (CEEP). In the second, we find organizations such as European Trade Union Congress (ETUC) and the European Federation of Public Sector Unions (EPSU). These social partner organizations also play a significant role in shaping the political discourse, particularly in matters of employment and social policy which are most pertinent to their constituencies. In addition to these more “formal” EU-level actors, various lobby groups operating at the Community level (such as the European Women’s Lobby (EWL)) may have some influence in shaping the universe of political discourse through the process of consultation and, even when not officially consulted, through issuing of opinions on EU policy and legislative initiatives, and lobbying other “friendly” actors with more direct influence over the discourse (such as the ETUC). In the Polish context, the state, different political factions, institutional entities (for instance various Ministerial authorities and Reform Commissions), the national “social partners” acting through the Tripartite Commission (such as cross-sectoral employers’ organizations and trade unions), as well as other special interest groups (such as the business lobby and associated policy think-tanks, women’s groups, and the Church), all coexist and interact within a shared universe of political discourse.

The extent to which particular actors have been able to shape the political discourse and influence concrete policies and institutional forms at either the domestic or supranational level has varied over the course of time. Thus, this framework also seeks to capture the major shifts in institutional architecture and political economy, including changes at the European level, the process of transition that began in Poland at the end of the 1980s, and the processes of structural adjustment leading up to the EU accession, as significant historic moments during which shared or hegemonic meanings are disrupted

and renegotiated with concrete implications for legal rules, institutions, and social (including gender) relations.⁵ As I elaborate on in Chapter 2, the relative balance of power and influence of the EU institutions *vis-à-vis* the Member States and each other, as well as the role of the European social partners in shaping the universe of political discourse, have altered over the years as a result of successive constitutional amendments and changes to the EU's institutional structures, voting rules, and legislative procedures. These changes have led to two major and related shifts, both of which have had an impact on the universe of political discourse. First, successive legal and institutional changes have precipitated the progressive expansion of the Community competences over various policy areas originally reserved for the Member States, thereby increasing supranational influence over the national universes of political discourse (and action) in a growing number of fields, including working time.⁶ Second, the roles and relative influence of particular European institutions *vis-à-vis* each other have also changed. As I discuss in more detail in Chapters 2 and 3, the influence of specific Member States within the Council, and later, the growing role of the European Parliament (which represents the European citizens) and the social partners have been crucial to the development trajectory of the Community working-time discourse and regime. Similarly, the path of the Polish political-economic transition, the associated process of institutional change/structural adjustment, and the process of EU accession have also had a significant impact on the power relations between different actors shaping the Polish universe of political

⁵ Thus, for instance, the presence or absence of gender language and rationales in various working-time instruments and policies does not necessarily imply that these policies or areas of regulation are not gendered, but rather, reflects the relative power of various actors and the settlements that are reached within the existing power dynamic of the universe of political discourse.

⁶ See Appendix A for a graphic representation of this process, particularly with respect to working time.

discourse, privileging certain discourses on working time over others, and thus affecting the shape of the Polish working-time regime.

1.3 Political Discourses and Labour Law in Multi-level Context

While societal paradigms, with their complimentary clusters of institutions, gender relations, norms, and legal rules are historically and contextually specific, the processes of globalization and regional integration, or “transition”, provide interesting case studies for examining the potential impact of supranational standards (and discourses operating at supranational levels) on domestic legal and regulatory regimes. As these processes also occur in the sphere of discourse, they broaden and complicate the universe of political discourse, or lead to an overlap and an interaction between multiple such universes operating at different levels. There exists a substantial body of literature and research in political science, and some legal scholarship, that theorize these types of interactions through various frameworks. These include different theories of European integration, Europeanization, legal pluralism, or reflexive law.⁷ In the context of the EU, the impact

⁷ In political science, the process of European integration has been explained by various intergovernmental (Moravcsik 1993), neofunctionalist (Haas 1964), historical institutionalist (Pierson 1996), and multilevel governance (MLG) theories (Hooghe and Marks 2001). Political scientists have also examined the role of law and the courts in the process of European integration, see: Burley and Matlii (1995), Alter (2000), Alter and Vargas (2000), Beach (2005). Moreover, the impact of policies and institutions operating at the EU-level on domestic “polities, politics, and policy” has been studied through different theories of Europeanization; both, “rationalist” models focused on more top-down analysis of the costs and benefits of adopting EU rules or disregarding them, and more bottom-up “social constructivist” models focused on the independent incentives of local actors to adopt EU rules (see Radaelli 2001; Schimmelfennig and Sedelmeier 2005 for a useful review). One subset of Europeanization literature is that which focuses on the implementation of EU policy and law (Trieb 2008). The most recent “wave” of EU implementation studies incorporates the rationalist and social constructivist approaches, by focusing on various factors affecting implementation and compliance with EU *acquis*, including the role of institutions, administration, politics, and local elites/actors (Trieb 2008; see Falkner et al. 2005; Leiber 2005, 2007; Falkner et al. 2008; Toshkov 2008 for examples of such studies in relation to social *acquis* and CEE Member States, including Poland). The politics of European integration have recently also been conceptualized by way of social and structural constructivist theories drawing directly on the work of Pierre Bourdieu: see, Kauppi (2002; 2003). On legal pluralism, in relation to European labour law, see: Flanders (1968); Fox and Flanders (1969); Fox (1973); Clegg (1975) (as cited in La Faro 2000). On reflexive law or reflexivity, see: Teubner (1983); Sciarra, Davies, and Freedland (2004) (for practical application).

of integration and enlargement processes has also been examined by scholars of comparative policy and comparative institutionalism, with the focus here being often the extent to which various policy fields and institutional clusters or regimes (be they welfare regimes, gender regimes, employment regimes, industrial relations systems, or legal regimes) remain distinct or converge under the pressure or influence of some external force, such as supranational regulation or globalization.⁸

The extent to which EU integration has interacted with domestic legal orders has also been considered by several labour law scholars.⁹ Bercusson (1995), for example, visualizes the EU labour law as a symbiosis between national labour law systems and the law of Community, with actors at the transnational, national and subnational levels having important role in its development and the Community and national laws mutually influencing each other. Indeed, presence of multiple sources, types, and influences on regulation has been a longstanding feature of labour law, even in the national contexts, and thus the focus on legal pluralism is not new in this field. However, the significant shift in EU social policy towards employment policy and regulation ushered in by the 1997 European Employment Strategy (Ashiagbor 2004; Kenner 2003; Barnard 2006), and the fact that the latter has been one of the most established areas of EU social policy for some time, has prompted scholars to pay particular attention to the impact of the EU law on domestic labour law regimes. Here, too, the discussion has focused on whether the pressures exerted by the EU norms, policy discourse, or by EU institutions (e.g. European

⁸ See, for instance: Rubery, Smith, and Fagan (1998, 1999); Esping Andersen (1999); Perrons (1999); Figart and Mutari (200; 2001); Walby (2004); Lewis, Campbell, and Huerta (2008).

⁹ See: Bercusson (1995); Deakin and Reed (2000); Kilpatrick (2003); Ashiagbor (2004); Sciarra, Davies, and Freedland (2004); Rogowski and Deakin (2011).

Commission or the European Court of Justice (ECJ)) on domestic labour law systems have contributed to some degree of their Europeanization or convergence between them (Kilpatrick 2003; Ashiagbor 2004), or whether the evidence points to a more complex, symbiotic and reflexive relationship or dialogue between these various levels of governance (Bercusson 1995; Ashiagbor 2004; Sciarra, Davies, and Freedland 2004; see also Kilpatrick 1998; La Faro 2000; Rogowski and Deakin 2011).

The multi-level argument in relation to labour law has also gone beyond the EU-Member State interaction. Examining the European Employment Strategy, for instance, Ashiagbor (2004) has not only focused on the relationship between the EU and domestic labour-law regimes (she considered Netherlands and the UK, for instance), but has also argued that EU policy and governance is itself subject to influences from other supranational bodies (i.e. the Organization for Economic Cooperation and Development, OECD).¹⁰ Hence, according to Ashiagbor, the EU policy and governance have been subject to the policy discourses based on neoliberal principles and Chicago-school neoclassical economics, which the OECD has promoted, and which have become hegemonic over the last several decades. The impact of these broader neoliberal discourses and governance structures adopted and promoted by the international financial institutions on the more localized discourses and regulations, including labour and employment regulations and labour market policies, has also been examined by Kerry Rittich, another legal scholar. Rittich (2002a; 2002b; 2006; 2009) has shown that the international financial institutions, particularly the World Bank, have been very influential in mainstreaming the discourse of deregulation, or the consensus around non-

¹⁰ See also Vosko (2007; 2010) for the discussion of the International Labour Organization (ILO) and the EU.

desirability of “excessive” labour laws and institutions of the labour market. These discourses and prescriptions, according to Rittich, have been crucial in re-regulation of labour markets by shaping how particular labour market concerns are being presented and solved (i.e. in terms of competitiveness, efficiency, and flexibility) at more localized levels of governance. Rittich has examined these processes, and their gendered impacts, in the context of political economic transition and restructuring, including those which took place in Poland in the early 1990s (Rittich 2002b), and more recently, in the context of policies regarding the nexus between work and family (Rittich 2006).

My examination of the impact of supranational bodies and policy discourses, particularly those of deregulation, flexibility, and work-family reconciliation, on the regulation of working time in Poland draws on Ashiagbor’s examination of the impact of and parallels between the EU and the OECD policy frameworks, and Rittich’s work on the role of international financial institutions in shaping regulatory discourses and concrete policy choices. In the Polish context, as elsewhere, the pressures and/or incentives to comply with international standards, conditions, and benchmarks – whether those required for “successful” market transition, membership in the OECD, accession to the EU, or, most recently, the goal of EMU-membership – have prompted and continue to inform policy (Leiber 2005, 2007; Stenning et al. 2010; Shields 2011) and legal change since 1989, including change in labour law (Leiber 2005, 2007; see Chapters 4 and 5 of this study). Indeed, the process of political economic transition in Poland has been also a process of legal transition; it has been facilitated by legal norms while simultaneously shaping these norms to reflect the dominant neoliberal ideology and political discourse of

the time.¹¹ While the processes of globalization and “systemic” change have broadened the range of discursive and regulatory influence, the impact of hegemonic discourses and rules operating at many levels is certainly not a new (post-transition) phenomenon in Poland. The dominant ideology of socialism and the political and economic influence of the Soviet Union were also facilitated by legal norms and political discourses during the People’s Republic period (shortly after the Second World War and up to 1989). Chapters 4 and 5 of this dissertation will examine the implications of these interactions, both prior to and post-transition, and assess their impact on the regulation of working time, gender equality, and the broader process of social reproduction in the Polish context.

Importantly, a finding that emerged from the recent scholarship on the European Employment Strategy and the EU regulation of part-time work is that the relationship between domestic and EU labour law and policy is more complex than that of simple convergence (Ashiagbor 2004; Sciarra, Davies, and Freedland 2004). This observation is not only consistent with the dynamic and shifting nature of social (and legal) relations as conceptualized by the universe of political discourse discussed above, it is also supported by EU scholarship in other fields and the evidence that the national systems of labour and employment law have been remarkably resistant to the pressures for change. One example of such resistance comes from the work of an Austrian political scientist Gerda Falkner (and others), which studies the domestic implementation of EU labour law Directives in the “old” (Falkner et al. 2004; Falkner et al. 2005) and “new” Member

¹¹ See, for instance, Kerry Rittich’s work on the role of International Financial Institutions and their political and economic agenda in the process of restructuring the Central Eastern European countries, including Poland (Rittich 2002b). Rittich places gender at the centre of restructuring process, by addressing the consequences of restructuring for the relationship between reproduction and production. See section 1.4 of this chapter.

States (Falkner and Trieb 2008; Trieb and Falkner 2008). Falkner and her colleagues suggest that there is no single way in which Member States have adopted and complied with the social *acquis*. Rather, at least three different “worlds of compliance” have been identified in the “old” EU Member States and the “newer” Central and Eastern European (CEE) Member States. While compliance was more seamless in some national settings, in others the political elites resisted aspects of “Europeanization,” either by active opposition to specific measures, or by, what Falkner and her colleagues term “opposition through the back door” (Falkner et al. 2004, 452; Falkner et al. 2005, 278). The fact that “back door” opposition is necessary, however, suggests that domestic actors nonetheless feel *some* pressure or obligation to comply, even if this compliance remains merely formal or on the surface.

Going further, some labour scholars have noted that the evolution of EU labour and employment regulation and policy may in fact be a reflection (or reflexion) of the shifts in policy preferences of the individual Member States (Sciarra, Davis, and Freedland 2004). This, as Sciarra, Davis, and Freedland (2004) suggest, has been the case in relation to the EU regulation of part-time work. My analysis of the relationship between the EU working-time regime and that which exists in Poland will be informed by the conceptual insights of this scholarship. What I would add, however, is that the extent to which Member States are able to inform EU policy or resist it may well depend on their relative bargaining power within the EU. More recent accession states such as Poland, may not have the sufficient political power within the EU to exert influence over the shape of the Community’s labour and employment law and policy. Poland’s influence was particularly low, if not entirely absent, during the pre-accession process (from 1998 until

2004), since the country was expected to adopt the already existing EU policies and laws, which it had no role in developing. Thus, transnational and EU policy discourses and regulations had been likely influential in shaping the Polish discursive universe and legal regime fairly early on. Indeed, research by political scientists¹² shows that conditionality was very influential in the CEE countries in general (Schimmelfennig and Sedelmeier 2005b), and studies by Simone Leiber (2005; 2007) and Dimiter Toshkov (2008) show that Poland was remarkably compliant in the adoption of EU directives. The fact that accession to the EU was predicated on adoption of the *acquis communautaire* is, of course, an important explanation of this compliance.

Nonetheless, as Falkner's study on Czech Republic, Hungary, Slovakia, and Slovenia (2008) points out, *prompt* adoption of the *acquis* does not necessarily translate into *effective* adoption. The study revealed a "gulf between law and action," meaning that the subsequent enforcement of the "Europeanized" policy has been very poor in those four Member States (Trieb and Falkner 2008, 165; Falkner and Trieb 2008). At the same time, these results were not necessarily inconsistent with the compliance patterns of the "old" Member States, as they fit into the "world of dead letters", a subset of one of the three worlds of compliance characterized by highly politicized transposition process and also identified in Ireland and Italy. While Poland's example does not precisely fit into this "world of dead letters" (Falkner et al. 2008, 162), Leiber (2005; 2007) also shows

¹² I must point out that my engagement in this thesis with the political science literature on Europeanization is limited and does not reflect the depth of the debate between the different models by which institutionalist political science scholars conceptualize the impact of the EU in domestic contexts. Nonetheless, I have found some of this literature compatible with my conceptualization of the process of policy and law making in a multi-level context as a universe of political discourse. I also found this literature useful in my thinking about the role of actors and institutions, politics and law, and the external and internal factors that influence the development of legal norms.

that Poland's often at-the-last-minute and minimal compliance was not always followed with proper administrative and enforcement support either.

The above noted studies suggest that in addition to external pressures, domestic, or endogenous variables are significant in determining whether compliance with or assimilation of EU policies is achieved, and whether it is meaningful. One such variable stressed by institutionalist scholars of Europeanization, both those employing rationalist and constructivist models,¹³ is the presence of local actors who are motivated to facilitate this process (Radaelli 2001, 127-128; Schimmelfennig and Sedelmeier 2005a; Sedelmeier 2011 for a particularly useful review). According to Schimmelfennig and Sedelmeier (2005a, 12; see also Sedelmeier 2011), for example, conditionality operates in different ways. From a rationalist perspective, decisions to comply and adopt EU rules, or defy them, can be made on the basis of a cost-benefit analysis, with factors such the clarity of the rules, power imbalance, and the size and proximity of potential rewards being influential on the likelihood of compliance (Schimmelfennig and Sedelmeier 2005a, 10-17). The achievement of conditionality also depends on a number of local factors, including the presence of actors who see the EU rules and policies in question as useful to their own independent policy agenda. Thus, in this latter sense, "conditionality may change the domestic opportunity structure in favour of those domestic actors and strengthen their bargaining power vis-à-vis their opponents in society and government" (Schimmelfennig and Sedelmeier 2005a, 12). The quality of political opposition, the

¹³ As Sedelmeier (2011) explains, these are two major conceptual approaches employed by institutionalist scholars of Europeanization. As I explain below, the rationalist approach emphasizes logic of consequences (external pressure and utility maximization for the local actors), while the constructivist (or sociological) one emphasizes the logic of appropriateness (persuasion, socialization, and learning).

presence of “veto players,” administrative capacities, and other supportive local institutions are some facilitating factors.

Alternatively, from a constructivist perspective, adoption of EU rules depends on social learning and their appropriateness in the local context (Sedelmeier 2011). What matters is whether or not particular rules or policy prescriptions are perceived as legitimate, whether they resonate with the local norms (or at the least do not conflict with them), and whether local actors can positively identify with these rules and policies. Thus, according to this model, Europeanization is achieved through socialization and persuasion, not “hard” conditionality, and transnational networks and experts can have significant role in facilitating the former (Schimmelfennig and Sedelmeier 2005a, 18-20). While the rationalist and constructivist approaches are conceptually distinct, as Ulrich Sedelmeier (2011) points out, they are not mutually exclusive.¹⁴ Importantly, both emphasize the role of local actors and the importance of balancing out the external and internal dynamics (Radaelli 2001, 130) for understanding why, when, and how EU rules are influential.

Since the concept universe of political discourse presumes that actors are influential and it has been suggested that the adoption of transnational (OECD, IMF) and EU policy agendas in Poland was indeed facilitated by particular local actors whose agendas and preferences aligned with those promoted at the transnational level (Shields 2001; 2010), these conceptual insights will help me ascertain the relative roles of the EU discourses, conditionality, and working-time laws and policies on the one hand and the role of the local actors, including political, social, and lobby groups on the other. Interestingly, as

¹⁴ Ultimately, however, Sedelmeier (2011) concludes that rationalist explanations better account for the process of Europeanization in the CEE candidate states (prior to 2004), given that meeting conditionality requirements was necessary for EU membership.

the Polish stance on the revision of the *Working Time Directive* (WTD)¹⁵ (which happened since its accession) suggests, “weaker” Member States may still be able to achieve their policy goals and preferences at supranational levels by siding and allying with more powerful ones (such as the UK).¹⁶ The extent to which Polish labour law, particularly the rules on working time, have been affected by European law and policy discourse, and the discourses operating at the level of international financial institutions, will be evaluated in Chapters 4 and 5.

1.4 Towards a Gendered Labour Law Analysis – Social Reproduction, Gender and Working Time

The first two sections of this chapter sought to conceptualize the context for the analysis of legal rules and policies more generally, and to capture the multi-level character of EU regulation. In this last, and most substantial section of the chapter, I focus on constructing the framework for the critical gender analysis and assessment of the EU and Polish working-time regimes, and the legal standards that are associated with them. The political discourses and negotiations within which policies and norms are embedded and which help to reproduce them are inherently gendered. Whether gender is explicit or not within these discourses, and what assumptions policy makers and other actors involved in the process make about gender relations, gender roles, and the meaning

¹⁵ *Council Directive 93/104 EC of 23 November 1993 concerning certain aspects of the organization of working time*, [1993] O.J. 1993 L 307/18 (23.11.1993), repealed by *Directive 2003/88 EC of the European Parliament and of the Council of 4 November 2003 concerning certain aspects of the organization of working time*, [2003] O.J. L 299/9 (18.11.2003) (hereinafter *Working Time Directive*).

¹⁶ Although Poland was prompt in adopting the Directive prior to accession, as I discuss in more detail in Chapter 3, in the negotiations leading up to the most recent and unsuccessful revision of the *Working Time Directive* Poland had sided with the UK, a long-time opponent of the Directive. Interestingly, the Polish Members of European Parliament were more divided and only some endorsed the official Polish position on the Directive; others, particularly those representing the political opposition in Poland, voted in its support (Cercas Interview, 23 February 2010, Brussels; Tomaszewska Interview, 25 February 2010, Warsaw).

of gender equality depends on the dominant understandings and social settlements that are reached. One of the goals of this dissertation is to understand what sorts of rationales underlie working-time policies of the EU, of those operating in the Polish context, and to question to what extent they are based on specific gendered notions which impede their more transformative reconceptualization.

Because my goal is to highlight the gender dimension of working time, the approach that I develop here draws on theories which place gender and the essential processes of social reproduction – the work of care and maintenance of lives – within a larger political economy and place it at the centre of policy and labour law analysis. Following the work of other feminist scholars, this approach demonstrates that the manner in which the demarcation between production and social reproduction is drawn and the way in which responsibilities for the latter are distributed between the state, the enterprise, and individual households, as well as between men and women, has a crucial impact on gender equality in the labour market and society as a whole. This relationship is particularly evident when we consider the way in which standard working time has been historically organized and regulated and ask what sort of work and whose working hours it standardized.

As I show in the subsequent sections of this chapter, managing time has been a decisive factor in reproducing gendered forms of work organization. In industrialized European economies, work patterns and hours have historically evolved in a manner that made the work of care increasingly incompatible with participation in paid employment. Depending on the dominant political discourse, different institutional arrangements were made to support social reproduction. In the liberal market economies of Europe, for

example, taking an unencumbered male worker as the baseline meant that regulation of work hours largely ignored reproduction. It assumed that men would be unencumbered by unpaid responsibilities and entrenched the notion of exclusive engagement, thereby putting women at a disadvantage in terms of their access to *standard* jobs. By contrast, in planned economies, such as pre-1989 Poland, there was a more explicit acknowledgment that social reproduction should be supported by the state and the (state-run) enterprise because the focus was not on male employment, but rather on *all adult* workers. Even if the rationale underlying the adult-worker model was only formally that of equality, but practically often that of securing a larger workforce (see Chapter 4), it nonetheless enabled women's mass participation in standard employment.

To draw the crucial link between standard norms of time and work organization and the unequal division of responsibilities for paid and unpaid work between men and women, I will rely on some key concepts developed in feminist political economy and employed in feminist analyses of the labour market. I begin by discussing the concept of "social reproduction" and identifying some of the key assumptions underpinning the role of the family within the capitalist mode of production, the consequent social marginalization of women, and the subsequent limitation of their labour market opportunities. Next, I explain how gender figures in the institutionalization of social reproduction in various societies by reference to concepts of "gender order", "gender regime," and "gender contract". I then turn my focus to working time. First, I explain the historical processes by which the organization of work under industrial capitalism set the stage for working-time standards that were increasingly incompatible with unpaid tasks of social reproduction, particularly the care of children. Next, I address the concept of

working-time regime and argue that since gender equality in a given society depends on specific working-time arrangements that are available to labour market participants (Fagan 1996, 2001; Rubery, Smith, and Fagan 1998, 1999; Figart and Mutari 2000, 2001), unpacking the gendered assumptions on which standard working-time arrangements have been based is crucial to moving beyond them and developing a concept of working time that is more equitable. Accordingly, I then move to consider the SER and its associated working-time norms and regulations, and demonstrate how they are gendered by what they assume about work and workers.

Although many of the concepts discussed in this chapter have been developed in reference to advanced capitalist economies, they can nonetheless be applied to explain similar processes in other types of political economies, including planned and transition economies such as Poland. In fact, one contribution of this study, particularly Chapters 4 and 5, is to illustrate how these various processes have played out with respect to organization of social reproduction and working time in the context of planned and transitioning economy. What I seek to demonstrate is that *where* the line is drawn between production and social reproduction and how the latter is valued and accommodated within a particular society is not simply a matter of some natural order of things, but rather a matter of the interplay between normative assumptions, legal rules, and concrete institutional arrangements negotiated by social actors within the universe of political discourse. Organization of working time illustrates this process very well.

1.4.1 Theorizing Social Reproduction

Overview of the Concept

A key concept in feminist political economy, social reproduction – the process of the daily and generational maintenance of the working population – is also one of the crucial mechanisms necessary for the maintenance of economy, culture, society, and humanity (Laslett and Brenner 1989; Fudge and Cossman 2002; Bakker and Gill 2003a, 2003b; Luxton 2006; Bakker and Silvey 2008). It refers to both a process and specific tasks (Bezanson 2006, 25). Although most social reproduction is carried out within the household, it operates simultaneously at the levels of the market, the state, and the family (Lewis 1992). It reflects and involves negotiations of imbalances in gender and other social relations, such as class, race, and citizenship, and is affected by structural inequalities in those relations (Acker 1988; Fudge and Cossman 2002; Bakker and Gill 2003a, 2003b; Luxton 2006; Bakker and Silvey 2008). One way in which these inequalities play out concerns the division of labour between unpaid and paid work, both of which are necessary for social reproduction, but the responsibility for which is distributed unequally.

Social reproduction has been variously theorized in feminist literature. Most definitions relate to its three aspects: 1) biological reproduction; 2) reproduction of labour power; and 3) social practices connected to care, socialization, and the fulfillment of human needs (Bakker and Gill 2003a, 23; Bakker 2007, 541).¹⁷ Earlier discussions of social reproduction focused on the first two aspects identified above to make apparent the essential contribution of unpaid reproductive and domestic work to the capitalist

¹⁷ This last element includes public policy and social provision associated with health, education, welfare, and socialization of risk, as well as institutions, norms and relations that shape how the social, political, and moral orders are understood, evolved, and perpetuated (Bakker 2007, 541).

economy (Secombe 1973; Humphries and Rubery 1984; Laslett and Brenner 1989). Later accounts, most notably that proposed by Antonella Picchio (1992), sought also to explain the interdependence between production and social reproduction by defining the particular relationship that links them and identifying the structures and institutions that help to mediate the tensions between them. Beyond its economic aspects, feminists extended the scope of social reproduction to incorporate the elements of care and social provisioning, including the provision of sexual, emotional, and affective services (such as are required to maintain family and intimate relationships), voluntary work directed at meeting needs in the community and the reproduction of culture, ideology, and “human constitution” generally (Bakker and Gill 2003a; Hoskyns and Rai 2007). Some recent accounts, for instance, focus on the role of care and social provisioning in building effective functionings and capabilities (Picchio 2003) or on its relational and affective, thus not readily commodifiable, dimensions (Himmelweit 2000; Lewis and Gulliar 2005). Feminist political economists have also begun to look at the transformations in organization of social reproduction in the context of developed liberal economies, although increasingly with the view to the global effects of these processes and consequent transformations in social reproduction everywhere (Fudge and Cossman 2002; Rittich 2002b; Bakker and Gill 2003b; Spike Peterson 2003a; Bezanson 2006; Bakker and Silvey 2008).

In the following, I review in more detail a number of key analytical contributions to the conceptualization of social reproduction.¹⁸ I begin with those approaches that

¹⁸ There is a vast literature on social reproduction which I do not aim to review here. For more comprehensive overview of the literature and debates on social reproduction, see Laslett and Brenner (1989); and more recently, Bezanson (2006); Luxton (2006); Bakker (2007). While I draw on these sources and much of the literature reviewed within them, my comments here are limited to only a selection of literature.

demonstrate the links between the processes of capitalist production and accumulation and the often unpaid social reproductive work carried out within households.

Specifically, I refer to Picchio's articulation of the political economy of social reproduction in early capitalism (Picchio 1992). Next, following Isabella Bakker's (2007) suggestion that we distinguish between *work* and *labour* to expand the concept of social reproduction beyond its role in the economy (while nonetheless affirming its vital importance and contribution to it), I consider select literature on the affective and relational dimension of care work. Finally, I note recent developments in the analysis of social reproduction that address the impact of the global political, social, and economic transitions on its organization in different contexts. This literature makes apparent the linkages between social reproduction in the developed market economies, transition economies such as Poland, and those in the process of development, and brings inequalities based on race, nationality, and citizenship into sharper focus. It also underscores that although the framework of social reproduction has been largely developed in relation to its operation and institutionalisation in capitalist economies, it continues to be of considerable analytical value, particularly given the worldwide reach of the market economy, prominence of neoliberal discourse, and the increasing permeation of capitalism into the "structures of everyday life".¹⁹ The extent to which the insights developed so far are applicable to transition economies such as Poland and whether new insights can be gained from the assessment of the changes in social reproduction in this context are some of the questions that I consider in this thesis.

¹⁹ Bakker (2007, 542) makes reference to historian Fernand Braudel's term to reinforce that the spread of capitalism has material and structural effects on life at all levels of organization, including people's ability to meet their daily needs. Bakker and Gill (2003a) term the effect of this process as "human in/security".

Social Reproduction as a Corrective to Orthodox Political Economy

Contrary to dominant neo-classical approaches which regard the family or labour supply more generally as exogenous to the economy, feminist political economists locate social reproduction within basic economic processes including production, distribution, and circulation (Secombe 1973; Humphries and Rubery 1984; Picchio 1992). They do so by demonstrating that the work involved in it, the bulk of which is carried out within the household on an unpaid basis and mainly by women is, by its very nature, *productive* – it produces and maintains the labouring population without which the economy could not be sustained. As Picchio (1992, 97) explains, “housework is the *production* of labour as a commodity, while waged work is the *exchange* of labour. To be exchanged, labour must be produced; and to be used in the production of other commodities, labour must be produced and exchanged”. However, both this functional dependence and the productive nature of domestic work remain largely unacknowledged in the capitalist system and the unpaid work of social reproduction is not subject to the same logic or organization that governs productive activity. In fact, what makes the capitalist mode of production unique is its tendency to *separate* the site of procreation from the site of production (Picchio 1992; Fudge and Cossman 2002)²⁰ and divest itself of the responsibility for the costs associated with the former. This separation is arbitrary as the processes that are involved in the two are in fact “inextricably intertwined” (Picchio 1992; Rittich 2002b, 185).

²⁰ See also Rittich (2002b, 182-183), although Rittich does not deal with the processes of “social reproduction” but with the more narrow distinction between productive and reproductive economies (with the latter being an integral but not the only element of social reproduction) and the manner in which they are often arbitrarily segregated. According to Rittich, the boundary between production and reproduction is drawn differently in different contexts and cultures and varies in societies over time but it is always arbitrary. The degree of the divide is a product of specific cultural and historic moments (Rittich 2002b, 186) and is “a marker of the current political settlement over organization and the assignment of costs and responsibilities [for social reproduction] to different parties” (Rittich 2002b, 192). The sharpest divide according to Rittich seems to be drawn with the historical rise of industrial capitalism in Europe.

Picchio notes that although familial work is linked to the productive process through wages (supporting the subsistence of the homemaker) or social transfers, wages are regarded as costs of production but housework, as unpaid labour, is a deduction from the costs; it is not compensated with a wage of its own and when it is (*e.g.*, indirectly, through the family wage or social transfers), the relationship is still such as to guarantee a high surplus/profit (Picchio 1992). Thus, Picchio observes that “the more labour is embodied in its reproduction the less it costs the employer” – an increase in housework leads to an increased standard of living and better quality labour without necessarily costing the employer any more (Picchio 1992, 121). This paradox, she maintains, can only be explained by the separation of the processes of production from reproduction and the transfer of responsibility for the latter from the employer to the worker, or, more precisely, by shifting the burden onto the household and especially women family members. According to Picchio then, the “subordination of social reproduction to the needs of capital accumulation” illuminates the essential contradiction within the capitalist society – the conflict between the standard of living of the workers and the drive for accumulation by those who own the means of production (Picchio 1992, 121).

Picchio and other feminist political economists have pointed out that, aside from the family, state institutions play a key role in mediating this contradiction (Picchio 1992; Fudge and Cossman 2002; Rittich 2002a, 2002b). The state assumes its mediation role of a “regulator” by enacting social policies and laws that often take for granted women’s domestic labour (Picchio 1992, 112). Thus, as Picchio points out, although the state has historically assumed some responsibilities connected to social reproduction (such as health services, education, some income security, etc., albeit to a different degree in

different contexts) in most developed market economies,²¹ it has always done so in a supplemental way and on the presumption that the basic needs will be met at the household level.²² Consequently, women's work within the household acts as an "alternator," with women constantly adjusting its level to the changing demands and conditions under which social reproduction is carried out, including the expansions or contractions in the state's involvement, impact of the market forces, and changing family circumstances (Picchio 1992; Bezanson 2006, 27; Luxton 2006, 38).²³ But there is a limit to the family's (and women's) ability to mediate these tensions. As Luxton (2006) points out: "without sufficient support, standards of living drop, the most vulnerable households typically collapse, and a crisis in social reproduction is produced" (Luxton 2006, 38), meaning that there is a general breakdown in the ability of individuals, families, and communities to sustain themselves, care for and educate one another and, in turn, to sustain and reproduce society as a whole.

Social Reproduction and the Labour of Love

The conceptual incorporation of social reproduction (and women's unpaid work) into political-economic theory and explanation of the process by which it is subordinated within capitalism provides an important corrective to more mainstream theories, mainly

²¹ The exact manner in which the demarcation between production and reproduction is drawn in different societies varies. There is vast comparative, sociological and political science literature on different forms of welfare state which sketches out the array of institutional arrangements that developed in an effort to socialize some of the risks and costs of social reproduction, but also to "organize" the work involved in it.

²² For more discussion on the state's role in organization of social reproduction through stabilizing a specific gender order see the following section. Also, on the role of the socialist state in organizing social reproduction in Poland, see Chapter 4.

²³ As the case of Poland demonstrates, the process of political economic transition has had a disproportionate impact on women. Effects of state retrenchment and marketization and privatization of responsibility of social reproduction have resulted in extremely heavy double burdens and more precarious labour market position of women. For the discussion of these phenomena, see Chapter 4.

those offered by the neoclassical tradition.²⁴ Through focus on unpaid household work it also draws the attention to the unequal gender relations that characterize its organization and to the role of the state in institutionalizing this inequality.²⁵ But regardless of its economic significance not all work that is involved in social reproduction can be explained through productive and economic relationships, and this has been one source of criticism of early articulation of the social reproduction framework. Aspects of social reproduction, such as the care of children, are not only hard to commodify fully, they are also valuable beyond the economic contribution they make. In a review essay surveying the development of the social reproduction concept, Isabella Bakker (2007) suggests one way of rearticulating it in a manner that responds to the above critique, namely, to broaden our understanding of the concept “work”. Drawing on Antonio Gramsci, Bakker suggests that a clearer distinction between *work* and *labour*, the latter being a specific aspect of work that in capitalism is characterized by alienation of the labourer and appropriation of surplus labour, allows for a conceptualization of social reproduction that is not entirely mediated by capitalism and thus better accounts for those forms of social reproductive *work* that cannot be completely commodified (Bakker 2007, 548).²⁶

A similarly expanded conception of “work,” which defies the dichotomy between paid and unpaid work, production and reproduction, employment, and domestic work is

²⁴ Although it also corrects classical Marxist approaches which tended to downplay social reproduction.

²⁵ I discuss the process by which these unequal gender relations that characterise social reproduction under capitalism are institutionalised in section 1.4.2 of this chapter.

²⁶ See also Bakker and Gill (2003a), 20-23. Both Bakker (2007) and Bakker and Gill (2003a) draw on Gramsci’s broad conception of work as being “not primarily a category of Political Economy,” but “part of an ontological conception of the world, a world that is grounded in education, culture and in other institutions of social development” (Bakker and Gill 2003a, 20). They note that Gramsci recognized that work in a capitalist society encompasses both the social relations defined by capital (labour) and the creative process that could exist outside of labour relations. Bakker and Gill see this distinction as crucial to explaining the crisis in social reproduction as primarily occurring when capitalist market forces penetrate into basic human and social institutions that were previously shielded from commodification.

that offered by the British sociologist Miriam Glucksmann. Glucksmann (1995; 2000; 2005) conceptualizes work as a relational process that occurs in many different spheres and is embedded in and defined by particular social relations or expressed through kinship connections. “Total social organization of labour”, the conceptual device that Glucksmann proposes, illuminates “the manner by which all the labour in a particular society is divided up between and allocated to different structures, institutions and activities” (Glucksmann 2000, 67). These divisions and allocations are historically contingent and change over time and across space. Whether specific activity is considered “work” depends not on whether it is paid for, but rather on the particular relations or circumstances within which it is carried out. Accordingly, Glucksmann suggests that the dichotomy between *paid* work (or employment) and *unpaid* work (domestic/household work) is unhelpful since the former can occur outside of the formal employment sphere and the latter can be carried out in other contexts than the domestic/household labour (such as voluntary work: Glucksmann 2005, 29; see also Taylor 2004 applying the Total Social Organization of Labour concept to volunteer work). This conceptualization of work highlights the interdependencies between different types of work in society (and economy) and challenges the classical dichotomy between productive and reproductive work, paid and unpaid work, thereby highlighting the importance of all types of work to the sustainability of the economy and society as a whole.

The expanded conception of work that includes but is not limited to labour, finds further support, as Bakker points out, in the literature on the economy of care and, more recently, literature on social policy of care. From the economy of care perspective, Susan

Himmelweit revisits early writing on domestic work and considers the analytical implications of the manner in which feminist economists attempted to include domestic activity into the realm of “work”.²⁷ She notes that these analyses often likened domestic activities to all other work types by showing that they are: 1) extrinsic/purposeful; 2) part of the division of labour; and 3) separable from who performs them (Himmelweit 2000, 104-105). The problem with this definition, she notes, is that it abstracts the essence of “work” from its dominant characterization as wage *labour* producing manufactured products for the capital thereby assuming the dominant definition as the baseline. She also suggests that rather than dichotomize or try to show that all work is alike, a more useful approach is one which recognizes that different types of work exhibit different degrees of commodification because of their particular characteristics. The abstracted definition of “work” may be suitable for domestic tasks such as cleaning and cooking, but it does not apply to those forms of work in which it matters who performs it (both to the effective execution of the work and to the person carrying it out). Caring work, she notes, provides one such example because it is often “an activity which is inseparable from the person doing it [and] in which the relationship between a carer and her work is crucial” (Himmelweit 2000, 110).²⁸ As such, caring (both paid and unpaid) is distinct and Himmelweit urges that rather than attempting to valorize it through showing that it is like all other work, we need to recognize its unique relational and affective dimension. Much like Glucksmann’s, her goal is to challenge the artificial dualism between work and home, production and reproduction in order “to make care be a part of paid labour and

²⁷ Note that this reference to “work” is not that in Gramscian sense specified at note 24 but the more narrow conception that Bakker attempts to distinguish by referring to it as “labour”.

²⁸ Himmelweit (2000, 110) also notes that caring is ambiguous, “it stretches from physical care, which may to some extent be independent of the relation between the carer and the person cared for, to emotional caring, in which the person doing the caring is inseparable from the care given”.

work to be recognized in the caring activities that go on in the home” (Bakker 2007, 548 referring to Himmelweit). This characterization of work, Bakker notes and I agree, has crucial implications for policy, particularly in the area of working time.

Another strand of feminist writing on care which picks up on this theme, comes from the social policy literature on the provisioning role of the state. Drawing on concepts of care as a universal human need (involving the rights of both, the person receiving care but also the person providing it) (Nussbaum 2003) and the recognition that aside from the labour that goes into its provision, care often involves love and is integral to identity formation (Lewis and Guilliari 2005; Lewis 2007, 107²⁹), scholars writing from this vantage point are also underscoring that among the types of work that are involved in social reproduction, the work of care is unique. Jane Lewis, for instance, argues that given its crucial importance to human flourishing, care work must be regarded as inherently valuable and accommodated in a manner that provides meaningful opportunities to individuals (both women and men) to be able to carry it out should they choose to do so, and whether they do it within their own families or as part of paid employment (Lewis and Guilliari 2005; Lewis 2006; Lewis 2007). In part, this means that they must have *the time* to do it without having to absorb the costs and suffer from negative consequences in the labour market.³⁰ In a similar vein, other scholars have recently pointed out that social reproduction, particularly its care aspects, is important for those who perform it and, more significantly, is essential to building effective functionings and capabilities for the future generations (Picchio 2003; Chiappero-

²⁹ Lewis refers here to Graham (1983) and Balbo (1987).

³⁰ However contrary to these views, as I will explain later (section 1.4.3), norms of working-time organization have evolved in such a way as to (until relatively recently) ignore the time-intensive nature of social reproduction on the presumption that labour market participants will be unencumbered by such tasks.

Marinetti 2007). These insights are important because they highlight that beyond its economic contribution, social reproduction has significant relational dimensions that make it an integral part of maintaining the overall wellbeing and health of the society. Accommodating (and this includes making the *time* for) social reproduction, then, is much more than a matter of accommodating individuals and/or families (and their choices or preferences); it is a matter of recognizing its indispensability for social cohesion and human sustainability. Failure to attend to its inherent complexities will inevitably lead to a crisis; indeed, high levels of stress (particularly among women), and low fertility rates in many capitalist economies, including Poland, are some of the warning signs that such a crisis is already present.³¹

Social Reproduction: The Global Perspective

The crisis tendencies in the organization of social reproduction under capitalism are also the focus of substantial literature that considers how the processes of change in social reproduction in the countries of the North/West articulate with social reproduction in the developing world. For the purposes of this Chapter, I only wish to flag that there is a growing recognition that the economic, political, and social transformations, including the transnationalisation of capitalism and market principles, are not only contributing to the reorganization and the crisis of social reproduction in developed economies but also destabilizing these processes everywhere else and leading to increasing human insecurity on a global scale (Bakker and Gill 2003b; Bakker and Silvey 2008). As the already

³¹ The crisis in social reproduction occurs when the gender contracts which exist in a given context can no longer contain the inherent contradictions. Phenomena such as women's double burden, time poverty and stress, and decreasing rates of fertility indicate that there are serious discrepancies in how productive and socially reproductive activities are distributed and organized between different institutions and among men and women. This in turn, compromises the ability of individuals, families, communities, and society as a whole to sustain themselves (Fudge 2005).

artificial boundary between production and reproduction (both paid and unpaid) is being redrawn, the division of labour is increasingly occurring not just along gender and class lines, but also along those of race, ethnicity, nationality and geographical location (Bakker and Gill 2003b; Bakker and Silvey 2008). The work of care and the maintenance of life – key aspects of social reproduction – is central to many of these transformations, as is demonstrated for example by literature on restructuring in the Central and Eastern Europe, or the development literature on migration and particularly, the global migration of carers. In her work on the political, economic, and legal transition in the former planned economies, Kerry Rittich (2002b) notes, for example, that one of the key impacts of market restructuring on social reproduction is that it sharpens the boundary between productive and reproductive spheres in a context where the articulation between them was once far more acknowledged by economic planning and public policy than it is under capitalism. The extent to which the underlying gender relations are equal, means that this shift toward the more pronounced separation in the organization of social reproduction, will have more or less disparate impact on men and women in different transition states.

A similar process of redrawing the lines between production and reproduction and the division of responsibilities for either is also taking place in other parts of the World, since the market logic underlying restructuring in Central and Eastern Europe has also been informing development efforts more generally. The exact impact of these efforts is the subject of an extensive literature (in various disciplines) that I do not intend to discuss here. What I do wish to note, however, is that political economists are increasing recognizing that many of these impacts are related to disruptions in social reproduction and human security that are a direct result of capitalist expansion and the expansion of

neoliberal discourses (Bakker and Gill 2003a, 2003b; Bakker and Silvey 2008; Stenning et al. 2011). As people's and entire communities' means of survival and daily maintenance become circumscribed across the developing world by capitalism's reach,³² the global connections between the processes of social reproduction are becoming more apparent. Migration for work, for instance, provides an example of the transnationalisation of social reproduction and has been a focus of growing literature on "global care chains" which documents and analyses the migration of care workers from the transitioning or developing countries in the South/East to the rich North/West (Bakker and Gill 2003a, 2003b; Arat-Koc 2006; Perrons, Płomien, and Kilkey 2010).

Other forms of migrant labour (both licit and illicit), sex trafficking, or production of necessities such as food and clothing (whether carried out by migrant workers in the receiving country or produced offshore) offer further examples that the division of labour between production and social reproduction is increasingly drawn along geographical lines and social reproduction is increasingly commodified although continually undervalued (Bakker and Silvey 2006). Gender continues to be a crucial relation and much migrant work is gendered, particularly that which involves care and household maintenance. Inequalities between women along the relations of class, race, and citizenship status are particularly apparent in these contexts. The problems involved in these scenarios are many, but from the perspective of social reproduction and its sustainability the obvious problem is that while migrant labour from the transition and developing economies (in itself a result of distortions in social reproduction in those contexts) may provide temporary solutions to the crisis in social reproduction in the

³² A process that Bakker and Gill (2003) liken to the Enclosure Movement that starting in Europe in the 17th century, increasingly circumscribed people's ability to meet their own subsistence needs by limiting their access to arable land.

receiving states and secure the means of existence in the sending states, it also leads to significant distortions in social reproduction everywhere and entrenches further inequality in its organization. Importantly, it represents its continued subordination to the needs of capitalist accumulation.

These insights expand the framework of social reproduction and provide important analytical tools for looking at the historical transformation in the mechanisms and institutions by which it is carried out and mediated in developing countries, including transition economies such as Poland. Given Poland's relatively recent transition to the liberal market economy and even more recent accession to the EU, these insights will also help me understand the relationship between particular types of political economy and the organization of social reproduction, as well as the impact of transnational policies and regulations on national political discourses and normative and legal orders.

In this next section, I consider the manner in which social reproduction is institutionalised, with particular focus on how it is gendered and what accounts for the diversity that exists among specific contexts.

1.4.2 Institutionalization of Social Reproduction: Gender Orders, Gender Regimes, Gender Contracts

As discussed above, the process of social reproduction is characterized by tensions and asymmetries. Because biological propagation of the species constitutes one of the key elements of this process, social reproduction is gendered. In part due to biological difference, men and women are assigned different roles. Moreover, relations of class, race, and nationality are also significant depending on the specific context. While the family is the main institution within which the tasks involved in social reproduction are carried out, the state also plays an important role in organizing social reproduction,

mediating the tensions which may arise between social reproduction and the productive process, and ensuring that social reproduction continues (Fudge and Cossman 2002).

Unlike the family (mainly female family members), which carries the most significant burden of this process, the state's provisioning role has been often residual (particularly in liberal market economies), although in some forms of political economy, such as the Polish state-socialism, the state assumed a more direct role in provisioning.³³ Another way in which the state intervenes involves the state's role in stabilizing a particular "gender order" – the overarching relations of power and ideas about masculinity and femininity – to ensure that social reproduction continues.³⁴ To explain better the state's role in this process, I proceed by defining the concept "gender" and discussing the significance of "gender regimes" and "gender contracts" in the organization of social reproduction.

Gender is not a predetermined category that is reducible to sex or to the body; rather it refers to a process whereby the socially and culturally produced ideas about male-female difference, power, and inequality structure the reproduction of these differences in the institutionalised practices of society (Connell 1987; 2005; Gal and Kilgman 2000, 5). Gendering is *reciprocal*, meaning that while cultural and social norms inform how institutions and social structures are envisioned and made, institutional and structural patterns reflect and further reinforce the normative assumptions that underlie

³³ As I will discuss in Chapters 4 and 5, the post-transition Poland provides an unfortunate example of the detrimental effects that a sudden withdrawal of the state from this function can have on the standard of living and social reproduction of the population.

³⁴ In the influential framework of gender relations developed by Connell (1987; 2005) the concept of "gender order" refers to the overarching relations of power and ideas about masculinity and femininity that have historically developed in societies through particular structures of gender relations. Connell distinguishes a number of such structures which are interrelated but also remain relatively autonomous from one another: i) production relations (including the divisions of labour), ii) power and iii) the emotional and sexual relationships between genders (Connell 1987; 2005).

them. This process is also *dynamic*; gender relations are constantly made and remade (Connell 1987; 2005) and a change at one level results in changes in the gender relations as a whole (Connell 1987; 2005; Walby 2004).

The state's key role in the process of gendering is to stabilize the overarching gender order in various social sites, among them, the legal system, the labour market, the family, and the school. Each of these sites itself contains specific set of gender relations, which Connell refers to as its gender regime (Connell 2005, 120). Alternatively, Walby (2004) conceptualizes the gender regime more broadly and essentially as parallel (although not identical) to Connell's gender order. Walby's gender regime is then composed of other subordinate gender regimes (which are more institutionally specific, although she does not limit them to singular institutions), "domains" (economic, polity and civil) and "social practices" (Walby 2004, 10). In her conceptualization, much like in Connell's, gender relations are constituted by all of these levels and changes at any level affect changes in the overall gender relations. Thus in the context of the EU, for example, Walby has noted the emergence of an overarching EU gender regime that is evolving as a result of regulation and policy enacted at the trans-national level, and which, in turn, transforms more localized gender regimes in various EU member states.³⁵ Although the relationship between these gender regimes is inherently dynamic, the stability of a society's gender order can be achieved when at particular historical moments the gender regimes of interacting institutions (or spheres) are "harmonized" and there is "some fit, however temporary, fragile, and incomplete, between the processes of reproduction and

³⁵ See also Heather MacRae (2006) on the role of EU in shaping the national gender regime in West Germany. MacRae notes that in the past, most theorizations of gender relations, even those comparative, focused on the national, state-level regimes. She argues that it is necessary to look beyond the state and include trans-national policy fields, such as the EU, as crucial in shaping the gender regimes at the more local level.

production” (Fudge 2005, 265). Judy Fudge (2005) suggests that this fit is achieved if a gender contract is institutionalised in key sites including families, firms, schools, state policies, and the market (see also Vosko 2010, 6-9).

Defined as “a socio-cultural consensus about the respective organisation of interaction between the sexes which affects the orientations and actions of men and women in a social system” (Pfau-Effinger 1994, 1359, citing Hirdmann 1988), the gender contract includes unspoken rules about how men and women should distribute and prioritize their time between reproductive and productive work. The concept gender contract was developed partially as a critique of previous typologies, such as Lewis’ degrees of breadwinning model which tended to emphasize institutional and economic factors and were unable to account for diversity existing within specific regime types. Brigit Pfau-Effinger (1994; 1998), for example, suggested that one way to explain such *intra*-regime variations is to account for the importance of cultural norms and that the concept gender contract better accounts for variations because it emphasizes that the state of gender relations is a reflection of historically (and thus contextually and culturally) specific relations and negotiations.

Gender contracts develop historically and as such their exact content varies from context to context (Pfau-Effinger 1994; 1998).³⁶ Much like gender relations in general,

³⁶ The extent of the cultural or contextual *intra*-regime variation, however, is not to be taken to mean that culture is the determining factor in the overall gender relations, but rather that it is a significant factor in the reciprocal and constitutive interplay between norms and structures which shapes the overall gender order of a particular society. In a similar vein, others have pointed out that factors such as class and race, but also regional differences, may also account for variations in gender contracts and relations that exist within specific states (Warren 2000; Duncan 1995). In addition to the concept of gender contract, the importance of culture has also been highlighted by post-structuralist critiques of “regime” typologies. See for example Julia Adams and Tasleem Padamsee who propose that the concept of “regime” used in feminist work on welfare states should be expanded to incorporate the way in which signs organize the relations of subjects who operate within a specific field of power (Adams and Padamsee 2001).

gender contracts are typically marked by asymmetrical relations of power,³⁷ but they are also dynamic and *consensual*, meaning that there is some degree of resistance and agency involved in their negotiation, which helps to account for change in their content over time, however slow or whatever the nature of this change may be. This dynamism and consensual nature of gender contracts explains why some gender contracts are more egalitarian than others. Thus, although the unequal division of labour between production and reproduction is a common feature of all gender orders, the degree to which responsibilities for reproduction are shared (between the state, the enterprise, and the families, as well as between men and women) can vary – from place to place and over time – depending on the particular gender contracts that exist and the institutional arrangements that are made to support them. As I further elaborate in the following section, the extent to which these gender contracts have also presumed specific allocation of time between paid and unpaid work among men and women relates to the specific working-time regimes that exist in a given society. It in turn has a bearing on the degree of inequality in the labour market.

1.4.3 Time, Working-Time Regimes and the Standard Employment Relationship

The traditional concept of working time arranges the world around two poles. On the one hand, there is the pole of measured time, comprising recognised and paid work, workers, and occupational solidarities; this is male time *par excellence*, to which women must conform if they intend to partake of it on an equal footing. On the other hand, there is

³⁷ As Connell (2005) points out, although the practice of gender is central to social life everywhere, particular gender arrangements are diverse: they are constantly made and remade. What remains constant regardless of the historicity and specificity of gender's content is its relational nature which is always and everywhere characterized by some form of social demarcation and cultural opposition by which the relation between women and men is understood and practiced (Connell, 2005: 44-43).

unlimited time, female time, a space populated primarily by retired workers, women and children, their poorly understood and unpaid work, non-occupational solidarities, rest, consumption...

Alain Supiot (2001, 68)

The gendered separation between productive and socially reproductive spheres, which is particularly marked and institutionalized in advanced market economies, is, at least in part, a product of the historical peculiarities of nascent capitalism and industrialization. It is generally agreed that the organization of modern work was forged in the gradual transition from household to market production; a process that was accompanied and aided by changing social values, conceptions of time, and specific technological and organizational innovations.³⁸ In this section, I provide a brief overview of this process with specific emphasis on the development of industrial time discipline and division of labour, and elaborate on how this relates to social reproduction. Specifically, I show that because industrial work and the organization of time developed in a way that made it increasingly incompatible with labour-intensive tasks such as the care of children, it has had particular labour market consequences for those whose primary responsibility it is to carry them out. I then explain the concept of working-time regime to show that how working time is organized in a given society has, depending on the context, profound effects on access to paid employment and serves to reproduce gendered forms of work organization, and/or contributes to phenomena such as overwork

³⁸ The development of the organization of industrial work has received considerable attention in social, political, and economic sciences literature and has also associated with factors such as the Protestant work ethic, rationalized ways of monastic life, economic principle of competition, and the introduction of the clock. This process has been written about by Benjamin Franklin, Karl Marx, and Max Weber, Edward P. Thompson and numerous prominent theorists since. For a contemporary review and references see: Adam (1995).

and double-shift. I conclude this section by considering the relationship between working-time regimes, the SER, and social reproduction.

Time and Industrial Discipline in Historical Perspective

As already noted, it is widely believed that the advent of industrial capitalism was accompanied by the emergence of the modern concept of time and a significant increase in working hours (Thompson 1967; Schor 1992; Lee and McCann 2006; Lee *et al.* 2007). In his seminal essay entitled “Time, Work Discipline and Industrial Capitalism,” British historian Edward P. Thompson traces the raise of modern time discipline through a process of transition from the pre-industrial “task-orientation” to the clock-dependent “timed work” of industrial production (Thompson 1967). While the former was characterized by uneven rhythms and governed by completion of specific tasks and routines, the latter was measured by the standard of the clock, with time becoming increasingly regarded as currency to be spent and accounted for, not something to be idly passed and wasted: “...all time must be consumed, marketed, put to use; it is offensive for the labour force to ‘pass the time’” (Thompson 1967, 91). Thompson associates this transition not only with technological innovations but also with influence of Puritanism and increased popularity of capitalist principles, including the impulse to exploit workers maximally, so as to suit the production process. Combined with increased reliance on the clock, Thompson suggests, these new attitudes of “time thrift” gave rise to a more disciplined tempo of work (what he refers to as “time discipline”) and marked increases in working hours, eventually contributing to clearer demarcation between work and leisure and commodification of time and work more generally (Thompson 1967, 83-4, 93). Although Thompson’s analysis does not make explicit reference to the impact of this

transition on the processes of social reproduction he notes that women's task-oriented activities such as rearing of children and household maintenance would have made their submission to industrial time discipline more difficult.³⁹

Thompson's depiction of the new tempo of life and work set by industrialisation is still commonly cited; however, recent social science theories and empirical research have questioned his stark binary between clock time and task orientation (Adam 1995; Glennie and Thrift 1995). As Barbara Adam (1995) notes, such a dualistic conception by implication fails to recognize that task orientation and clock-time/industrial time can be, and have been, simultaneously experienced. Even those people whose work is not completely structured by the clock economy, she argues, are nonetheless under the pressure of it since they are embedded in a market economy organized by its principles (Adam 1995, 87). To exemplify, Adam points to the feminist research on women's working time, which shows that this time cannot be easily placed within a perspective that separates work from leisure, or clocks from tasks, and, as such, renders women's work times invisible by the assumptions and categories of classical social science analysis (Adam 1995, citing Davies 1989; 1994).⁴⁰

³⁹ Supiot (2001) also draws on this polarized conception of work time and notes that women had to conform to the "measured time" of men's work if they wanted to participate in paid employment. One criticism of this characterization is that it does not adequately capture the process of gendering. As Joanne Conaghan (2006) notes, "for workers to be free to engage in 'timed-work', arrangements must be in place to ensure that other essential activities – particularly tasks associated with reproduction and rearing of children – continue to be carried out" (Conaghan 2006, 109). Thus Conaghan argues that beyond the difficulties that the industrial tempo and presumption of exclusive engagement may have caused for women's ability to participate in industrial work; women's caring and reproductive work within the home likely made the entrenchment of the timed-work arrangements possible in the first place and viable in the long-term, something that Thompson fails to observe.

⁴⁰ Adam (1995) goes further and notes that while these conceptualizations are valuable because they show that women's work (both paid and unpaid) does not always fit in with the dominant time organization based on the clock-time, they nonetheless present analytical problems because, rather than challenge the dualism of the framework that they try to transcend, they recreate it or simply offer a new one (Adam 1995, 97).

Although Thompson's cursory treatment of women's experience of industrial discipline is a missed opportunity for more elaborate exploration of the multiplicity of time in this process of transition, I do not think that this completely detracts from his description of the transition *per se*. Provided we bear in mind that his account tends to overdraw and dichotomize task and clock-time orientation in a way that leaves out the complexity of people's and, particularly, women's experiences of work-time, it nonetheless vividly illustrates the impact of these new forms of temporal and structural organization of production on people's working conditions, and the implications of these changes for social reproduction can still be deduced. It is evident that during this process of transition women were not completely excluded from paid work; most women, particularly those who were poor, had to, and did, find ways of reconciling care of children and household chores with paid work to support their family's subsistence. Since the submission to this new tempo of work was a matter of survival, women found ways of coping even if it came at an expense to their leisure and the overall standards of living. It is more likely that, at least in the early phases of this transition, the negative impact was not so much the complete exclusion of women from paid work, but rather the severe costs to social reproduction as a result of women's increased workloads and time commitments.⁴¹

⁴¹ There is ample evidence of women's participation in work even at the expense of social reproduction. The standards of care and maintenance during this period were very poor; food was scarce and infant neglect widespread as mothering was an unaffordable luxury. Infant mortality rates were very high, particularly among the poor segments of the population. When the children lived, they were seen as an economic resource for families and many were also working from a very early age – as young as three years old: see Schor (1992, 58 and 92-93), where she refers to such evidence in Britain and United States. Although poor standards of care and exploitation of child labour can not necessarily be attributed to the onset of industrialisation *per se*, as both existed prior to it as well, industrialisation and the changed tempo of work associated with it most certainly exacerbated this care deficit by creating a total dependence on wage labour (by, for example, enclosures of land previously available for cultivation), significantly increasing work hours and imposing severe time discipline and depressing standards of living at the expense of profits.

Aside from the temporal and structural constraints and intensification of work, it was also the change in the *site* of production that exacerbated the tension between production and reproduction, and created further impediments for women. As Laura Leete (2000) notes, subsequent technological and organizational innovations, such as the division of labour and mechanisation, led to mass industrialisation, economies of scale, and significant productivity gains. Many goods and services previously produced in the home were eventually commodified (Leete 2000), arguably “freeing” people of some tasks previously carried out within households, but also shifting the site of production from homes and cottage industries into mills and factories. But as the site of production shifted, it created further obstacles for women’s participation given that labour-intensive nature of care makes it generally compatible only with work that can be performed on an intermittent basis (Leete 2000, 254).⁴² While spinning and weaving for pay in one’s home made looking after young children possible, it is unlikely that the factory floor afforded similar opportunities. Thus, Leete argues that it was also this shift away from home production combined with the time-intensive nature of child rearing that progressively created the structural barriers for women’s engagement in the labour market.⁴³

⁴² Juliet Schor (1992) also elaborates on this process in her book *The Overworked American*. Schor notes, with respect to United States, that despite time-saving devices, which became widely available and the fact that many items and services previously produced in the household began to be available on the market, the work of care was never fully commodified in the same way and continued to make women’s participation in the labour market more difficult.

⁴³ Leete (2000) also argues that it is not just a women’s issue. She says: “While women were the last to leave the home, they were not the only ones to do so. Men preceded them by a century or so. Rather, it is centuries long changes in production technology and the basic economic forces of capitalist market economies that have removed production from the home and changed the nature of work. All parents, men and women alike, face these issues” (Leete 2000, 258).

Working-Time Regimes and Standard Employment Norms

Women's exclusion or marginalization was further cemented through the dominant working-time regimes that emerged across Europe after the Second World War, and the associated standard employment relationship (SER) (Fudge and Vosko 2001b, 271; Supiot 2001, 59; Fudge 2005, 226). According to Deborah Figart and Ellen Mutari (1998; 2000), working-time regimes are composed of particular standards or regulations of work hours and patterns, *and* the normative assumptions about the appropriate organization of the unpaid work of social reproduction.⁴⁴ Specifically, literature concerning these regimes demonstrates that how working time is organized in a particular context is shaped by and simultaneously reinforces specific institutional arrangements and associated normative assumptions about the organization of productive and reproductive work and the distribution of responsibilities for either at various societal levels and between men and women (Figart and Mutari 1998, 2000; Rubery, Smith, and Fagan 1998, 1999). As such, these regimes are crucial predictors of equality in the labour market because they have a significant impact on how men and women allocate their time between paid and unpaid work and among each other, which in turn determines their availability for paid work.

The dominant working-time regime that emerged across Europe in the post-war years was based on the standard of 8-hours per day and 48-hours, and later 40-hours per

⁴⁴ The concept working-time regime has been elaborated in work of Deborah Figart and Ellen Mutari (2000), who have based it on the insights of the comparative welfare regimes literature spearheaded by Gøsta Esping Andersen's *Three Worlds of Welfare Capitalism* – a typology of welfare states based on the particular philosophies and specific institutional configurations that exist in various capitalist economies and which form the basis for re-distribution of welfare and social provision (Esping Andersen 1990). Although Esping-Andersen's original formulation made a crucial connection between forms of capitalism, relations of class and organization of labour, feminist scholars critiqued its gender blindness and further expanded its scope by highlighting the taken for granted role of gendered social reproduction arrangements including the role of unpaid work in provision of welfare (Lewis 1992; Lewis and Ostner 1992; Orloff 1996). The concept working-time regime that I rely on in my analysis of the distinct working-time arrangements in Poland and the EU builds directly on this literature, although I place more emphasis on their legal components.

week and ensured other benefits such as paid annual leave and public holiday entitlements (Lee, McCann, and Messenger 2007). A product of bargaining and legislation aimed at protecting workers and ensuring efficient and predictable organization of production in the manufacturing sector, it simultaneously reflected and further entrenched the division between paid labour and unpaid work of social reproduction (albeit to a different extent in specific contexts) that widened with the shift from home to industrial production, and institutionalized the underlying expectations about the appropriate distribution of women's and men's respective responsibilities for either sphere. In many advanced market economies, for example, the standard working-time regime ignored reproductive work on the basis of gender contracts based on different incarnations of the male breadwinner/female caregiver model that, as the name suggests, generally presumed that women not men would perform most reproductive work (Rubery, Smith, and Fagan 1998, 23; Supiot 2001; Fudge 2004, 267). A key feature of the working-time regime in that context and the linchpin of the gender contract underlying it was the SER (Fudge and Vosko 2001a; Supiot 2001, 59; Fudge 2005, 226).

The SER refers to a particular model of employment contract which became dominant in industrialized market economies and was characterized by full-time, full-year work, usually executed on employer's premises, under their supervision and typically lasting over the employee's life-course (Müchenberger 1989; Supiot 2001). Much like the working-time regime with which it was associated, the SER was constructed on presumption of exclusive engagement and therefore it best suited workers unencumbered by other responsibilities. Consequently, since women were assumed to be primary caregivers, the SER largely circumscribed their participation in paid work by

failing to accommodate their unique schedules. Job stability, access to a family wage, and a full range of social protections and benefits – all key aspects of the SER – meant to provide stability and efficiency in the Fordist-style enterprises of the post-war era along with ensuring protection for workers (Bosch 2004). These same features of the SER, however, were also the means of indirectly subsidizing and thus stabilizing social reproduction.

As I discuss in the Chapter 4, the SER model of work was not just unique to liberal market economies. Parallel models of work and time organization, which shared some of the SER's features (although also had important differences) and those of the working-time regimes built on its basis, also developed in industrialized planned economies of the Central and Eastern European (CEE) countries, including Poland. The extent to which these models varied reflected differences in the distribution of responsibilities for the process of social reproduction between the state, the state-run enterprise, and the family, in the specific gender contracts in place in each country, and in the official state ideology.

1.5 Conclusion

In an effort to assemble a conceptual toolkit capable of addressing the questions central to my thesis, the theoretical approach outlined in this chapter has gone beyond traditional legal analysis by including a number of concepts originating from political science and other social science disciplines.

A critical analysis of the EU and Polish working-time regimes, and the assessment of the extent to which they accommodate gender difference and promote or impede equality and social sustainability, is one of the key objectives of this study. Neither is possible without first unpacking the SER and the working-time norms that historically

have been associated with it. Understanding how these norms are gendered and what they assume about workers, in turn, requires that we look more closely at the relationship between the processes of production and social reproduction, since the legal rules and institutional arrangements that structure employment relations and working-time regimes tend to presume and simultaneously reproduce a particular relationship between these processes. This relationship is inherently gendered. The extent to which it is unequal (or the processes of social reproduction are subordinated, insufficiently supported, or undervalued) shapes the relative opportunities and access for women and men, and has an impact on the long-term sustainability of a particular political economy.

As will be apparent from Chapters 2 through 5, gender equality or issues of work-family reconciliation were not significant rationales for regulation of *standard* working-time and, thus, did not feature predominantly in the European universe of political discourse until the mid-1990, nor until relatively recently in the Polish context. As a result, the discussion of working-time discourse and regulation that follows focuses on many other objectives, which were more influential in setting up the foundation for the EU and Polish working-time regimes. Nonetheless, the framework set out in this chapter is important for understanding why this apparent absence of attention to gender may be a reflection of specific presumptions about who the subjects of regulation are. When analyzing laws and policies, including those regulating working time, it is important to remember that *all* policies are in fact gendered, whether they make gender or issues of equality explicit or appear to be gender-neutral. This gendering occurs because policy rationales and justifications tend to reflect the hegemonic paradigms, which in turn are reflections of the social settlements that are reached through struggles among collective

actors. As these actors are variously and unequally situated within the universe of political discourse, assumptions about gender will always have direct bearing on the social paradigms that emerge and, in turn, on the dominant ideologies or discourses that inform concrete policies, laws, and institutional structures. In the multi-level context such as that of the EU, the universe of political discourse is significantly expanded, or different discourses interact with each other thereby multiplying the number of actors and collective identities that vie for attention. While this multi-level “reality” significantly complicates the process, it may nonetheless create openings for actors on one level, which may not have existed on another, or, as the case of Poland will show, it can at times reinforce existing tendencies and furnish additional rationales for certain policy directions. Periods of transition, such as that which has been occurring in Poland for a couple of decades, are particularly interesting for examining and evaluating these multi-level processes and their consequences.

To set the foundation for the analysis of the Polish working-time regime, I begin by looking at the supranational level. In the following chapters, Chapters 2 and 3, I consider the evolution of working-time political discourse and regulation at the EU level, keeping in mind the broader political-economic context, the national developments, the influence of other transnational actors, such as the OECD, and, most crucially, the stance taken by EU institutional actors and the “social partners”, namely, the representatives of industry and organized labour acting at the EU level.

Chapter 2

The European Union Universe of Political Discourse on Working Time – From Security to Flexibility and Beyond

2.1 Introduction

The regulation of working hours is fundamental to society. It was one of the original trade union demands, and now lies at the heart of Social Europe. It is a key aspect of health and safety in the workplace, and recognizes that allowing working people time to raise their families ('the short-term and long-term reproduction of the labour force') is vital to the interests of workers, societies and economies. *And it is crucial to achieving gender equality at work.*

European Trade Union Congress (2006a)¹

The acknowledgment of the relationship between working time, social reproduction, and gender equality that is so explicitly articulated in the European Trade Union Congress (ETUC) position statement cited above, has, until fairly recently, been largely absent in most European Union (EU)-level documents dealing with the issue of working-time regulation. In fact, the European trade unions themselves have paid scant attention to the relationship between working time and gender equality, as the promotion of equality was never the focus of working-time regulation (Lehndorff 2007). Instead, the traditional rationales for regulation of hours have been protective and organizational, with the most prominent components of the working-time political discourse being security and flexibility: first, the security to maintain existing standards and limit work hours to protect workers' health and safety and right to leisure time; and second, the flexibility to

¹ Excerpt from the ETUC Position on the First Stage Consultation of the Social Partners at Community level on the Reconciliation of Professional, Private and Family life, 08.12.2006. <http://www.etuc.org/a/3194/>.

manipulate work hours to suit the production process, meet the needs of the enterprise and, remain efficient and competitive. As this chapter explains, the tensions existing between these competing objectives – and between their social and political proponents – have, through the 1980s and early 1990s, defined the universe of political discourse on working time in a way that significantly subordinated other rationales for regulation in this area. Although other social rationales, including better reconciliation of employment and family obligations have been present in the working-time political discourse since the 1970s, paradoxically, it was the rise of flexibility as a hegemonic component of this universe at the end of the 1980s and through the 1990s that coincided with the resurgence of interest in work-family reconciliation in the working-time discourse of the new millennium. As this chapter will show, however, the historical embeddedness of flexibility in the discourses of deregulation and “labour market rigidities” has made it a conflicted and unstable universe for the discussion of the interface between working time and gender.

The chapter proceeds as follows. First, I take up the concept of flexibility. Although flexibility has shaped the European debates on employment regulation and working time since the 1970s and became hegemonic through the 1990s, the concept flexibility itself is in fact highly ambiguous. Therefore, one of my first goals is to elaborate the meaning of flexibility. Defining this concept in part means locating its ideological origins and its political and economic dimensions, particularly its place within the broader discourses of deregulation and neoliberalism.² It is necessary to understand how the concept flexibility

² For my purposes here, I draw on a multi-dimensional conceptualization of neoliberalism proposed by Leah Vosko (2010), drawing on work of others. Vosko conceptualizes neoliberalism as a theory of political and economic practice; based on the ideas of Frederick Von Hayek on the one hand, and a series of projects emerging in the 1980s typically associated with Thatcherism, Reaganomics, and monetarism. In the first

has been used in the context of EU working-time policies and why it has stopped short of delivering transformative solutions to the working-time issue.

Building on the elaborated concept of flexibility, I then shift to a more detailed consideration of EU policy discourses concerning flexibility and, particularly, how they have influenced the EU working-time regime, which I discuss in Chapter 3. I begin by describing how the historical shifts in the institutional arrangements and the allocation of power between the different actors who shape the Community-level universe of political discourse gave rise to European social policy, of which working-time regulation is a component. Next, I move to consider the evolution of working-time discourses, particularly the contest between security or “health and safety” and flexibility. The pursuit of labour market flexibility and the goals of job creation, competitiveness, and economic efficiency have provided the dominant impetus for modernization and regulation of working time. However, as the focus has shifted to workplace flexibility, gender-related concerns have become the subject of increased attention within this context. Specifically, working-time flexibility has been promoted as a way of facilitating women’s labour market access and attachment through opportunities for better work and family reconciliation. While flexibilization of working time may in fact promote better reconciliation and, more fundamentally, may challenge working-time standards that take for granted unpaid work relating to the care of family members and the running of

sense, neoliberalism proposes that well-being best advanced by maximization of entrepreneurial freedoms within the institutional framework formed by the rights to private property, individual liberty, free markets and free trade (Vosko 2010, 90, note 2, citing Harvey 2006). In the second sense, Vosko identifies three “projects” of neoliberalism: the economic, the political, and the social. The economic project is associated with liberalization, deregulation, and privatization of public/state services. In the political sense, it is a project of substituting certain forms of state intervention with new forms of governance aimed at supporting the markets. The social project of neoliberalism consists of the withdrawal of collective responsibility and its reconfiguration, such as that inherent in the process of dismantling the Keynesian welfare state. See also, Fudge and Cossman (2002) for an earlier and similar conceptualization of neoliberalism, with emphasis on elaborating the project of privatization and its many strategies.

households, not all types of flexibility are capable of delivering this transformative promise. Indeed, there are reasons to believe that the discursive and policy engagement between working-time flexibility and gender may be merely instrumental to the achievement of other objectives, and that it falls short of an actual engagement with *gender equality*. I conclude by considering why the policy discourse about working time has taken this specific shape.

2.2 From Security to Flexibility – Defining the Terms of the Working Time Debate

2.2.1 Shifting the Priorities in the Debate on Working Time

Through much of the 20th century, particularly its latter part, the political discourse on working time at most levels of governance was dominated by the issue of working-time reductions (Bosch, Dawkins, and Michon 1994; Supiot 2001). Largely driven by the trade union movement and workers' demands, and guided by social rationales such as the promotion of a better balance between work and leisure, or protection of health and safety, working-time reductions were also an important source of productivity gains and economic growth (Bosch 1999, 135).³ Significantly, because the key goals of the labour movement focused on the preservation or improvement of the working time *status quo*, the interests represented and protected by labour unions were mainly those of typical (male) workers in standard (male) jobs (Supiot 2001).⁴

³ Moreover, the economic case for working-time reductions was also made by, for example, promotion of job sharing to redistribute work and decrease unemployment. The drive towards consumption was also one of the rationales underlying the promotion of leisure.

⁴ In this context, it is not surprising that the *Council Directive 93/104 of 23 November 1993 concerning certain aspects of the organization of working time*, [1993] O.J. 1993 L 307/18 (hereinafter *Working Time Directive*) was passed under the rubric of health and safety and made no reference to gender and gender equality goals. This is despite the fact that, by 1993, gender equality was a well-established area of EU social policy.

With changes in work organization, composition of the labour force, and the broader political-economic context, the long-standing focus on reduction of working hours and security began gradually shifting towards the focus on flexibility (Bosch 1999; Anxo et al. 2004). Gaining in importance through the 1980s (Pollert 1988, 281), flexibility became the dominant component of the political discourse on work organization and working time by the mid-1990s, with transnational organizations like the Organization for Economic Cooperation and Development (OECD), the EU, and even the International Labour Organization (ILO) actively promoting it. The prominence of this discourse was so pervasive that even the trade unions, traditionally opposed to flexibility (which was seen as a source of insecurity and deterioration of working conditions), eventually adopted the position that flexible working-time arrangements have the potential to improve working conditions, provided that they are available to *all* workers, and that some level of protective regulation is maintained to strike a balance between flexibility and security (ETUC 2005a; ETUC 2006a; Pillinger 2006).

There has been a sense, then, that flexibility is the only way forward in working-time organization and, more broadly, that it has become one of the key hallmarks of our “liquid modernity”⁵ (Bauman 2000). However, despite the widespread use of this concept, what is actually meant by flexibility continues to be highly ambiguous in the mainstream discourse. To begin with, the term *flexibility* is rarely defined in the numerous policy prescriptions and strategic papers that refer to it and the relationship between its various dimensions, forms, and strategies is often unspecified. This, as the legal scholar Sandra Fredman (1997, 301) points out, renders “flexibility itself a flexible

⁵ The term “liquid modernity” was coined by a Polish-English sociologist Zygmunt Bauman in his 2000 book by the same title, wherein he uses the term to describe contemporary social reality.

term” (see also Perrons 1999, 392); or a vague catch-all or abstract phrase (Pollert 1988) that, in the policy discourse, often carries either neutral or explicitly positive connotations by its association with other keywords like efficiency, growth, or competitiveness (Standing 1986). The vagueness of this characterization obliterates the fact that flexibility is a heterogeneous phenomenon; there are not only different types of flexibility and flexibility strategies but, as Gerhard Bosch (1995, 17) reminds us, “flexible working-time arrangements” also differ across national labour relations contexts and employment models. Specifically, this neutrality glosses over the fact that flexibility’s various forms have distinct, and often opposing impacts on different stakeholders,⁶ be they specific parties to the employment relationship, firms, different labour market participants (Goudswaard and de Nanteuil 2000; Strzemińska 2008a), or society in general (Bauman 2000; Sennett 1998). Finally, this neutral characterization also obscures the fact that flexibility historically has been embedded in the broader discourse of deregulation and promoted by neoliberal reform agendas in most industrialized countries (Ashiagbor 2004; Fudge 2005), and, to various extents, in the former socialist states undergoing political-economic transition to liberal market economies (Stenning et al. 2011; see also Chapters 4 and 5 of this study).

Contrary to these neutral depictions of flexibility practices, as the American sociologist Richard Sennett (1998, 74) convincingly argues in his book *Corrosion of Character*, flexibility has concrete, and often negative, personal consequences. These, in turn, extend beyond the realm of work, and tend to affect people’s everyday lives, as well

⁶ As I show in Chapters 4 and 5, in Poland, for instance, deteriorating trade union representation and a highly insecure labour market have contributed to development of very detrimental flexibility practices, at least from the perspective of working conditions and workers’ ability to balance paid work with unpaid family obligations. Indeed, the Polish example aptly illustrates that the neutral or positive depiction of flexibility in the political discourse often masks the tensions and conflicts inherent in flexibility itself.

as their relationships and the communities to which they belong (Sennett 1998; Bauman 2000).⁷ However, flexibility may also challenge the traditional (and gendered) conceptions of “work” and “worker” (Conaghan 2005; Collins 2005), and, thus facilitate more egalitarian work organization and distribution of tasks in society (Plantenga and Remery 2009). Given these complexities and diverse takes on flexibility’s potential, it is necessary to unpack this ubiquitous yet ambiguous concept by defining it more precisely and understanding its origins. This elaboration will allow us to assess how flexibility has been used in the context of working-time regulation at the EU level and in Poland, to decide whether it indeed possesses a transformative potential, and to determine how it could be implemented in a more socially sustainable way.

2.2.2 Defining Flexibility and its Three Dimensions

According to the OECD, flexibility is the ability of systems, organizations, and individuals to adapt successfully to changed conditions by adopting new structures and patterns of behaviour (OECD 1986). The OECD’s conceptualization has been a common frame of reference in the debate on flexibility, and illustrates well the largely positive (i.e. the notion of successful adaptation) and politically neutral connotations of flexibility in the dominant discourse. The OECD characterization of flexibility has been very

⁷ Indeed, the recognition that flexibility has some negative consequences is one of the key rationales underlying the more recent shift towards the promotion of “flexicurity” by the European Union. In its *Employment in Europe Report - 2006* (not published in the Official Journal), the European Commission describes flexicurity as an optimal balance between labour market flexibility and security for employees against labour market risks. In the Commission’s interpretation, flexicurity involves replacing the notion of job security, a principle that dominated employment relations until recently, with that of “protection of people.” See: Eurofound European Industrial Relations Dictionary (2008) for the full description, including listing of EU policy instruments and the common principles of flexicurity: <http://www.eurofound.europa.eu/areas/industrialrelations/dictionary/definitions/FLEXICURITY.htm/>. See also, Viebrock and Clasen (2009) for a comprehensive review of the concept. Nonetheless, flexibility continues to be an important element in the flexicurity discourse and, as some have been arguing, it continues to be hegemonic (Fredman 2004; Monks 2007).

influential in the context of policymaking; however, the recent elaboration of the flexibility concept by the European Foundation for the Improvement of Living and Working Conditions (the European Foundation) is more incisive because it makes the political and economic dimension of flexibility more apparent. Specifically, the European Foundation's definition disaggregates flexibility by identifying its three key dimensions: 1) the employer, or business efficiency flexibility; 2) employee, or work-family balance flexibility; and 3) flexibility as the policy response to "labour market rigidities".⁸ While the first two dimensions are the ones most often identified in the contemporary discourse, the last dimension is usually less explicit. I begin by considering this third dimension because making it apparent helps to historicize the concept flexibility; it is also crucial to understanding how the remaining two dimensions have been employed in the official discourse and practice.

Flexibility as the Policy Response to Structural Rigidities

The concept of flexibility initially arose in the 1970s to address the needs of firms dealing with increasing competitiveness and the growing pressures to increase economic efficiency and productivity (Bosch, Dawkins, and Michon 1994; Goudswaard and de Nanteuil 2000). These changing conditions, sometimes referred to as the "new economy", emerged from the interplay between ongoing processes and new phenomena, including the globalization of markets, internationalization of finance, introduction of new modes of production and just-in-time delivery, as well as the information technology revolution (Perrons et al. 2005; Fudge and Owens 2006; Albo 2010; Clement et. al. 2010). In

⁸ The Eurofound European Industrial Relations Dictionary (2007). <http://www.eurofound.europa.eu/areas/industrialrelations/dictionary/definitions/FLEXIBILITY.htm> (hereinafter Eurofound Industrial Relations Dictionary 2007). See also, Chung, Kerkhofs and Ester (2007).

response, an economic and organizational consensus began to develop, according to which business survival and success in this altered environment demanded a new kind of firm, one that was nimble, adaptive, and flexible (Atkinson 1984; Pollert 1988).

Through the 1980s, the notion of flexibility, one of the hallmarks of this new consensus, became increasingly mainstreamed in the political and economic discourse and actively promoted at most levels of governance as the essential strategy for regaining and maintaining economic competitiveness (Pollert 1988; Ojeda Avilés and García Viña 2009, 79). This shift to flexibility, however, did not occur in a political vacuum. In fact, it was highly politicized because flexibility was closely tied to deregulation. As Ashiagbor (2004, 33-71) explains, both were essential elements of neoliberal reforms that were carried out in the 1980s and 1990s in most industrialized countries, on the advice of institutions such as the International Monetary Fund (IMF) and the OECD. Influenced by Chicago-school neoclassical economic theory and the “law and economics” school of regulation, these reforms targeted and sought to dismantle or “trim down” various forms of government interference and regulation of markets, such as those that developed in many Keynesian-style welfare states in the post-WWII period (Ashiagbor 2004, 10-22). This attack was based on the thesis that regulation is a source of rigidities and impedes the functioning of markets, including labour markets. Ashiagbor observes that according to this view, employment protection systems, or institutional arrangements that include labour and employment laws and collective agreements, for instance, weaken the demand for labour by making hiring less attractive and limiting the capacity of firms to respond to

changes in external markets by adopting flexible patterns of workplace management (Ashiagbor 2004, 40-43).⁹

In the European context, focus on the removal of rigidities became particularly prominent in the 1980s, amid growing concerns about weak economic performance and high unemployment (Bruun and Hepple 2009, 47-48; Ojeda Avilés and Garcia Viña 2009, 79). Compared to the “robust” American economy and the vibrancy of the emerging and highly competitive markets in East Asia (OECD 1994), the European economy was in a downturn and apparently was losing its competitive edge. According to Ashiagbor, unemployment quickly was regarded as the source and the symptom of Europe’s decline, and, most significantly, it was attributed to the systems of labour market regulation that existed in most EU Member States (Ashiagbor 2004, 38). In accordance with the prevailing economic orthodoxy, the IMF and the OECD advised the European governments and the EU to deregulate their labour markets and restructure their welfare regimes (Ashiagbor 2004, 38-43). Consequently, as Ashiagbor convincingly argues, as of the 1980s, combating unemployment and increasing employment rates became the key objectives of EU employment policy, and the flexibilization of labour markets was prominently adopted as one of the key strategies for achieving these goals (Ashiagbor 2004; see also Bosch, Dawkins, and Michon 1993). As I show later (section 2.3), this focus on flexibilization and deregulation was a significant force in shaping the EU universe of political discourse on working time. I will also suggest that the

⁹ More specifically, this logic sees protective regulations as precisely the types of institutional barriers, or market interferences, that distort competition, rack up the costs of production, thwart the evolution of nimble, adaptive, flexible firms, and prevent existing firms from thriving. These barriers, in turn, apparently contribute to the exodus of such firms, leading to loss of jobs and preventing the creation of new ones, thus raising unemployment rates. However, as Ashiagbor notes with reference to various OECD policy documents and statements, no empirical research has so far provided clear evidence of the link between employment protection systems and labour market performance, although the OECD itself remains committed to the critique of employment protection systems (Ashiagbor 2004, 42-43).

embeddedness of flexibility in the discourse of deregulation privileged certain types of flexibility over others.

Reconciling Business Efficiency with Employee Needs?

Although enterprises have experimented with flexible organization of work since the 1970s (Machol 1980; Bosch, Dawkins, and Michon 1994; Strzemińska 1984, 2008a, 2008b), official endorsement and promotion of flexibility in the political discourse has certainly contributed to, and supported, the increased reliance on flexibility strategies and practices at the enterprise level. As I have already observed, flexibilization in the organization of work can entail many different strategies (see Table 1). Furthermore, the forms of flexibility utilized by enterprises to improve productivity and efficiency do not always match the needs and demands or improve the working conditions of the increasingly diversified labour force. It is important, therefore, to distinguish between different dimensions of flexibility and to identify the tensions that exist between them.

From the standpoint of enterprises, flexibility can be driven by the “employers’ desire for variable (flexible) labour inputs, in terms of numbers employed or hours worked, to match changes in demand for products and services” and can be achieved by employer strategies designed to meet these objectives (Eurofound Industrial Relations Dictionary 2007). Alternatively, increases in productivity also can be achieved by promoting changes in employees’ skills and tasks (Eurofound Industrial Relations Dictionary 2007). Specific flexibility strategies employed by the enterprises can be qualitative, quantitative, external, or internal;¹⁰ the practices of flexibility may be

¹⁰ Goudswaard and de Nanteuil (2000, 19-20) and Vielle and Walthery (2003), in their reports for the European Foundation for the Improvement of Living and Working Conditions (the European Foundation), have developed useful typologies of the various flexibility strategies or practices that fit into the work

Table 1 Forms and Practices of Business Efficiency Flexibility

	Quantitative flexibility	Qualitative flexibility
External flexibility	<i>Employment status</i> Types of contract (fixed duration, temporary, on-call work, etc.) <i>Numerical/contractual flexibility</i>	<i>Production systems</i> (subcontracting, freelance labour) <i>Productive/geographical flexibility</i>
Internal flexibility	<i>Working hours</i> (overtime, part-time, weekend working, irregular/variable hours) <i>Temporal/financial flexibility</i>	<i>Work organization</i> (job rotation, multitasking, making workers responsible for planning, the budget, etc.) <i>Functional/organizational flexibility</i>

Source: Vielle and Walthery (2003, 8).

numerical, productive, organizational, or temporal (Atkinson 1984; Goudswaard and de Nanteuil 2000; Vielle and Walthery 2003; Strzemińska 2008b).¹¹ As these strategies are employer-driven, many of them tend to conflict with employee interests, although some are more intrusive than others. Those forms of flexibility practice that interfere with

organization and business efficiency dimension based on four variables, and organized along **two** axes: (1) quantitative, qualitative; and (2) external, internal. *Quantitative* flexibility refers to “the practices intended to affect the volume of work or employment,” while *qualitative* flexibility relates to, for instance, the practices of subcontracting to agencies or hiring specialized staff internal mobility between different facilities of the same undertaking (Vielle and Walthery 2003, 8). The distinction between *internal* and *external* flexibility, on the other hand, is between forms of flexibility that affect organization of work and different forms of employment. The first refers to, for example, the organization of workers’ activities within the framework of an existing, presumably stable, employment relationship, and the different work arrangements to which it can give rise. This flexibility may involve “internal mobility between different facilities of the same undertaking, multitasking of staff, annualisation of working hours, performance-related pay and profit-sharing schemes” (Vielle and Walthery 2003, 8). External mobility, on the other hand, relates to “the characteristics of the employment relationship as defined in the employees’ contracts of employment,” or their status. This flexibility can include forms of employment that are temporary, outsourced, or based on freelance work contracts. In practice, these various types of flexibility often overlap. Part-time work, for instance, is one example of such overlap, as it can be situated on the border between internal and external flexibility (Goudswaard and de Nanteuil 2000, Vielle and Walthery 2003, 8).

¹¹ The European Foundation distinguishes **four** types of flexibility practice: (1) *numerical flexibility*, which refers to practices designed to modulate employment statutes within undertakings and organizations; (2) *productive flexibility*, which refers to practices for decentralizing production and the use of subcontractors; (3) *temporal flexibility*, which makes use of variations in working hours and atypical hours or hours determined at short notice; and (4) *organizational flexibility*, which refers to practices designed to increase the multitasking of workers and to depart from conventional patterns of subordination (Vielle and Walthery 2003, 8).

employee interests have been sometimes termed “negative flexibility” (European Foundation 2007, 10-11; Strzezińska 2008b, 106-107).

By contrast with “negative flexibility”, employee-friendly or “positive” flexibility requires that those flexibility strategies that are utilized by the enterprise also coincide with the “employees’ desire for variable (flexible) contractual arrangements and working conditions to match changing private and domestic needs” (Eurofound Industrial Relations Dictionary 2007; European Foundation 2007, 10-11). When predictable and secure, flexible-work arrangements or types of employment relationships can indeed be beneficial from the perspective of achieving better work-life balance, active aging, easing the reconciliation of various competing obligations, such as familial and care obligations, or continuing education (Goudswaard and de Nanteuil 2000; Vielle and Walthery 2003; Anxo et al. 2004b; Supiot 2001; Plantenga and Remery 2010). Moreover, according to Dominique Anxo and others, and Deidre McCann, the availability of positive flexibility for all workers is also a necessary component of promoting “decent working time” or realizing workers’ individual preferences, and is crucial for the promotion of gender equality (Anxo et al. 2004b, 202-203; McCann 2004) because of its potential to make reconciliation of work and family obligations more manageable, and to enable better sharing of paid and unpaid work between men and women.

As research suggests, beyond benefiting workers and improving working conditions, positive flexibility can also lead to productivity gains for enterprises because it decreases absenteeism, tardiness, boosts morale, and decreases turnover (e.g. facilitating the retention of women) (OECD 2001b; Anxo et al. 2004b, 202-206). Whether or not firms recognize that positive flexibility can translate into long-term

economic gain, and can thus be mutually beneficial, European Foundation research has nonetheless shown that firms have a clear preference for deployment of external and/or quantitative forms of flexibility (Goudswaard and de Nanteuil 2000, 4). This preference is evidenced by the continuing spread of temporary work, outsourcing, part-time and asocial hours, and excessive overtime, for example. Since all of these flexibility practices contribute to diminishing job stability, insecurity, and lack of predictability in the scheduling of work, they are generally detrimental to workers and unlikely to improve working conditions or help with reconciliation of work and other obligations (Perrons 1999; 2000b; Goudswaard and de Nanteuil 2000; Strzemińska 2008b; Rittich 2010). Even the deployment of functional flexibility, which tends to yield more worker-friendly results, produces very limited benefits from the standpoint of improving working conditions. Functional flexibility is unlikely to compensate for the persistence of job monotony and/or job intensification in the workplace (Goudswaard and de Nanteuil 2000). As one European Foundation study concludes, it appears that “[i]n a more flexible environment, the improvement of working conditions increasingly becomes an issue in its own right” (Goudswaard and de Nanteuil 2000, 4). Indeed, a 2007 European Foundation study on the impact of flexibility on work-life balance concluded that on the basis of data collected in the 2000 European Working Conditions Survey (EWCS), it was “lack of flexibility [that] actually improves work-life satisfaction of parents employed full time,” since many parents who have some flexibility in their work arrangement tend to also work longer hours (European Foundation 2007, 25-27).

The “uneven” use of positive and negative flexibility practices and strategies confirmed by research is, to a large extent, related to the discourse of deregulation within

which flexibility has been embedded. The main goals of this discourse have always been market development and efficiency. Indeed, the main forms of flexibility promoted at the transnational level, including at the EU, have been part-time work, temporary work, and other types of precarious labour arrangements that were unlikely to provide positive flexibility to workers or make for more egalitarian labour markets (Jeffery 1998; Ashiagbor 2004; Rittich 2006a; Vosko 2010). More recently, efforts have been made to recast these forms of atypical, flexible work in more favourable light by making a connection between 1) flexibility and “adaptability” of work, and 2) the reconciliation of work and family life or work and other non-work activities (Perrons 1999; Lewis 2005; Jenson 2009). Some prominent examples of this trend are the OECD’s *Babies and Bosses*¹² series and the emphasis on activation of women or better reconciliation of work and family in many EU policy documents, including the European Employment Strategy and employment guidelines, the Green Paper on the *Partnership for a New Organization of Work*,¹³ and the *Roadmap to Equality*.¹⁴ Nonetheless, as I will discuss in the following section (which will focus on how the concept of flexibility has been employed in the EU universe of political discourse on working time), there are good reasons to be wary of this more recent shift.

¹² *Babies and Bosses* is a four volume series which reviews work and family reconciliation policies and family outcomes in Australia, Denmark and the Netherlands (OECD 2002); Austria, Ireland and Japan (OECD 2003); New Zealand, Portugal and Switzerland (OECD 2004); and Canada, Finland, Sweden and the United Kingdom (OECD 2005).

¹³ COM (97) 128 final.

¹⁴ *Roadmap to Equality between Women and Men 2006-2010*. Communication from the Commission to the Council, the European Parliament, the European Economic and Social Committee and the Committee of the Regions. COM (2006) 92 final (hereinafter *Roadmap to Equality between Women and Men 2006-2010*). The document listed the reconciliation of private and professional life, emphasizing flexible working-time arrangements as one way of achieving this objective. However, it also expressed the potentially negative impact that women’s sole take up of such arrangements may have on their opportunities and urged that such arrangements/entitlements like part-time work and parental leave should be encouraged for men as well.

2.3 EU Working-time Regulation – The Terrain of Competing Discourses

The objective of equal career opportunities for women and men have not been at the forefront of working-time policies [...] However, it definitely is a working-time issue, as differences in working time profiles of women across Europe are much more pronounced than those of men...

Stephen Lehndorff (2007, 22)

Regulation of working time has been a longstanding issue on the EU agenda.

However, the extent to which the Community could regulate in this area, and the types of regulatory actions it could adopt, have depended on the reach of its competences and the availability of legal instruments and processes by which to assert it. As was the case with much of the Community's social *acquis*, the adoption of working-time standards was enabled by a series of constitutional changes that expanded the Community's regulatory reach and the allocation of power between the different political and institutional actors with the influence over the universe of political discourse (i.e. the Member States, the Commission, the Council, the Parliament, and the social partners) (see Appendix A). The following section briefly describes the historical shifts in the EU's institutional framework in order to set the frames of reference for a closer examination of the universe of political discourse that gave rise to the Community working-time regime.

2.3.1 The Institutional Framework of Social Europe

The EU dates back to the 1950s, when it was established as a steel and coal community¹⁵ and later expanded into a broader European Economic Community (EEC)

¹⁵ *Treaty Establishing the European Coal and Steel Community*, 18 April 1951, 261 U.N.T.S. 140 (expired 23 July 2002) (*ECSC* or *Treaty of Paris*).

of six neighbouring states.¹⁶ The 1957 *Treaty of Rome*¹⁷ which founded the EEC, had a relatively narrow, and mainly economic, thrust as its primary purpose was to establish a common market between the signatory states. This task was to be accomplished through the removal of barriers to movement (of goods, persons, services, and capital) and the impediments to competition (Bercusson 1995; Barnard 2006). Thus, while the *EEC Treaty* conferred significant regulatory powers on the Community institutions¹⁸ for the purpose of market building, it envisaged only a limited role for them in the field of social policy,¹⁹ reserving this area for the regulatory action of the individual Member States (Barnard 2006). Specifically, the Treaty's Social Policy Title committed the Member States to "agree upon the need to promote improved working conditions and an improved

¹⁶ Germany, France, Italy and the three Benelux countries (Belgium, Luxembourg and the Netherlands). The communities together, the ECSC, the EEC, and the Atomic Energy Community are often referred to as the European Communities (EC) or European Community for short.

¹⁷ *Treaty Establishing the European Economic Community*, 25 March 1957, 298 U.N.T.S. 3 (hereinafter *EEC Treaty* or *Treaty of Rome*).

¹⁸ The key institutions of the EEC, shared with the Euroatom and ECSC, were the Common Assembly (later, the European Parliament) and the Court of Justice (later, the European Court of Justice). Initially, the three communities had separate High Authority (called the Commission) and Council. Under the *Treaties of Rome*, the Council was assigned the most power, with the Commission coming second, and the Common Assembly having very limited power. The *Merger Treaty*, 1965 [1967] O.J. 152, established the European Communities (EC) in 1967, to which the institutions of the EEC were carried over. These key institutions have continued to form the core of the EC and later the EU; however, with time, the balance of power has shifted between them, particularly between the Council and the Parliament (the importance of the latter growing significantly with the subsequent Treaty change). Thus, the key institutions of the contemporary EU are: the Council of the EU, the Commission, the European Parliament, the European Council, and the European Court of Justice. The European Council – composed of national heads of state or government and the President of the Commission – sets the overall political direction of the EU, but has no power to pass laws. The European Parliament, the Council of the EU, and the European Commission, share the law-making power. The Commission is the executive branch of the EU, its permanent bureaucracy, and represents the interests of the Union as a whole; it proposes legislation, implements decisions, "guards" the Treaties, and is responsible for the day-to-day running of the Union. The Council appoints the individual Commissioners, while the President of the Commission is appointed by the European Council and elected by the Parliament. The Council represents the governments of individual Member States, and its Presidency is shared by the Member States on a rotational basis. The European Parliament represents EU citizens, by whom it is directly elected every five years. The European Court of Justice upholds EU law. Other EU institutions and bodies include, among others, the European Central Bank, the Court of Auditors, the European Social and Economic Committee, and the Committee of Regions.

¹⁹ The Treaty included binding social provisions on freedom of movement of workers (art. 48-49) and establishment (art. 52-58), and equal pay (as necessary to minimize distortions in competition, art. 119).

standard of living for workers” (*EEC Treaty*, Article 117), while its Article 118²⁰ charged the Commission – an institution responsible for co-legislating (with the Council) and for “guarding” the Treaties – with the limited procedural/consultative task of promoting “close coordination” and “facilitation” of Member State actions in the field of social policy.²¹ As Barnard (2006, 4-5) observes, neither of these articles were binding on the Member States and thus, neither conferred enforceable rights on European citizens, or significant regulatory competency in the social field to the EEC institutions.

The asymmetry between the social and economic components of the *EEC Treaty* was not necessarily an indication that the Member States saw the former as unimportant (Deakin and Rogowski 2011, 7). Rather, it stemmed from the consensus that harmonization of social standards was not required for the purpose of economic integration and should remain within the scope of national competence (Barnard 2006, 5-7). First, the EEC (EC as of 1967) structure was superimposed on the existing national social protection models and standards, which according to the majority of the Member States and the weight of expert opinion at the time were not sufficiently discrepant to cause distortions in competition.²² Second, it was believed that the development of the social dimension was not necessary because the benefits of market integration would eventually lead to the overall improvement in social standards across the Community

²⁰ These articles were subsequently renumbered in 1997, however I will use the previous numbering where I refer to them in their historical context.

²¹ Barnard (2006, 4) cites *Germany UK and Others v. Commission* (Joined Cases 281, 283, 285, 287/85) [1987] E.C.R. 3203, as the case affirming the limited, procedural scope of this article. According to Barnard, the article could not be used to impose on Member States results to be achieved, nor prevent them from adopting measures at the national level.

²² Of the six founding states, it was only the French government that took a more pro-regulatory stance, as it sought to guard the high level of legal protection, particularly in regard to hours of work, equal pay, and social security. However, the French position was not supported by 1956 Report of the International Labour Organization (ILO) Committee of Experts, which took a position that with exception of equal pay, no harmonization of social standards was necessary for the creation of the common market (Moffat 1997, 48).

(Barnard 2006, 5-6). Indeed, through the 1960s and early 1970s, the policies of Keynesianism and the steady growth and prosperity of the Member State economies made for a political climate that was fairly receptive to improvements in social standards, including labour standards (Kenner 2003; Bruun and Hepple 2009, 34-40).

The EC's first enlargement in 1973,²³ however, provided the impetus for the broadening of the Common Market's social dimension to counteract potential distortions stemming from the accession of states with different social standards²⁴ (Kenner 2003, 24). Moreover, with the effects and human costs of the uneven growth across the Community becoming evident, the Community's architects realized that further market integration would require "a human face" to gain the support of European citizens (Barnard 2006, 9; Kenner 2003, 24). Hence, in 1974, the Council passed a Resolution (based on the Commission's proposals) adopting the Community's *First Social Action Programme (SAP)*²⁵ and proclaiming commitment to social progress alongside the Community's further economic and political expansion (Kenner 2003; Barnard 2006). Specifically, the SAP referred to the attainment of full and better employment, the improvement of living and working conditions, and the increased role for social partners – the representatives of labour and business – for decisions taken at the Community-level and for workers at the enterprise-level, as the key social policy goals. Nonetheless, as Kenner (2003, 27-42) shows, with the 1974 Council Resolution setting out the program being a form of non-binding soft-law that required political will to apply it, and with

²³ The accession of Denmark, Ireland, and the United Kingdom.

²⁴ As Kenner (2003, 24 note 8) points out, the need to secure the high level of social protection in Denmark after its accession was a significant factor.

²⁵ *Council Resolution of 21 January 1974 Concerning a Social Action Programme* [1974] O.J. C 013/1 (hereinafter *Social Action Programme* or *SAP*).

Europe's economic stability having been shaken by the twin oil shocks of the 1970s, the legislative program and the subsequent actions adopted under it fell short of expectations. Consequently, although some areas of social policy experienced rapid expansion during this period,²⁶ with the area of equality between men and women being most prominent,²⁷ the extent to which the Commission could take further and broader action on social policy was largely constrained by the limited Treaty bases and the requirement of unanimity in the Council.

Just how limiting this latter requirement was became particularly evident with the 1979 election of the Margaret Thatcher Conservatives in the United Kingdom (UK). While not opposed to continuing the process of market integration, the UK Conservatives were fully averse to developing the EC's social dimension (Hepple 1987, 80-83; 1990; Barnard 2006, 10; Kenner 2003). Instead, through the 1980s, the Thatcher administration became Europe's key promoter of the neoliberal policies of deregulation, opposing harmonization of standards and the expansion of social dialogue and worker consultation as primary sources of rigidities and market constraints (Hepple 1990; Barnard 2006, 10; Bruun and Hepple 2009, 46-47). In doing so, the UK sided with the European business lobby and employer organizations, at the same time alienating organized labour. Accordingly, through much of the 1980s, the UK vetoed all proposals for Community-level social standards, making this period one of particular "stagnation" in the

²⁶ As Bruun and Hepple (2009, 44) explain, the EEC labour directives adopted during this period reflected the context of recession brought on by the OPEC crisis, with the main issues tackled being collective dismissals, transfers and insolvencies. The aim of these measures was to equalize costs and thus, improve economic competition.

²⁷ The provisions of the EC Treaty on equal treatment were implemented by directives on equal pay (1975) and equal treatment (1976), and several landmark decisions of the European Court of Justice (ECJ).

development of the social *acquis* (Bercusson 1995; Moffat 1997; Kenner 2003; Barnard 2006, 10).

A major breakthrough for Social Europe came with the adoption of the *Single European Act*²⁸ in 1986, which according to Barnard (2006, 11), “breathed new life” into the integration project and, at least partially, alleviated the UK-imposed stalemate. Despite the Delors Commission’s stated commitment to developing the Community’s social dimension, or the “European social space”, the driving force behind the *SEA* was to complete the single market (Kenner 2003, 71-72). However, to legitimize further market integration and the entrance of new Member States (Greece, Portugal and Spain) with significantly lower GDPs and labour costs, the Act also introduced several changes to the Social Policy Title of the *EC Treaty*. According to Kenner (2003, 79), the *SEA* was “a pale shadow” of the earlier institutional reform proposals drafted by the European Parliament, an institution representing the Community’s citizens. Nonetheless, the Act introduced some important innovations, the long-term effects of which, were likely unforeseen by their authors, especially the UK. Of particular significance was the inclusion of Article 118a into the Social Title, which gave the Community new regulatory competences to adopt minimum standards Directives in the areas of working environment and health and safety at work. To ease the passage of binding instruments, the *SEA* changed the voting rules, extending qualified majority vote (QMV) rule to matters falling under Article 118a. Moreover, one of the Act’s most important innovations was to provide for the “co-operation” between the European Parliament and the Council in the adoption of legislation falling under Article 118a, thus partially responding to the

²⁸ *Single European Act*, [1987] O. J. L 169/1, 25 I.L.M. 506 (an act modifying the basic treaties) (hereinafter *SEA*).

critiques about the Community's democratic deficit by giving the Parliament a far greater role and influence over the content of the Community legislation than it previously had (Craig and DeBurca 2011, 11). Along similar lines, Article 118b was added to emphasize the importance of social dialogue at the EC level, and the Commission was charged with the role of promoting talks between the representatives of management and labour (Kenner 2003, 79-80; Barnard 2006 11-13).

This expansion of the Community's social competences in 1986 was followed by the "solemn proclamation" of the *Community Charter of Fundamental Rights of Workers*²⁹ (*Social Charter*) at the 1989 Strasbourg Summit, which, building on the *Treaty of Rome*'s objectives of improving living and working conditions and the Social Title of the *SEA*, established twelve basic categories of workers' rights.³⁰ As a symbolic declaration of political intent, the *Social Charter* was not legally binding. However, the *Action Programme*,³¹ which accompanied the *Social Charter*, outlined the Commission's legislative plans for giving effect to the rights contained in the latter. Specifically, the programme included 47 different measures, 10 of which were to be adopted as Directives.³² While the UK opted-out of the *Social Charter*, it was well known that any actions proposed by the Commission and adopted by the Council under the 1989 *Action*

²⁹ *Community Charter of Fundamental Social Rights for Workers*, Luxembourg: Commission of the European Communities (hereinafter *Social Charter*).

³⁰ The twelve categories of workers' basic social rights, included the freedom of movement (Art. 1 to 3), employment and remuneration (Art. 4 to 6), improvement of living and working conditions (Art. 7 to 9), social protection (Art. 10), freedom of association and collective bargaining (Art. 11 to 14), vocational training (Art. 15), equal treatment of men and women (Art. 16), information, consultation, and participation for workers (Art. 17 to 18), health protection and safety at the workplace (Art. 19), protection of children and adolescents (Art. 20 to 23), protection of elderly persons (Art. 24 and 25), and protection of disabled persons (Art. 26). The *Social Charter* also included provisions on Member States's action (Art. 27 to 30).

³¹ *Action Programme relating to the Implementation of the Community Charter of Basic Social Rights of Workers*. Communication from the Commission, COM (89) 568 final (29 November 1989) (hereinafter 1989 *Action Programme*, or *AP*).

³² Mainly in areas where the *SEA* established competence.

Programme would be taken under the EC Treaty (post the *SEA* amendments), and thus bind all Member States, the UK included. Significantly, since unanimity was no longer required for Article 118a actions, the sole UK veto would not be capable of blocking social legislation proposals. In effect, after the inertia of the 1980s, the early 1990s constituted a period of some expansion for the Community's social *acquis*, with several labour and employment law Directives, including the Directive on working time, adopted under the new legal basis provided by Article 118a.³³

The scope of the Community's competence in the social field continued to expand through the 1990s, although initially without application to the UK, which, maintaining its earlier stance, opted-out of the Social Chapter (Social Policy Protocol and Social Policy Agreement) appended to the 1992 *Treaty on European Union*.³⁴ Binding on the remaining eleven Member States, the agreement listed additional fields to which qualified majority voting (QMV) and the co-operation procedure³⁵ applied, and identified new areas of social policy in which the Council could adopt measures by unanimous vote. Moreover, the agreement envisaged greater policy-making involvement for the social partners, whose opinions on the direction of the Community policy and action would

³³ Nonetheless, as Barnard (2006, 14) points out, even at this highpoint of Community activity in the social field, these actions remained modest *vis-à-vis* the far-reaching economic measures simultaneously proposed and adopted to achieve the single market goals by 1992.

³⁴ *Treaty on European Union* (EU), 7 February 1992, [1992] O.J. C 191/1, 31 I.L.M. 253 (hereinafter *Treaty of Maastricht*). Importantly, the *Treaty of Maastricht* also introduced the co-decision procedure which further strengthened the role of the Parliament because it gave it the power to block legislation of which it disapproved, if it was subjected to this procedure (Craig and De Burca 2011, 14).

³⁵ In the *Qualified Majority Voting* procedure votes in Council are weighted in accordance with the size of population, though adjusted. At present, this method of voting applies to particular matters concerning employment and industrial relations specified by Article 153(1) and Article 153(2) of the Treaty on the Functioning of the European Union (TFEU). The *cooperation procedure*, also known as the Article 252 procedure, was introduced by the SEA and was the primary legislative procedure before the Treaty of Amsterdam. Under this procedure, the Council could, with the support of Parliament and acting on a proposal from the Commission, adopt legislation by qualified majority. The Council could also overrule the Parliament's rejection of the proposed law, when acting unanimously. Cooperation procedure was limited by the Treaty of Nice and eliminated entirely by Treaty of Lisbon (Craig and De Burca 2011).

from now on be sought by way of formal consultation process. Going even further, the agreement also provided that the Council would give legal (and binding) effect to collective agreements reached by the representative social partners acting at the Community level (Barnard 2006). Contrary to the expectation, however, this expansion of EU competences in the social field and the new power given to the Parliament and the social partners in the legislative and policy-making processes failed to yield significant policy developments in the years following the Social Chapter's adoption. While the Commission's 1993 Green and 1994 White papers on social policy,³⁶ issued shortly after Maastricht, continued to profess the EU's commitment to the dynamic development of its social dimension, the stringent Economic and Monetary Union (EMU) convergence criteria and the budgetary constraints associated with them on the one hand,³⁷ and the ongoing UK Social Chapter opt-out on the other, significantly tempered the enthusiasm of the remaining eleven Member States (Barnard 2006). In effect, as Barnard (2006, 22) points out, only four social Directives were adopted by the Council under the Social Chapter in the five years between the 1992 Maastricht and 1997 Amsterdam Treaties.

Following the electoral victory of the British Labour Party in May 1997, the UK ended its opt-out, which enabled the Social Chapter's amendment and its insertion into the EC Treaty on occasion of the 1997 Amsterdam intergovernmental conference.³⁸ The substantive changes to the Chapter included: 1) the amendment of Article 117 to include

³⁶ *European Social Policy: Options for the Union*. Green Paper, COM (93) 551 (17 November 1993) and *European Social Policy: A Way Forward for the Union*. White Paper. Part A. COM (94) 333 final (27 July 1994).

³⁷ Article 121(1) of the *EC Treaty* lists four main criteria of convergence. This tension between the social and economic policy goals was also reflected by the 1993 White Paper on *Growth, Competitiveness, Employment: The Challenges and Ways forward into the 21st Century*, COM (93) 700 final, (5 December 1993).

³⁸ *Treaty of Amsterdam*, a result of this IGC, was signed on 2 October 1997, [1997] O.J C 340/1, 37 I.L.M. 56.

an express reference to “fundamental social rights” set out in the 1961 *European Charter* and the 1989 *Social Charter*; 2) the replacement of the co-operation procedure with co-decision under Article 137, thereby further strengthening the role of the European Parliament; and 3) particular attention to the principle of equality (of opportunity and treatment in matters of employment and occupation) between men and women to which the co-decision procedure was also extended (Barnard 2006; Craig and De Burca 2011). Moreover, a special emphasis on employment was reflected by the insertion of a new Title on Employment into the Treaty, as well as a more general mainstreaming of the objective of attaining high levels of employment.

Significantly, in addition to the expansion of the Social Chapter, the Amsterdam Treaty also ushered in a new regulatory mechanism for its governance. By contrast with the “hard” and rights-based approach taken at the end of the 1980s and in the early 1990s, the approach adopted in Amsterdam focused instead on the “soft” coordination of the national employment policies. Specifically, while the individual Member States remained in charge of their own policy development, the Amsterdam Employment Title required them to do so by taking into account the Council’s annual broad economic guidelines, additional guidelines drawn up by the European Council, as well as the non-binding employment guidelines proposed by the Commission on an annual basis. The European Employment Strategy – as this yearly cycle of policy making became referred to after the 1997 Luxembourg summit – marked the official shift away from the Community’s emphasis on measures securing workers rights to those addressing the rates of European unemployment, particularly the promotion of active labour markets and the development of a skilled, trained and adaptable workforce (Ashiagbor 2004; Barnard 2006). According

to Ashiagbor, the European Employment Strategy also marked the shift away from European social policy to European employment policy (Ashiagbor 2004).

The soft regulatory mechanism adopted in Amsterdam was further developed by the 2000 Lisbon Strategy,³⁹ which named it the open method of coordination (the OMC). Although Lisbon shifted even further away from the traditional method of harmonization (through Directives, for instance) to coordination of Member State action (through the activities of the Council, European Council, and the European Commission), this shift was also accompanied by greater expansion into areas over which the Community had some competence but where the Member States continued to exercise significant control. According to Barnard (2006, 27), this shift was particularly significant with respect to areas where “law has proven to be a rather blunt instrument to bring about social change” (such as equality), and in the context of the prospective fifth, Eastern enlargement, which would bring in new Member States with distinct legal and industrial relations traditions. The Lisbon Strategy’s ambitious goal of becoming “the most competitive and dynamic knowledge-based economy that would be capable of sustainable economic growth with more and better jobs and greater social cohesion”⁴⁰ was reinforced by emphasis on employment activation and promotion of equal opportunities (to enhance that end). Lisbon set specific targets for employment rates at 70 percent for men and 60 percent for women (to be met by the deadline of 2010). Finally, to improve the legitimacy of its action, Lisbon extended the realm of social actors whose input would be sought, beyond the industrial social partners to actors in the broader civil society (Barnard 2006).

³⁹ Presidency Conclusions, Lisbon European Council, 23 and 24 March 2000, Bull EU-3/2000, 7-17.

⁴⁰ *Ibid*, para 5.

While Lisbon was not the last instance of Treaty change, for the purposes of the present chapter the most significant developments in the Community institutional architecture had taken place by that point. What should be mentioned is that the non-binding commitments to workers' basic rights found in the 1989 *Social Charter* and the 1961 *Charter of Rights* found a more robust expression in the *Charter of Fundamental Rights of the European Union*,⁴¹ which was signed and proclaimed on 7 December 2000 at the European Council meeting in Nice, and became legally binding on 1 December 2009, with the coming into force of the *Treaty of Lisbon*.⁴² The *Charter of Fundamental Rights*, among others, guarantees the rights to decent working conditions, work-family reconciliation, and gender equality. Article 31(2) enshrines the right "to limitation of maximum working hours, to daily and weekly rest periods and to an annual period of paid leave." Article 33(2) guarantees the right to "reconcile family and professional life" including protections against dismissal for reasons connected to maternity or parental leaves, while Article 23, the right to equality between men and women. While the Charter presents an important development and has been greeted with enthusiasm, both the UK and Poland negotiated a special protocol (Protocol No 30), which limits the Charter's application in both countries by restricting its interpretation by the Court of Justice of the European Union and the Polish and British national courts, specifically with regard to the "solidarity" rights contained in Title IV of the Charter. Both the right to work-family reconciliation and the limitation of working time are contained in that Title.

⁴¹ *Charter of Fundamental Rights of the European Union*, [2010] O.J. C 83/389 (hereinafter *Charter of Fundamental Rights*).

⁴² *Treaty of Lisbon, amending the Treaty on European Union and the Treaty establishing the European Community, signed at Lisbon, 13 December 2007*, O.J. C 306/01

This brings me to the another issue which has not been mentioned up to this point, and that is the role and influence of the European Court of Justice in the process of advancing and broadening the scope of the European social policy, and particularly the competences over working time. While opinions on the Court's role in advancing social and equality rights are divided⁴³, for my purposes here it is worth to recount Barnard's (2006, 36) observation that one of the key issues related to the Court's role is the challenge that its decisions have posed to the national systems of labour law and social protection. Claire Kilpatrick has recently noted that the Court, even if not directly involved in the process of legislating, nonetheless provides important input into the content of secondary legislation and can have a significant influence in the context of institutional struggles among the EU institutions or between the Member States within the Council (Kilpatrick 2011). As I will show in Chapter 3, this has been the case in the context of the *Working Time Directive*.

Ultimately, what the foregoing summary demonstrated, and as European law scholars contend, the process of Treaty amendment and Community's geographical expansion had significantly reconfigured the balance of power between the key institutional and social actors, extended the Community's competence *vis-à-vis* Member States (indeed, the Member States had ceded power via the very process of Treaty change) and diversified the legal instruments and techniques by which to exercise these powers (Barnard 2006; Craig and De Burca 2011). As will be shown next, this process of

⁴³ While the ECJ played a role in expanding the early EC equality jurisprudence (albeit mostly from a formal equality perspective), its record on gender has not been particularly good since. Particularly, feminist scholars have pointed out that the Court's "ideology" on motherhood and parenting remains gendered and conservative. See: McGlynn (2001, 2005) and Busby (2011).

re-arrangement and growth has had a particular effect on the universe of political discourse on working time (see Appendix A for graphic summary).

2.3.2 Between Security and Flexibility – Fostering Economic Efficiency and Combating Unemployment as Rationales for Community Working-time Regulation

The issues of working time were not very prominent in the EEC-level discourse before the 1970s. The matter remained within the competence of the Member States whose economic prosperity and stability in the preceding two decades made for a political climate that was receptive to progressive working-time reductions (Bosch, Dawkins, and Michon 1993; Moffat 1997).⁴⁴ Although specific regulations differed between countries, by the early 1970s most EEC Member States had individually legislated the 40-hour (or 48-hour) workweek (Bosch, Dawkins, and Michon 1993, 1), which became the “fixed reference poin[t] around which enterprises developed their work organization paradigm” (Bosch 1999, 135). From that point on, flexibilization of working time began to attract attention within national debates. Alongside concerns for productivity, discussions on working-time flexibility during the early 1970s also focused on its potential to enable the achievement of various *social* objectives. Specifically, matters of worker’s choice of working time (Bosch, Dawkins, and Michon 1993, 26), concerns about leisure, consumption, and work-life balance (Moffat 1997) all figured in these discussions. Indeed, in the early 1970s, even the official discourse of transnational institutions like the OECD (that have since then most eagerly promoted the flexibility-for-competitiveness agenda) acknowledged the social dimension of working time, its

⁴⁴ According to Bosch, Dawkins, and Michon, this trend or tendency towards harmonization was reinforced by the establishment of the international framework of working-time standards by, among others, the International Labour Organization (1993, 1, citing Blainpain 1988).

potential role in the improvement of living and working conditions and better adaptation of working time to workers' divergent needs at different life stages (OECD 1973a; OECD 1973b).⁴⁵

The objectives of improving the living and working conditions also prompted some discussion on working time at the EC-level, particularly in light of the interest in expanding the Community's social dimension and the Council's adoption of the 1974 *Social Action Programme*. Lacking the competence to propose binding Community legislation in this field, however, the Commission drafted a non-binding Recommendation affirming the 40-hour workweek and a four-week annual leave as social standards. While the Council adopted this Recommendation in July 1975, with Europe's economic outlook drastically altered by the OPEC crisis that began in October of the previous year, no concrete follow-up measures were taken to implement it (Moffat 1997).⁴⁶ In fact, along with the economic downturn, the whole discourse surrounding working time began to change once again. Rationales for regulation shifted away from the improvement of working conditions towards responding to economic change (Bosch, Dawkins, and Michon 1993), stimulating job growth and increasing efficiency and competitiveness of enterprises (Moffat 1997). Working-time reductions were not

⁴⁵ The social dimension was a subject of the 1972 international conference on New Patterns of Working Time, organized by the OECD. The objective of the conference was to carry out dialogue with representatives of management and trade unions to examine ongoing trends and identify areas for further research and examination. The conference was part of OECD's new expanded objective to extend its activities beyond focus on quantitative growth of the economy towards more engagement with the qualitative aspects of growth, or its social ends. See: OECD 1973a. The following year, a report by Archibald Evans, the OECD Rapporteur, considered in more detail the issue of flexibility in working-time and its potential role in improvement of living conditions (OECD 1973b). See also: OECD 1976. As Bosch, Dawkins, and Michon (1993, 26) have suggested, however, this shift to focus on individual choice was also prompted by the labour shortage in the early 1970s. Specifically, they cite the 1973 Rehn Report wherein it was proposed that policy should promote solutions that make individual choice coincide as much as possible with "manpower" requirements.

⁴⁶ Indeed, with the economic conditions altering significantly half way through the 1970s, no working-time measure or even a common strategy would be possible at the EC level until the 1990s.

completely off the agenda as the creation of new workspaces was initially explored through job sharing and work redistribution, with further working-time reduction measures being proposed by the governments in France, Belgium, and Luxembourg into the early 1980s.⁴⁷ However, there was a growing consensus that more flexibility was required to better respond to the changed economic circumstances, and concessions on working-time organization were being obtained through social dialogue and collective bargaining in some national contexts (Bosch, Dawkins, and Michon 1993).

Consensus around flexibility continued to strengthen through the 1980s, along with the deepening recession. Introduction of new modes of production, information technologies, and the globalization of markets exacerbated the tensions already felt after the oil shocks, spreading the general mood of “pessimism” across Europe (Kenner 2003, 72). Loss of manufacturing jobs due to the dropping demand and migration of firms to developing countries on the one hand, and the privatization of publically-run enterprises and sectors on the other (Standing 2009), meant losses in union membership in most EEC Member States (Ebbinghaus and Visser 1998⁴⁸) and gave employers more influence over the working-time agenda. Moreover, the shift towards a service-based, 24-hour economy, and the influx of women into the labour market caused changes in staffing and organizational demands (Supiot 1999; 2001; Anxo et al. 2004a). Consequently, through the 1980s, further concessions on working time were made in various national contexts

⁴⁷ 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] O.J. C 290/4.

⁴⁸ Ebbinghaus and Visser (1998, 3) identify the period from 1975 to 1995 as a period of “crisis” during which the rates of union density fell rapidly across Western Europe, from 40% at the start of the 1980s to 34% by 1990. While they stress that the rate of attrition varied in different Western European states, the overall trend was that of decline. The authors cite three types of factors affecting union density as: cyclical (political economic change), structural (social change), and configurational (institutional context).

(Bosch, Dawkins, and Michon 1993),⁴⁹ which were reflected in new working-time laws that included “longer daily and weekly maximum hours, longer periods of variability, widened possibilities for Sunday work and night work for women and greater derogation from legal minimum standards through collective agreements” (Bosch, Dawkins, and Michon 1993, 26-27). According to Gerhard Bosch, Peter Dawkins, and François Michon (1993, 27), these national developments were being “coordinated” by Member States of the EC, “probably [...] to generate a new and more flexible regulatory framework for employers in the more competitive EEC internal market.” With major economic institutions such as the OECD urging deregulation and flexibility of Europe’s labour markets as the cures for “eurosclerosis” (Grahl and Teague 1989, 91-92), high unemployment, and lagging performance (Ashiagbor 2004), along with similar urgings by the European business, a further shift to flexibility was inevitable.

While the EC Member States generally agreed on the need for more flexibility, there was no similar consensus, however, on how flexibility should be accomplished, and particularly, whether there was any role for the Community in this field. According to Niklas Bruun and Bob Hepple (2006, 48), most of the continental Member States did not see minimum standards and social dialogue as incompatible with flexibility. Working time had long been regulated by state-level legal intervention in continental Europe (Blanpain 1988, 18), and despite growing concerns over labour market flexibility and

⁴⁹ Bosch, Dawkins, and Michon (1993, 26) cite Belgium, France and Sweden as having made legislative changes by that time, and similar laws as being on the agenda in Austria, Germany and the Netherlands. Also, Tergeist (1995), refers to a 1986 European Trade Union Institute (ETUI) document noting that organized labour does not oppose flexibility per se, provided that it can retain a right to examine and evaluate different forms of flexibility from the standpoint of their likelihood to lead to the improvement of working conditions and the ability of employees to have some control over their working time (Tergeist 1995, 12, citing ETUI 1986).

economic efficiency,⁵⁰ most of these Member States maintained that social and economic standards could coexist and, indeed, bolster each other (Ojeda Avilés and García Viña 2009, 79). Similarly, as Simon Deakin and Frank Wilkinson (1994) have pointed out, continental Member States viewed transnational social standards as capable of raising productivity along with positive social and economic outcomes, provided that these standards retained some room for collective negotiations and derogations to reflect local circumstances. In this view, a *regulated* approach to flexibility was not only compatible with efficiency, it could also lead to more *equity* (Deakin and Wilkinson 1994).

By contrast, apart from select protective regulations (such as the nineteenth century protections of vulnerable groups: children, young persons and women), the UK had historically adopted a *collective laissez-faire* approach to regulation of working time; leaving the matter almost entirely to collective bargaining and employer regulation (Hepple 1990; Rubery, Deakin, and Horrel 1994, 274; Barnard 1997b, 9). While the resulting working-time norms were similar to those in continental Europe, in the 1980s, the Thatcher government took active steps to weaken trade unions and to dispense with other forms of regulation, believing them to be sources of rigidity which inhibit labour market flexibility, undermine job creation, and economic growth (Hepple 1987, 80-83; Ashiagbor 2004; Bruun and Hepple 2009, 45-49). From the UK's perspective, a harmonized transnational approach to regulation was undesirable, regardless of the amount of flexibility it enabled. Only full deregulation could provide the flexibility and efficiency that was necessary for economic success (Deakin and Wilkinson 1994), with

⁵⁰ Hepple cites examples of Belgium's and France's attempts at infusing flexibility via collective bargaining and derogations into their otherwise protective national legislation (Hepple 1990, 25). Throughout the 1980s, other states, like Germany, also promoted negotiated flexibility, and many experiments with working time organization took place in the German context (Strzemińska 2008a, 2008b; Bosch, Dawkins, and Michon 1993).

the bottom line being that since the UK had avoided setting minimum working-time standards of its own, it was not prepared to accept any from the EC (Bruun and Hepple 2006, 48).

Although both approaches ultimately focused on facilitating efficiency and flexibility, the ideological and regulatory differences between them were fundamental and caused significant tensions at the EC level through the 1980s. Given that the existing institutional framework provided limited legal basis for the Community action in the social field and made any such action dependent on the political will of all Member States, these differences made futile most of the Commission's efforts to secure a Community-wide approach to regulation of working time during this period.

In the early 1980s, for instance, the Commission proposed a series of working-time measures, partially in response to the regulatory developments taking place in many of the Member States, and as a result of the business lobby's pressures for more flexible and diversified work arrangements (Hepple 1990). Reflecting the limited competences, the proposed measures included draft Directives on part-time (1982)⁵¹ and temporary work (1982)⁵², both of which were proposed under the equal treatment provisions of the *EC Treaty*, as well as a non-binding *Council Recommendation on reduction of working time* (1983)⁵³. While all of the measures reflected the growing emphasis on flexibility, the Commission's overall approach appeared to be an attempt at breaching the tensions between security and flexibility and the social and economic rationales present in the working-time discourse of the late 1970s and the early 1980s. In a 1980 Commission

⁵¹ *Proposal for a Council Directive on voluntary part-time work*, [1982] O.J. C 62/7.

⁵² *Proposal for a Directive of the Council on temporary work*, [1982] O.J. C 128/2.

⁵³ *Supra* note 47.

Communication on Voluntary Part-time Work,⁵⁴ for instance, the Commission urged Member States to diversify working-time arrangements, but also to promote “voluntary” take up of part-time work, ensure that such work is not only promoted for women, and improve the quality of part-time work (“upgrading”), so as to encourage its take up by a broader range of workers⁵⁵ (Voluntary Part-time Work Communication 1980, 6). This was to be accomplished through extending part-time opportunities to a variety of occupations and positions, including those requiring “higher qualifications” and “more responsibility”, and ensuring that a wide range of part-time or reduced work schedules (on a daily, weekly or monthly basis) be explored to best meet the varying needs of workers at different stages of their lives (Voluntary Part-time Work Communication 1980, 15). One of the overarching objectives, or the “ideal solution,” that the wide promotion of part-time work would help facilitate, was:

... without restricting each worker’s freedom of choice, to seek a gradual reduction and redistribution of working time and at the same time to encourage greater sharing of non paid family and occupational responsibilities between marriage partners (Voluntary Part-time Work Communication 1980, 1).

Similarly, the 1982 *Memorandum on the Reduction and Reorganization of Working Time* and the 1983 *Draft Council Recommendation*, sought to balance the diverse needs of workers (and different types of workers) and employers. While more flexibility in work organization was to enable the latter to take maximum advantage of production

⁵⁴ *Voluntary Part-time Work*. Communication from the Commission. COM (80) 405 final (17 July 1980) (hereinafter Voluntary Part-time Work Communication).

⁵⁵ The Commission developed this approach on the basis of the *Council Resolution of 18 December 1979*, [1980] O.J. C2/1 on the adaptation of working time.

facilities and, hence, maximize productivity gains,⁵⁶ reduced hours of work were to create new jobs and serve a range of social objectives. Among others, reorganization and adjustment of daily hours also was to promote women's employment opportunities, create the conditions "which would allow a greater sharing of family responsibilities," as well as enable flexible retirement and life-long training (*Draft Council Recommendation* 1983, 4). So as not to interfere with the creation of jobs and the other social benefits created by shorter work times, the Commission's 1982 *Memorandum* and the 1983 *Draft Council Recommendation* urged against excessive reliance on overtime (as a particular form of flexibility) and, to that effect, suggested introducing overtime restrictions in the national legislation.

Thus, along with attempting to balance security and flexibility and the tensions between their proponents (management and labour, as well as the different Member States), and reconciling the social and economic objectives that working-time regulation could serve, the Commission's approach in the early 1980s also appeared to promote a degree of convergence in working hours of all workers. Crucially, with references to issues such as the reconciliation of paid work with the obligations involved in the care of children, training or flexible retirement, the 1983 *Draft Council Recommendation* also had the potential to significantly expand the political discourse on working time. Nonetheless, since the Commission's proposals in the early 1980s ultimately fell within the regulated flexibility approach, all met with the UK's opposition and the country exercised its veto power within the Council to block any Community action in this area (Hepple 1990; Moffat 1997). Indeed, it was not until the passage of the 1986 *SEA* and the

⁵⁶ Economic benefit was also to be realized by simultaneous reduction in compensation (to reflect the reduced hours) and removal of labour market rigidities through, for instance, relaxing mobility laws to ensure that workers were free to move to take advantage of job gains achieved in different areas.

subsequent adoption of the *Social Charter* and the *Action Programme* in 1989, that new opportunities opened for regulatory action on working time (see Appendix A). As will be shown below, however, the necessity to reframe the working-time issue to “fit” the new legal basis for action and to overcome the UK opposition had specific and limiting consequences for the political discourse on working time.

2.3.3 Limiting Flexibility, or Embedding Flexibility? – Health and Safety and the 1993 *Working Time Directive*

The passage of the *SEA* in 1986 enabled further development of the Community social dimension. One of the Act’s most significant innovations in the realm of social policy, and one that had a particular impact on the evolution of working-time discourse and regulation, was the expansion of the EEC’s regulatory competences to include matters related to the working environment and health and safety at work (Article 118a), and the application of the qualified majority voting (QMV) rule to these matters. The Act also gave the European Parliament a larger role in shaping the Community policy discourse and legislation by extending the co-operation procedure to matters falling under Article 118a. Given the Parliament’s more pro-labour tendencies *vis-à-vis* the Council and the Commission, this was an important innovation.

Another development that was significant in elevating the issue of working-time in the context of EEC policy was the adoption of the 1989 *Social Charter* which referred to working time in two of its articles. Specifically, the Charter’s Article 7 envisaged measures on “the duration and organization of working time and forms of employment other than open-ended contracts,” while Article 8 declared the right of every worker to a weekly rest period and annual paid leave. Although these provisions were not themselves

binding on the Member States, given that the Charter was merely a “solemn declaration”, the Commission’s accompanying *Action Programme* of 29 November 1989⁵⁷ called for adoption of more concrete and binding Community legislation. With respect to working time, this Programme called for a Directive on the “adaptation of working time” to be adopted under the new Article 118a competences of health and safety (*Action Programme* 1989, 17-18). In 1990, the Commission presented a draft Directive precisely on these grounds.⁵⁸

As Moffat (1997) observed, this shift in the framing of working time from an organizational matter related to reduction of unemployment and more efficient use of production facilities (but also other social objectives), to a narrowly construed matter of health and safety was clearly tailored by the Commission to take full advantage of the new competences, and thus be able to propose a Directive binding on all Member States where it had previously been able to only propose Recommendations. Perhaps more importantly, given that unanimity was no longer required for matters under Article 118a, reframing working time in terms of health and safety would also increase the likelihood of the proposal’s adoption by the Council, because it would effectively neutralize the UK veto (Moffat 1997).⁵⁹ While this strategy made some sense, re-characterizing working time as a health and safety matter was not without controversy or consequence for the working-time discourse and regulation. Because the approach was vehemently resisted by

⁵⁷ Supra note 31.

⁵⁸ *Proposal for a Council Directive on the Organization of Working Time*, O.J. C 254/4 (9 December 1990).

⁵⁹ As Moffat notes, although the reconciliation of social (adaptable working time for workers) and economic (job growth and competitiveness) objectives continued to be important, the Commission placed more emphasis on “improvement of living and working conditions” and “health and safety”, with few references being made to “working time” per se. Also, the scope of the measure later proposed by the Commission was more narrow; rather than Recommendation, the Commission proposed a directive that would set only minimal standards at the EEC-level by setting maximum duration of work, rest periods, holidays, night work, weekend work and systematic overtime (Moffat 1997).

the UK, which rightly saw it as the Commission's opportunistic way of sidestepping its opposition, the Commission had to be careful in making a very clear case for health and safety. The UK's opposition had consequences for the conceptualization of working time. Specifically, since the broad notion of working-time that lay at the heart of the 1983 *Draft Council Recommendation* was no longer fully congruent with the Commission's health and safety case, most references to the broad range of social objectives that could be achieved through working-time reductions were left out of the Directive's 1990 draft. While the Treaty enabled the Commission to propose a binding instrument, it also limited the scope of such document to one prescribing only minimum standards, hence harmonizing the Member States regulations at the lowest common denominator.

Furthermore, while the British support was ultimately unnecessary for the Directive's adoption, the country continued to play a key role in shaping the working-time discourse, with the effect that when the *Working Time Directive* was eventually adopted by the Social Affairs Council in 1993 (over the UK's abstention), the instrument's protective value was more symbolic than real. Over the course of the Council negotiations and the legislative process, a long list of derogations and exclusions from the rules prescribed within the Directive was added, thereby significantly circumscribing the Directive's protective functions (Kenner 2004a; 2004b). Indeed, as Graham Moffat (1997) suggests, the key driving force behind the instrument, "perhaps even its *raison d'être*" was probably labour market flexibility, not the protection of health and safety (Moffat 1997, 63). The fact that the Directive officially sanctioned significant working-time flexibility, particularly the flexibility to extend working hours for some categories of workers and in certain specified circumstances, tends to support Moffat's

interpretation. Ultimately, whether the motive behind its adoption was to prescribe flexibility or not, the Directive did appear to run counter to its own aims or those more broadly espoused by the *Action Programme* with which it was associated, namely to “improve living and working conditions.” It is important to note that in narrowing down the discussion of working-time reductions to matters of health and safety, the Directive omitted any references to promotion of other social goals (Moffat 1997), including the commitment to work-family reconciliation and the link between work hours, sharing of domestic responsibilities, and the promotion of equal opportunities. As the future discussions on the Directive and working time in general would elucidate, and as will be discussed in Chapter 3, the framing and legal choices made with regard to the *Working Time Directive* in the years preceding its adoption would prove to be a source of ongoing tensions. More importantly, these choices had crucial consequences for the shape of the emerging working-time regime for which the Directive provided the foundation.

Although the economic climate continued to be unfavourable in the period between the 1992 Maastricht and 1997 Amsterdam Treaties, the EU appeared to be moving away from neoliberalism (Kenner 2003). This shift, according to Kenner (2003, 310), reflected political developments in the UK and the US, where more moderate political parties were already in or about to come into office. Although flexibility continued to be seen as the primary cure for employment creation and efficiency, Kenner suggests that the focus shifted from labour market flexibility to workplace flexibility (Kenner 2003, 229-230). Employability and adaptability became the key objectives, and flexibility and diversification of work and working-time arrangements were to play key roles in making work more adaptable for increasing categories of workers. As employability and

adaptability eventually formed the central pillars of the European Employment Strategy, Title VIII of the Amsterdam Treaty and the post-Amsterdam Employment Guidelines, working-time flexibility became increasingly important. Both the European Commission's 1996 *Action for Employment in Europe* paper,⁶⁰ and the 1997 Green Paper on the *Partnership for a New Organization of Work*⁶¹ reflected this shift by pointing out that security in this new context would have to come at the cost of flexibility. Much like the 1983 *Draft Recommendation*, the Green Paper identified issues like mainstreaming equal opportunities, integration of people with disabilities, and lifelong learning, which were key elements of the new debate on workplace organization, including reorganization of working-time. Although this new attention to the impact of working time on other aspects of life remained firmly tied to the rationales of economic efficiency and competitiveness, the broader conceptualization of working time, and the re-casting of flexibility as capable of promoting various social objectives, appeared to recall the approach taken by the 1980 Voluntary Part-Time Work Communication, the 1982 *Proposal for a Directive on voluntary part-time work*, and the 1983 *Draft Council Recommendation* on the reduction and reorganization of working time and, as such, opened doors to a new engagement with gender and gender equality.

2.3.4 Working Time Flexibility Beyond Economic Efficiency – Reconciliation of Work and Family, and Gender Equality

As already noted in the previous section, the social dimension of working-time policy has been present in EU political discourse since before the 1970s. Indeed, the key rationale for working-time regulation, the protection of health and safety, has always

⁶⁰ *Action for Employment in Europe. A Confidence Pact*, CSE (96) 1 final (5 June 1996).

⁶¹ Supra note 13.

been social in nature and, for a brief period in the 1970s and the 1980s, the goals of attaining work-life balance or better reconciliation between work and other social objectives were already on the agenda. Having been completely omitted from the *Working Time Directive* by the mid-1990s, however, the objective of work-family reconciliation, and to a lesser extent the goal of equal opportunities, once again became significant social variants of the working-time flexibility discourse.

To be sure, the new recognition that standard organization of working-time had a significant impact on women's access to employment and that it was necessary to promote measures enabling better work-family reconciliation were strictly linked to increasing rates of employment. On the international level, the OECD and the World Bank put reconciliation issues on their agenda, through respective policies and publications such as the OECD's *Babies and Bosses* report series⁶² and the World Bank's *Engendering Development: Through Gender Equality in Rights, Resources, and Voice*⁶³ (Rittich 2006a, 43). Both discussed flexible working-time arrangements as being important to achieving women's inclusion in the labour force, while also making it possible to achieve better balance between their private and public lives (Rittich 2006a, 52).

As for the EU, various non-binding commitments to reconciliation of work and family had been espoused by Member States since the *Treaty of Rome* (Lewis 2006d), and the 1989 *Social Charter* made a clear, although non-binding commitment to it in the

⁶² Supra note 12.

⁶³ A 2001 World Bank policy research report, co-published by the World Bank and Oxford University Press.

context of its equal treatment provision (art. 16).⁶⁴ The inclusion of work-family reconciliation as the equal opportunities pillar of the 1997 European Employment Strategy and the post-Amsterdam Employment Guidelines more firmly embedded it within EU employment policy discourse. However, it did so by way of “soft” methods of governance.⁶⁵ The goals of activation of increasing numbers of women and their retention in the labour market were reflected in the Lisbon and Barcelona Strategies and the *Roadmap to Equality 2006-2010*, among others, all of which further strengthened the commitments to reconciliation of work and family and promotion of equal opportunities. In addition to its role in supporting women’s employment activation, reconciliation through working-time flexibility became increasingly promoted as a necessary strategic element in addressing the EU’s impending demographic crisis (Stratigaki 2004: 44-46; Guerrina 2005).

In terms of its more specific nexus with working-time policy and regulation, reconciliation of work and family and promotion of equal opportunities were used as key rationales for several instruments addressing various aspects of working time, parental accommodations, or new forms of work at the EU level. The *Parental Leave Directive*

⁶⁴ The Article 16 principle of reconciliation in the 1989 *Social Charter* was quite broad, providing that measures should be developed to enable men and women to reconcile their professional and family obligation. 2007 *Charter of Fundamental Rights* (in force since 2009), however, limited the now binding right to reconciliation of family and professional life to discrete periods following birth of the child, including protection against dismissal during maternity and parental leaves and the right to paid maternity leave. See: Article 33.

⁶⁵ According to Szyszczak (2006), “soft” methods of governance involve legal and policy processes that move away from harmonization by hard law directives, and rather focus on monitoring of policy implementation through coordination, reporting, peer review, name and shame mechanisms, etc. The term “open method of coordination” (OMC) was coined at the Lisbon Summit of March 2000. However, this type of a coordination mechanism was already introduced in the 1997 European Employment Strategy (the Amsterdam Treaty) (see section 2.3.1). Moreover, as Szyszczak points out, similar mechanisms of governance have been used in coordination of policies in the area of Economic and Monetary Union (the Broad Economic Policy Guidelines), and thus date back to the Maastricht Treaty 1991 (Szyszczak 2006).

and the *Part-Time Work Directive* provide two such examples.⁶⁶ Also years in the making and subject to disputes during the 1980s, these Directives eventually pursued a different path from the *Working Time Directive*. Unlike the latter, the issues of part-time work and parental leave were successfully negotiated by the social partners during the mid-1990s, leading to framework agreements later adopted by the Council as Directives in 1996 and 1997, respectively. These Directives echoed the enthusiasm of the 1993 White Paper on *Growth, Competitiveness, Employment*, the 1996 *Action for Employment in Europe*, and the 1997 Green Paper on the *Partnership for the new Organization of Work* for working-time flexibility and work-family reconciliation strategies as ways of achieving women's activation and equal access to the labour market. They also more directly recalled the EU's equal opportunities agenda.

This embrace of work-family reconciliation in the EU working-time discourse has also been tied to the fact that, although predominantly demand or employer-driven, changes in organization of work and associated flexibility-promoting regulations have been increasingly motivated by supply-side concerns (see, for instance, *Partnership for a New Organization of Work*; McCann 2004). The changing composition of the workforce – a result of the mass increases in women's labour market engagement on the one hand, and the aging population in most EU countries, on the other – prompted European policymakers and the social partners to pay closer attention to workers' abilities to reconcile work with family and other obligations. Moreover, the long-term goal of increasing employment rates prompted further interest in “encouraging” those segments of population with traditionally lower activity rates to enter the labour market. Thus,

⁶⁶ For the discussion of the Part-time Work (97/81/EC) and Parental Leave (96/34/EC) Directives, see Chapter 3.

continuing to increase women's participation, facilitating lifelong learning, retraining, and promotion of active aging became even more prominent elements of the recent EU policy. More recently, the growing concern with the aging population and low fertility has provided another impetus for promoting working-time flexibility for the purposes of work-family reconciliation (Stratigaki 2004; Guerrina 2005), since the latter policies are meant to address the needs of caregivers.

The social partner organizations on both sides have also actively taken up the agenda of flexibility as work-family reconciliation, even if with somewhat different focus and varying degrees of commitment. The European Trade Union Congress (ETUC), for instance has historically protected traditional working-time standards.⁶⁷ According to Catélene Passchier, the ETUC's Confederal Secretary, however, the Congress has become more open to supporting flexibility, partly to acknowledge the changing composition of the work force and its more diverse needs, and to respond to critiques that it was not sufficiently concerned with the lot of non-standard workers (Passchier Interview, 16 February 2010, Brussels). In its recent positions and reports, for instance, the ETUC accepted that, within some protective boundaries, working-time flexibility should be promoted as a way to enable better work-family reconciliation and gender equality (Pillinger 2006; see also ETUC 2006a, 2006b). However, the Congress' position has been that for those goals to be achieved, flexibility should be promoted for *all* workers, not just select groups, and that flexibility should be introduced within a protective framework to ensure that workers can really benefit from flexibility practices (Pillinger 2006; ETUC 2006a, 2006b; Passchier Interview, 16 February 2010, Brussels).

⁶⁷ Although, as was noted above, some openness to flexibility was expressed by the ETUI as early as in its 1986 Report. Supra note 49.

This shift in the ETUC's position on flexibility also stems from a change within the ETUC itself. Since 2003, Passchier has promoted a highly nuanced gender perspective on working time. At the same time, she doubted that this approach was uniform or fully representative of the views among European labour movement leadership (Passchier Interview, 16 February 2010, Brussels). She suggested that gender sensitivity was not necessarily a strong concern among many ETUC officials, or among union officials in the national organizations that the ETUC represented at the EU level.

The ETUC's stance on working-time has been the traditional point of contention between it and the EU-level employer organizations, mainly BusinessEurope (formerly UNICE), which have been promoting working-time flexibility and urging fewer protective regulations at the EU level. In terms of the reconciliation agenda, BusinessEurope has agreed that reconciliation of work and family is an important issue that can be achieved through flexibility (Second Phase Consultation 2004; Rønne Interview, 16 February 2010, Brussels). However, the organization has only promoted this agenda in the context of part-time work, temporary work and parental leave, and has opposed discussing reconciliation in the context of the *Working Time Directive* (Second Phase Consultation 2004; UNICE 2004a, 2004b). Focus on work-family reconciliation is also missing from the organization's recent *Go for Growth: An Agenda for the European Union in 2010-2014* (BusinessEurope 2009a). Although the report identifies the demographic crisis as one of the five key challenges facing Europe and lists the need to increase the supply of skilled workers as one of the two key ingredients in its strategy to boost growth (BusinessEurope 2009a), it does not mention flexibility or assistance to working caregivers who presumably are also in that skilled workers' pool. How the pool

of workers is to be increased without meaningful strategies for work-family reconciliation and redistribution of tasks between paid work and unpaid caring duties is unclear.

Although absent from the original *Working Time Directive*, the objective of work-family reconciliation also re-appeared in the context of discussions about the Directive's scheduled revision.⁶⁸ The Commission's 2004 consultation documents,⁶⁹ and later its proposal for a new Directive,⁷⁰ listed, among others, the issue of work-family reconciliation as significant for reconsideration of the working-time approach that the Directive adopted a decade earlier. Less emphasis was placed on the objective of equal opportunities, although work-family reconciliation and equal opportunities are clearly related. As I will elaborate in Chapter 3, however, the discussion of the most controversial provisions of the Directive – those that promoted negative forms of flexibility – continued to be debated in largely the same terms as before. The health and safety rationales on the one hand, and the necessity to provide sufficient flexibility for the most efficient operation of firms on the other, continued to constitute the key positions in the argument. Indeed, the negotiations concerning the Directive's revision failed precisely because no agreement could be reached on these grounds. Once again, the issue

⁶⁸ For a thorough discussion of the *Working Time Directive*, see Chapter 3.

⁶⁹ 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 (15 January 2004); 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*. <http://ec.europa.eu/social/BlobServlet?docId=2414&langId=en/> (hereinafter *Second Phase Consultation*).

⁷⁰ 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.

of work-family reconciliation was subordinated to the objectives on the basis of which a safer legal and political argument could be made.

2.4 Taking Gender Seriously?

While working-time flexibility and work-family reconciliation are now frequently featured side by side in EU discourse, as I have shown in the first section of this chapter, not all forms of flexibility are compatible with the objectives of work and family reconciliation. Nor are all forms of flexibility, including those that do allow for better reconciliation of work and family obligations, necessarily compatible with the goals of gender equality. Although diverse forms of flexible working-time arrangements have flourished in some national and industry contexts, too often flexibility has meant increased reliance on extended working hours and overtime, lack of predictability, and reduced worker control over their work schedule (Goudswaard and de Nanteuil 2000; Strzemińska 2008b). On the other side of the spectrum, flexibility has also meant the rise of non-standard jobs, including part-time and temporary contracts. The latter have been particularly aimed at women workers, and offered as convenient ways of reconciling their work with family obligations. Long hours and lack of predictability are not only incompatible with balancing work and family obligations (Fagan 1996; Figart and Mutari 2001; Anxo et al. 2004b; Strzemińska 2008b) – they have particularly dire consequences for those workers who maintain the chief responsibility for the provision of family care. Collette Fagan (1996) and Dominique Anxo (2004) have demonstrated, for example, that in those national contexts where long-hours culture was remarkably persistent, there was also a significant degree of polarization in working hours, as the long-hours on one end of the spectrum tended to be “balanced” by below-average, short, part-time hours on the

other. However, as Kerry Rittich (2006a, 70) notes, transnational policy makers “have no response to the equality concerns engendered by the increasing pressure to work longer hours *other* than the idea that women, too, should now be in the market on terms similar to men.”

The fact that the disproportionate numbers of workers “stuck” at the low end of the working-time spectrum are women highlights the important relationship between working-time organization, its regulation, and equal opportunities. It is also crucial to remember that even where working-time flexibility measures are promoted as “family friendly,” these measures are not necessarily conducive to the promotion of gender equality. As Anxo and colleagues (2004b, 203) urge,

To promote gender equality, measures must enable women to be on an equal footing with men in employment (the level or status of jobs, promotion prospects, etc.) and encourage a more equal sharing of the time-consuming aspects of family responsibilities between men and women. This objective can be facilitated by encouraging more men to adjust their working time at different stages in the life course, such as when they have young children.

The emphasis on the very redistribution of responsibilities that is recommended in the above passage as necessary for achieving more equality and more equal sharing of work and care time, has become more prominent in the EU policy discourse. However, the fact that this trend coexists with tendencies towards working-time flexibility by way of long-hours working on the one hand, and promotion of part-time work on the other, suggests that such redistribution is unlikely to occur.⁷¹ This inconsistency in approach, of

⁷¹ The statistical evidence that suggests that working-time patterns continue to be gendered (although they have shifted away from “all or nothing” situations); the tendency is for men to work longer hours, while women tend to work part time. This tendency is most pronounced in the UK, where polarization of working hours is most severe. However, it is representative of a general trend. Significantly, though, in a few

course, is highly problematic and illustrates that something is amiss in the sudden turn to promote flexibility as a work-family reconciliation and equality-enhancing strategy.

Why has the emphasis on gender been so selective and uneven in the EU discourse on working time and why has the focus on gender equality been almost entirely absent in the context of the *Working Time Directive*? One of the explanations for this trend is offered in the social policy literature on gender mainstreaming and on other forms of gender awareness in the context of policy, particularly the feminist critique of these approaches. Gender mainstreaming represents a recent shift towards the incorporation of gender concepts beyond their more traditional deployment in social policy and into the realms of economic, fiscal, and monetary policy. Most major transnational and regional institutions, including the EU, have adopted this new gender-sensitivity or “awareness” (Rittich 2006a; Jenson 2009; Knijn and Smit 2009). This development has been partially driven by feminist research, critiques, and policy recommendations.

Although attention to gender difference and specificity on the policy agenda is without a doubt a positive development, feminist policy scholars like Jane Jenson (2009), Jane Lewis (2006), and Maria Stratigaki (2004) have questioned whether this has been a genuine step in the right direction, or an instrumental move intended to serve other objectives. As Trudie Knijn and Arnoud Smit (2009, 486) ask with respect to incorporation of the gender perspective into the mainstream policy agenda: “[...] what happened with all these insights, and how are they reflected in current policy discourse?” Unfortunately, as these scholars are increasingly pointing out, the answer to Knijn and Smit’s question is that bringing in the gender language has not necessarily translated into

European countries, working-time discrepancies/gaps are closing slowly. This shrinking gap is common either where men are encouraged to shorten their work hours and take up care-related leaves, and where more robust institutional arrangements are present that enable women’s full labour market participation.

transformative policy and lawmaking, or “gender egalitarianism”. Instead, in various policies, including those on reconciliation of work and family, gender concepts have been often deployed in ways that suggest their appropriation, subordination, “cooptation,” and general diluting (Stratigaki 2004, 30; Lewis 2006; Jenson 2009; Knijn and Smit 2009, 486). The gender equality agenda, although omnipresent, has been at best weakened and lacking in coherence, and, at worst, completely subordinated to other policy goals.

The use of gender equality as a means to an end distinct from equality itself, and its subordination to other objectives, has also been noted in critical analyses of EU employment policy beyond the specific context of work-family reconciliation policies (although these policies are part and parcel of various employment strategies promoted by the EU). Collette Fagan, Damian Grimshaw, and Jill Rubery (2006), for instance, have suggested that the focus on women and the commitment to advancing gender equality in EU employment policy appears instrumental. This focus is primarily motivated by the objective of raising the overall employment rate by activating women, rather than by the desire to promote equal opportunities. This objective is evidenced in an approach that favours supply-side labour market policies but pays insufficient attention to the promotion of quality of work, and pays more attention to reducing the employment gender gap rather than the gender gap in wages (Fagan, Grimshaw, and Rubery 2006, 577).

The analysis of EU working-time discourse suggests that the shift to work-family reconciliation rationales has also been driven by an instrumental agenda. The relative absence of gender equality goals in the *Working Time Directive* can be partially attributed to the fact that the working-time debate has historically been dominated by other

considerations, such as the security versus flexibility debate, with the security at stake being mainly that of standard (male) workers. As the working-time discourse shifted to flexibility, this shift was deeply linked with the goals of labour market activation and economic efficiency. This focus made gender and equal opportunities, to the extent that they were featured at all, largely instrumental and subordinate to achieving economic goals. The same can be said about the more recent promotion of flexibility for women's activation, aiding better work-family reconciliation, and sharing of work and family responsibilities. These are, no doubt, significant developments that nonetheless are also tied to other policy goals, including increasing employment rates, meeting the care needs of the young and the aging, and the concern about decreasing fertility rates.

Another and related explanation for this lack of meaningful and coherent engagement with gender in working-time policy has to do with the key actors involved in the shaping of the universe of political discourse on issues of working time. The issues of working time have traditionally been the purview of collective bargaining and negotiations between social partners. In this context, the terms of the debate have tended to also be framed by considerations of security versus efficiency; standard employment was addressed separately from non-standard or “atypical” employment. This bifurcation has led to treating the two as separate subsets of the working-time regulation agenda. Although the ETUC has most certainly “caught on to” the connection between gender equality and working time more generally, this awareness has been recent and thus was not reflected in the terms of the debate on working time until the last, failed round of negotiations on the *Working Time Directive* (see Chapter 3 for more discussion). At the same time, according to a former officer of the European Federation of Public Service

Unions, Brian Synnot, women's umbrella organizations, like the European Women's Lobby (EWL), were absent from negotiations on the initial directive and only more recently became interested in the issue of working time (Synnott Interview, 18 February 2010, Brussels). Lack of EWL's or other women organization's input also meant that gender equality has been, until recently, largely marginalized in the political discourse on working time.

2.5 Conclusion

The goal of this chapter was to examine the role of the flexibility discourse in shaping the broader universe of political discourse on working time in the European context. As has been explained, although flexibility has gradually become the dominant component of the regulatory discourse, alternative rationales for regulation were present in the European Commission's approach through the 1980s. Given the institutional arrangements, lack of Community competence, the significant differences of opinion between Member States on how flexibility should be achieved, and the UK's push for deregulation, it was not until the passage of the *SEA* in 1986 and the adoption of the *Social Charter* and the *Action Programme* in 1989 that opportunities for regulation on working-time materialized. The adoption of the 1993 *Working Time Directive* was enabled by the new Article 118a and the qualified majority (QMV) voting rule. However, the prominence of the flexibility discourse, the tensions between the different Member States (the UK opposition), and between the EU institutions (the Council and the European Parliament, and the social partners), culminated in a choice of fairly (legally) narrow health and safety framing, as well as the inclusion of significant negative flexibility within the scope of this protective measure.

Subsequent changes in EU policy have given rise to a new social deployment of the working-time flexibility discourse. This new direction offers the promise of a transformative approach to labour market regulation; one which is more inclusive of different workers needs, the process of social reproduction, and takes into account the total social organization of work. At the same time, however, the extent to which it is possible to construct a more egalitarian working-time regime in Europe depends on the manner in which the most fundamental, “core” working-time standards have been conceptualized and handled. As the next chapter will show, although the rise of work-family reconciliation has had an impact on the overall approach to working-time regulation at the EU level, it has been far more important in shaping the periphery of the EU working-time regime, but not nearly as successful in transforming its “core”. In the next chapter, I consider the EU’s first and key instrument regulating working-time, the *Working Time Directive*. As the story of this Directive illustrates, the foundation of the EU working-time regime remains embedded in standard conceptions of work and worker, and this has specific gendered consequences.

Chapter 3

The European Union Working Time Directive– Laying the Foundation for a Flexible Working-Time Regime

3.1 Introduction

As I explained in Chapter 2, the pursuit of more flexible labour markets and more flexible workplaces was crucial in defining the EU universe off political discourse on working time. The enactment of the *Working Time Directive*¹ (Directive or WTD) in 1993 was, in a number of ways, a watershed event in developing a European Community (EC) approach to this area of regulation. For one, the Directive was enacted by way of a “hard” instrument, while most subsequent measures addressing aspects of working time or special leaves (for instance, part-time work and parental leave) would be adopted first by way of social partner negotiated framework agreements, only subsequently formalized into EC Directives.

Moreover, while the Directive invoked traditional rationales for the regulation of working time (health and safety) and constituted a symbolic nod to security and protection of workers’ interests, it also very clearly signalled that flexibility had become the dominant, or in Jenson’s terms, the hegemonic discourse (Jenson 1989, 239). Specifically, beyond setting Community-wide protective standards, the Directive also “harmonized” derogations from these standards. These derogations enabled significant extensions of working hours beyond the set limits, leading some to observe that the key rationale behind the measure was in fact deregulatory (Moffat 1997). Indeed, many

¹ Council Directive 93/104 EC concerning certain aspects of the organization of working time, [1993] O.J. L 307/18 (hereinafter *Working Time Directive*).

Member States subsequently utilized these derogations to re-regulate their national working-time regimes, although, in most cases the process was prompted by the European Court of Justice (ECJ) rulings on the scope of “working time” (Düvel 2003; Hardy 2006). As I will show in Chapter 4, this was also the case in Poland, where the neoliberal reforms of the country’s political-economic transition, the process of EU accession, and the required legal adjustment with the *acquis communautaire* prompted and sustained the progressive flexibilization of the Polish working-time regime.

Finally, unlike the working-time measures on part-time work and parental leave enacted some years later, the 1993 *Working Time Directive* made no reference to equal opportunities or the importance of work-family reconciliation, thereby setting a gender neutral tone for the “core” working-time standards. This approach was in stark contrast to the more explicitly gendered measures aimed at those forms of employment characterized by non-standard hours (part-time), or specific forms of accommodation (parental leave), which were already significantly feminized. While some scholars pointed out that the working-time approach adopted by the EU was clearly bifurcated (Golden and Figart 2000; Figart and Mutari 2001, 53), the Directive’s gender neutrality or its potential impact on workers charged with caring obligations was certainly not a significant or a contentious element of the political debate, at least not until the start of the Directive’s revision process in 2003. As this Chapter will show, despite new emphasis on the issue of work-family reconciliation, the efforts to gender the Directive have been only partially successful and the gendered bifurcation in EU’s approach to different aspects of working-time and flexibility has remained a characteristic feature of the EU working-time regime.

This chapter looks in more detail at the *Working Time Directive* to explain how the Directive's narrow framing and the uneasy balance between security and flexibility that was originally struck within this Community instrument has continued to pose problems for the Directive's more progressive recasting. First, more background is provided on the Directive itself and the challenges that it faced in the aftermath of its adoption. Next, the chapter considers the consultation and revision process that began in 2003 and lasted until 2009, and through which the issue of work-family reconciliation re-emerged as a consideration in regulation of the working-time standards.

3.2 The 1993 *Working Time Directive*

The European Council adopted the *Working Time Directive* in November 1993, pursuant to Article 118a² of the *Treaty of Rome*.³ Justified on the basis of health and safety, the Directive established basic working-time standards at the EC-level, including maximum permissible weekly hours of work, daily and weekly rest periods, and annual leave,⁴ though setting them at a level lower than that legislated or collectively agreed to in many of the Member States (Fajertag 1998 cited in Adnett and Hardy 2001, 116; Fajertag 1999), with, at the time, the exception of United Kingdom (UK).⁵

As I noted in Chapter 2, what made this Directive particularly remarkable and controversial, was the fact that the European Commission and a Council majority decided

² Now, Articles 137 and 138.

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

⁴ For a detailed discussion of the *Working Time Directive* provisions see section 3.2.2.

⁵ Prior to the 1998 *Working Time Regulations* which transposed the WTD in the UK, that Member State had no legislation on working hours, rest, and vacation periods. These matters were left to collective bargaining (Rubery, Deakin, and Horrel 1994, 274-275; Barnard 1997). However, after union density had severely decreased during the Thatcher administration, very few employees were covered by collective agreements (Bruun and Hepple 2006, 47).

to take it on without there being the usual consensus in the Council. A particular source of debate was how they went about making it a reality.⁶ The majority of the Council was able to pass the Directive over explicit protest of the UK government because the European Commission's "creative" reframing of working time as a health and safety issue meant that a qualified majority (QMV) was sufficient to pass it in a Council vote. The measure was an outcome of the post-*Single European Act*⁷ commitment to more balanced social and economic policy, expressed in the European Commission's 1989 *Social Charter*⁸ and the accompanying *Action Programme*⁹ (Barnard 1997; Kenner 2004; Hepple 2009). However, this new commitment to social Europe was not universally shared, as the UK opted out of the *Social Charter*, following its long-term opposition to EC-wide social standards. The UK was similarly opposed to Community-wide working-time standards, as it was dedicated to the idea that more flexibility could only be achieved through less regulation. By contrast, continental Member States did not equate flexibility with deregulation and did not regard basic working-time standards as a source of rigidity (Hepple 1990; Ojeda Avilés and Garcia Viña 2009, 79). Indeed, many had already introduced various forms of flexibility within their more regulated working-time regimes (Bosch, Dawkins, and Michon 1993). Differences in practice and regulatory outlook, particularly as of the late 1970s, produced significant divergence between the UK and

⁶ The Directive was opposed by the UK's Conservative government, which abstained from voting on this instrument and later challenged the Directive's legality in the European Court of Justice. For more discussion on the controversy and legal challenge see sections 3.2.1 and 3.2.3.

⁷ [1987] O.J. L 169/1 (29 June 1987) (hereinafter *SEA*).

⁸ 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*).

⁹ *Action Programme relating to the Implementation of the Community Charter of Basic Social Rights for Workers*. Communication from the Commission. COM (89) 568 final Brussels (29 November 1989) (hereinafter *Action Programme*).

other Member States. Because the UK had no centrally legislated or bargained working-time standards with the exception of a few sectors (Hepple 1990; Rubery, Deakin, and Horrel 1994, 274-275; Barnard 1997b, 9), this regulatory divergence, given progressing market integration, raised concerns about unfair competitive advantage of lower standards in Member States such as the UK (Mills 1996, 137).

Thus, the establishment of a basic floor of working-time rights by way of the 1993 Directive was not only a way to follow-through on the commitment to a more social Europe, but also to even-out the playing field. The choice of health and safety as a ground for regulation meant that this could be achieved without having to rely on the UK's approval or, indeed, without having to foreclose flexibility within the overall protective framework.¹⁰ That the latter was a consideration was already evident from the Commission's 1990 proposal¹¹ for the Directive, which despite its "health and safety" framing, was fairly sparse on protective provisions, proposing only to set minimum rest periods (daily, weekly, annual), minimum conditions for shift and night work, and provide that health and safety principles be observed in "the event of changes in working patterns resulting from adjustments in working time" (Commission Proposal 1990, 2). Issues of systemic overtime, maximum duration of working time, and weekend work were to be dealt with through collective bargaining or national legislation, which in accordance with the principle of subsidiarity was deemed the more appropriate level for their regulation (Commission Proposal 1990). According to Moffat, the 48-hour weekly maximum standard was only added at the European Parliament's insistence (Moffat

¹⁰ See section 3.2.2. for further discussion on the legal basis.

¹¹ *Proposal for a Council Directive on the Organization of Working Time*, [1990] O.J. C 254/4 (9 December 1990) (hereinafter Commission Proposal 1990).

1997, 56), thus proving the Parliament's more significant role. However, even this provision was eventually matched with longer reference periods and the provision enabling individual opt-out from that maximum, the latter negotiated at the insistence of the UK (Von Prondzynski 1994, 93). Effectively, after a two-year period of bargaining, the final Directive included so much flexibility through its numerous derogations that its health and safety purpose was largely circumscribed by flexibility to derogate from the set standards. Some observers deemed it to be a "bizarre" and a "most unsatisfactory" compromise (Kenner 2004: 589, 600). According to Barnard (1997, 11), even the British Secretary of State for Employment was reported to have had declared the Directive "toothless."

3.2.1 Minimum Standards and Maximum Flexibility

In terms of its stated objectives of protecting health and safety at work and "encouraging improvements...in the working environment" (preamble), the 1993 Directive set limits on the maximum hours of work (art. 6), established minimum entitlements to daily (art. 4, art. 5), weekly (art. 5) and annual rest periods (art. 7) for most workers, and made special provisions on hours' regulations for night workers (art. 8-11). In addition to the overarching health and safety rationale the Directive also invoked the principle of "adapting work to workers," requiring that any changes in the patterns and organization of work at the enterprise level take account of this principle, particularly where work is monotonous or carried out at a predetermined rate (art. 13).

In addition to the core provisions (see Table 2), the Directive included a series of derogations and exceptions making for significant flexibility within the overarching protective framework of the instrument. Specifically, although the 1993 Directive applied

to “all sectors of activity, both public and private,” it outright excluded a number of sectors, including air, rail, road, sea, inland waterway and lake transport, sea fishing, other work at sea, and the activities of doctors in training.¹² Moreover, all of the Directive’s key provisions, save for the annual leave and the principle of adaptability,¹³ were subject to some sort of a limitation, including: 1) complete derogations for specific categories of workers and in cases where the specific characteristics of an activity mean that working time is not measured and/or predetermined, or can be determined by the workers themselves; 2) legislated or negotiated derogations from provisions on rest breaks, night work, and reference periods in certain specified circumstances; 3) derogations from the basic four month reference period for the calculation of the weekly hours by legislation or collective agreement; and 4) derogation from the 48-hour maximum via the optional individual opt-out provision.

Article 17(1), for instance, provided that the 48-hour maximum calculated over the basic period of four months did not apply to managerial staff or workers with “autonomous decision-making power,” “family workers,” and workers “officiating at religious ceremonies in churches and religious communities.” Derogations from breaks, night work, and reference periods were also made for workers residing far away from their place of employment (art. 17(3a)), those employed in “security and surveillance activities” (art. 17(3b)), where continuity of service or production was required (art.

¹² These sectors were eventually included into the ambit of the Directive with the 2000 amendment, or the so-called “horizontal directive” (2000/24/EC, O.J. L195), and *Council Directive on the organization of the working time of persons performing mobile road transport activities* (2002/15 EC, [2002] O.J. L 080/35) adopted on 12 March 2002. With respect to seafarers, agreement was reached by the social partners in 1998, which provided for either a maximum number of working hours or a minimum rest regime (see Hardy 2006).

¹³ The annual leave, although itself not subject to the opt-out or derogations was nonetheless subject to a phasing in period of three years.

17(3c)), where there was a foreseeable surge of activity (such as in agriculture, tourism or postal services, art. 17(3d)), workers in railway transport (art. 17(3f)) and in case of accident or imminent risk of accident (art. 17(3g)).

Table 2 1993 *Working Time Directive*, Key Protective Provisions

Key Entitlement	Articles and Provisions
<i>Weekly working time limits</i>	Article 6(a): all Member States required to adopt measures necessary to ensure that weekly working-time is limited, whether via national legislation, collective agreements or agreements between two sides of the industry. Article 6(b): the maximum weekly working time at 48 hours, including overtime, to be averaged over a seven-day period.
<i>Daily and weekly rest</i>	Article 4: mandatory break, required when daily work-time equals or exceeds 6 hours. Article 5: minimum daily and weekly periods of uninterrupted rest. Eleven hours in each 24 hours, and 35 hours in each seven-day period. Detailed provisions to be set by national legislation, collective agreement or by another agreement between social partners.
<i>Annual leave</i>	Article 7: all Member States to take measures necessary to ensure that every worker is entitled to paid leave of at least three weeks, rising to four by 23 November 1999. Article 7(2): the annual leave cannot be derogated from or replaced by an allowance in lieu, except in the event that the employment relationship is terminated.
<i>Night-work provisions</i>	Article 8: (a) night workers are not to work more than the <i>average</i> of eight hours in any 24-hour period, and (b) those workers whose work involves particularly hazardous conditions or heavy physical or mental strain, not to work more than eight hours in the 24-hour period in which they perform night work. Article 9: entitlement to a free and confidential health assessments for night workers. Article 10: employers who utilize night work on a regular basis report this to the competent authorities on request Article 11: employers to ensure that worker's special health and safety needs that are necessitated by night-work environment are met.
<i>Adapting work to worker</i>	Article 13: Member States to take necessary measures to ensure that any changes in the patterns and organization of work at the enterprise level take account of the general principle of adapting work to the worker, with the particular view to alleviating monotonous work and work at the predetermined work-rate.

The calculation of the maximum 48-hour limit could also be varied in accordance with the *derogations via extended reference periods*. Specifically, the Directive enabled

Member States to extend the basic reference period for calculation of weekly maximums, provided that the period did not exceed six months (art. 17(4)). Indeed, in accordance with the Directive, the reference period for calculation of working time could always be extended to six months by collective agreement or workplace agreement, and where “objective or technical reasons or reasons concerning the organization of work” required further extensions, reference period could be extended up to 12 months (art. 17(4)).

In addition to the specific derogations and exceptions listed above, one of the most controversial provisions that allowed for exceeding the weekly maximum was the *individual “opt-out”* provision included in art. 18(1)(b)(i) of the Directive, at the insistence of the UK government. This provision gave Member States the option to not apply art. 6 (48-hour maximum) provided that certain requirements are met. In practice, the “opt-out” provision enabled Member States to adopt legislative provisions in the national working-time regulations that would allow individual workers essentially to waive their right to the maximum weekly working-time limit, with the provisos being that the worker does so without detriment, that employers keep records of working time, and that such records be made available to appropriate agency for the purpose of monitoring.¹⁴

Finally, to allow the Member States to comply and to adjust their national laws and workplace practices without significant economic detriment, the Directive stipulated relatively lengthy phasing-in periods (art. 18(1)(a)). This phasing-in stipulation also included the annual leave provision (art. 18(1)(b)(ii)), which had to be extended to all

¹⁴ The possibility of the 12-month reference period or the opt-out did not appear in the 1990 Commission Proposal (OJ C 254/4, 9 December 1990). At that point, only a six months reference period was contemplated and there was no opt-out. Clearly, the process of negotiation of the Directive cut both ways – the weekly maximums, not previously contemplated by the proposal, were set, but longer reference periods and the opt-out were included to provide more overall flexibility.

workers and could not be derogated from. Overall, the Member States had three years, until 23 November 1996, to transpose the Directive's provisions into national law, by which date many had indeed passed new national legislation, amended existing laws, or were in the process of discussing how best to comply with the Community law (EIRR 1997a). The exception was the UK, which was the only Member State without existing national legislation regulating working-time and one with a well-established long-hours culture (EIRR 1997a; Barnard 1997b; Barnard, Deakin, and Hobbs 2003). The UK stalled in transposing the Directive because its implementation would require significant adjustment in national practice (Mills 1996; Barnard 1997b) and because the UK was about to challenge the Directive's legality.

3.2.2 The UK's European Court of Justice Challenge

As its failure to transpose the Directive indicated, the UK Conservative government's opposition to the instrument did not cease with its adoption in 1993. Instead, three years later, in 1996, the British government decided to challenge formally the Directive at the European Court of Justice (ECJ), seeking the instrument's annulment.¹⁵ According to the UK's argument before the ECJ, the legal basis for the Directive was inappropriate. Specifically, the UK argued that the Directive should have been more properly enacted either under Articles 100 and 235 EC (now, 94 or 308 EC) which required unanimity, or the Social Policy Agreement in the Treaty of the European Union, which excluded the UK, and not under Article 118a (now 137), which required qualified majority (QMV) only. Moreover, the UK claimed that the link to health and safety was tenuous and that working time was in fact an employment issue. In a related

¹⁵ *United Kingdom v. Council of the EU*, C-84/94, [1996] E.C.R. I-5755 (hereinafter *Working Time Case*).

manner, the UK submission also stated that the concept of “working environment” in Article 118a of the EU Treaty should be restricted only to concerns about physical conditions and safety risks in the workplace and not to matters of working time, which should be dealt with via broader social policy measures.

Rejecting the UK’s argument, the ECJ held that while the Directive might indeed have affected employment, its primary objective was nonetheless to lay down measures related to the “working environment” which were motivated by the concern for the health and safety of workers and thus properly within the ambit of Article 118a (now Article 137). Defeated on the key issue, the UK was obliged to transpose the Directive into domestic legislation by the set deadline of 23 November 1996.¹⁶

The UK government was forced to decide between complying with the ECJ judgment or defying the Court and the EU. Prior to the release of the Court’s decision and in anticipation that it would reject the UK’s claim, the Ministerial Committee on Defence and Overseas Policy met at the end of May 1996 to discuss its options (Beach 2005, 131). According to Derek Beach, the British cabinet ministers discussed whether to: 1) accept the adverse decision and implementation of the Directive; 2) get around the adverse decision by negotiating with the other Member States to change the voting rule in Article 118a to unanimity by brokering a Council agreement to change the legal basis of the *Working Time Directive*; or 3) to defy unilaterally the ECJ decision by refusing to transpose the Directive into national law (Beach 2005, 131-132). While it was open to the UK government to pursue any of these options – and, according to Beach, there was a strong sentiment towards public defiance – the government nonetheless decided to

¹⁶ *Ibid.* The sole issue on which the UK government was successful was that of Sunday trading. The original Directive, on insistence of Germany, provided that Sunday should in principle be designated as the weekly rest-day. The UK challenged this provision and ECJ upheld its claim.

comply with the ruling, although it did not actually transpose the Directive for another two years. In December 1996, the Conservative government issued a Consultation Paper (URN 96/1126) in which it emphasized the need not to “over-implement” the Directive and impose unnecessary burdens on the business (Barnard 1999, 61). As Catherine Barnard (1999, 61) pointed out, the proposals included in this paper, “fell short of the minimum requirements of the Directive”. The Directive was finally transposed a couple of years later by the UK’s new Labour government, by way of the *Working Time Regulations* issued in 1998.¹⁷ The Labour Party expressed its support for the Directive during the early 1990s, both because commitment to social standards reflected its political commitments to labour and because it served as a way to differentiate the party from the ruling Conservatives (Blair 2010, 16). When it came time to transpose the Directive, however, the Labour government chose to do so taking advantage of all the flexibility that was available, along with the opt-out provision.

3.2.3 Diluting the Standards, Narrowing the Political Discourse

The Directive’s adoption and the UK’s failed challenge to its legality were symbolic milestones for the social dimension of Europe’s growing internal market (Hepple 1997). The Directive’s actual content, however, left much to desire. Although the harmonization approach was not one that the UK was prepared to accept in the Council, the Directive only in principle challenged the UK’s preferred way of doing the business of labour regulation. In practice, the Directive was sufficiently deregulatory to not only leave the UK’s long-hours culture unchallenged (Barnard, Deakin, and Hobbs

¹⁷ SI 1998/1833. These were amended in 1999, following substantial protests from the UK business lobby and employer organizations. The 1999 Regulations (SI 1999/3372) were significantly “watered down” and came under scrutiny of the Commission in its 2003 review, which will be discussed in part 3.2.5.

2003), it also opened doors to future deregulation in other Member States (Hardy 2006, 595). Indeed, the negative flexibility to extend work hours that the Directive was ushering-in through the various exclusions, possibilities of longer reference periods and, particularly, the ability to derogate through the opt-out, would continue to pose problems and define the discourse around the Directive for years to come.

While the Commission's ability to exploit the broad scope of Article 118a and to take advantage of the change in voting rules made the Directive possible, the approach also had significant consequences. The health and safety framing, affirmed by the ECJ, meant that a more expansive vision of working time, one that incorporated some focus on the social (and gender) impact of standard working-time norms beyond the health and safety considerations, was no longer possible for both political or legal reasons. This narrow Treaty-base precluded references to broader social goals that re-organization of working time could promote, such as those that the Commission advanced a decade earlier (*Draft Council Recommendation* 1983), but which were absent from the 1993 Directive (Moffat 1997). The overall approach was sparse and very traditional as it assumed a clear distinction between "free time" and "work time" that was the hallmark of standard (Fordist-style) work organization (Supiot 1999; 2001, 53). As such, the entire Directive was built around a particular conception of "work" and "worker" – one that presupposed availability and reflected the very same assumptions about the subjects of regulation that have formed the basis of the standard employment relationship (SER).¹⁸ This SER-centrism was further reflected by the fact that the prescribed derogations provided for only one form of flexibility, namely, the flexibility to *extend* work hours,

¹⁸As I will discuss in the last part of this chapter, issues of part-time and temporary work, also falling into the ambit of working time, were treated separately from this Directive, thereby reinforcing the distinction between standard and non-standard work and workers.

either on a temporary basis (through longer reference periods) or a more permanent basis (in case of excluded workers or the opt-out), without regard of how this would impact different workers. At the same time, apart from the overarching principle of adaptability provided for in art. 13, no flexibility to *adapt* or *reduce* work hours for individual reasons was inscribed into the Directive. The goals of work-family reconciliation and more gender equal distribution of work, although present in the 1983 *Draft Council Recommendation* and symbolically acknowledged by most Member States in the *Social Charter*, were completely absent from the 1993 Directive.

With the Directive preserving the *status quo* and, indeed, opening doors to considerable negative flexibility, other goals appeared to move to the far periphery of the universe of political discourse surrounding this instrument. As the next section will elaborate, subsequent changes in how the Community defined its policy priorities and the development of new regulatory mechanisms for coordination of Member State strategies broadened the debate surrounding working time and the *Working Time Directive* once again.

3.3 Working Time Directive Review and Revision Debacle

In the decade since the Directive's adoption in 1993, several developments occurred that had a significant impact on its scope and the broader political discourse concerning the issue of working time. Promotion of employment, economic growth, and competitiveness continued to be key priorities at the EC-level. Already in 1993, the Commission's White Paper on *Growth, Competitiveness and Employment*¹⁹ called for a

¹⁹ *Growth, Competitiveness, Employment: The Challenges and Ways Forward into the 21st Century*. White Paper, COM (93) 700 final (05 December 1993).

more integrated unemployment strategy, with early formulation of such a strategy being devised during the Essen European Council in 1994 (Ashiagbor 2004). In 1996, the European Commission's *Action for Employment in Europe*²⁰ reiterated the concern over Europe's unemployment and called for an integrated unemployment strategy based on "engendering the climate propitious to growth" through closer macroeconomic and internal market coordination, and the creation of new jobs through "revitalized" (reformed) national employment systems and active employment policy (1996, 2).²¹ This new focus on employment activation and legislative reform was congruent with the approach championed by the freshly elected UK Labour government. Although much more open to Community-level "social" initiatives than the Conservatives had been since the late 1970s (Kenner 2003; Blair 2010, 15-16), the Labour government headed by Prime Minister Tony Blair was still committed to emphasize primacy of the market (Kenner 2003; Vaughan-Whitehead 2003, 27-28). Unlike the UK Conservatives' deregulatory approach, however, the Labour Party would assume a more active role on social and employment policy, although in a way that ultimately aimed to enhance the markets (Vaughan-Whitehead 2003, 27-28).

With the UK more cooperative, employment policy became integrated into the Amsterdam Treaty²²(Title VIII), and the subsequent launch of the European Employment Strategy in 1997 was designed to facilitate the EC-level coordination of national policies through the open method of coordination (OMC), a new regulatory mechanism utilizing

²⁰ *Action for Employment in Europe. A Confidence Pact*, CSE (96) 1 final (05 June 1996).

²¹ As part of the latter, the Commission emphasized the need to adapt legislative frameworks to the workplace changes and growth of atypical employment, and emphasized that flexibility, when combined with security and carefully organized, can be a source of new jobs (1996, 18-19).

²² *Treaty of Amsterdam*, October 1997, [1997] O.J. C 340/1, 25 I.L.M. 506 (10 November 1997).

“soft” measures, including guidelines and benchmarks (Ashiagbor 2004). With an overall focus on activation of the labour market, the European Employment Strategy identified four pillars – entrepreneurship, employability, adaptability, and promotion of equal opportunities – as key priorities for European employment. Likewise, there was a renewed emphasis on the promotion of more flexible, diversified forms of working time that would meet the needs of diverse groups of workers and enable their labour market participation. Both the 1993 White Paper on *Growth, Competitiveness and Employment* and the 1997 Green Paper on *the Partnership for a New Organization of Work*²³ also called for the utilization of new forms of work and more working-time flexibility as key for job creation and adaptability for firms and workers, but also the promotion of equal opportunities and better employment inclusion. This renewed shift to a broader conceptualization of working-time and utilization of flexibility in a more balanced manner led to social partner-negotiated Framework Agreements on parental leave (1995) and part-time work (1997), adopted as Directives in 1996 and 1997, respectively.²⁴ Along with these measures, work-family reconciliation, and to a lesser extent the promotion of equal opportunities remerged once again as a working-time issue, and with the overall emphasis on the need to re-think organization of work and working time, it would also have an impact on the discussions surrounding the *Working Time Directive*.

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

²⁴ *Council Directive 96/34/EC of 3 June 1996 on the Framework Agreement on Parental Leave Concluded by UNICE, CEEP and the ETUC*, [1996] O.J. L145/4 (19 June 1996), amended by *Council Directive 97/75/EC of 15 December 1997*, [1998] O.J. L 10/24 (16 January 1998); *Council Directive 97/81/EC of 15 December 1997 on the Framework Agreement on Part-time Working* [1998] O.J. L14/9 (20 January 1998), amended by *Council Directive 98/23/EC of 7 April 1998*, [1998] O.J. L 131/10 (05 May 1998).

3.3.1 Developments Related to the *Working Time Directive*

In the context of this overarching focus on working-time flexibility, in 1997 the European Commission, somewhat paradoxically, issued its White Paper on *Sectors and Activities excluded from the Working Time Directive*.²⁵ Perhaps aware of the tension between the more traditional approach taken in the 1993 Directive and the approach to working time that it was now pursuing, the Commission made its case for extending the coverage of the Directive to new groups of workers on the basis that minimum working-time standards were required to prevent “[the] direct risk to the welfare and safety of others” (Sectors and Activities White Paper 1997, 3). Thus, the Commission suggested that long hours of work, particularly among doctors-in-training or in road transport, were not just a health and safety issue for the workers themselves, but more importantly, they also interfered with the broader public interest. The tactic proved successful; the sectors of air, rail, road, sea, inland waterway and lake transport, sea fishing, other work at sea, and the activities of doctors in training were covered by the minimum working-time standards by way of the 2000 *Horizontal Directive*,²⁶ while the 2002 Council Directive regulated working-time in the sector of road transport.²⁷

Another significant, and related development involved a series of legal challenges stemming from the Directive’s national transpositions. By 2000, most Member States,

²⁵ COM (97) 334 final (15 July 1997) (hereinafter Sectors and Activities White Paper).

²⁶ Directive 2000/34/EC of the European Parliament and of the Council of 22 June 2000 amending Council Directive 93/104/EC concerning certain aspects of the organization of working time to cover sectors and activities excluded from that directive, [2000] O.J. L195/41 (1 August 2000) (hereinafter *Horizontal Directive*).

²⁷ Directive 2002/15/EC of the European Parliament and of the Council of 1 March 2002 on the organization of the working time of persons performing mobile road transport activities, [2002] O.J. L 080/35 (23 March 2002).

apart from France and Italy, had implemented the Directive,²⁸ and several court cases had been referred to the ECJ for preliminary rulings.²⁹ While most of these cases revealed how complicated the Directive's framework was, and made important clarifications to its various provisions,³⁰ the 2000 *SIMAP v. Conselleria de Sanidad y Consumo de la Generalidad Valenciana* (SIMAP)³¹ and the 2003 *Landeshaupstadt Kiel v. Norbert Jaeger* (Jaeger)³² proved to have the most far-reaching legal and political implications.

The key issue in both cases concerned the definition of working time (art. 2 of the Directive), and, specifically, whether on-call work, or its inactive parts, could be excluded from the scope of this definition for the purpose of calculating weekly working hours. Pursuant to the 1993 Directive and its 2000 amendment, working time was defined as “any period during which the worker is working, at the employer's disposal and carrying out his activity or duties in accordance with national laws and/or practice” (art. 2); while rest, constituted “any period which is not working time” (art. 2). This dual construction classified “working time” and “rest” as mutually exclusive and provided no

²⁸ However, as the Commission's 2000 report on the state of implementation indicated, only Finland, Germany, the Netherlands, Spain, and Sweden had done so by the prescribed deadline of 23 November 1996. France and Italy had been “condemned” by the ECJ for failure to transpose, but had not at the time of the Report informed the Commission of their measures, while the UK had adopted the *Working Time Regulations* in 1998, following its failed ECJ challenge: State of Implementation of *Directive 93/104/EC of 23 November 1993 concerning certain aspects of the organization of working time*. COM (2000) 787 final (1 December 2000) (hereinafter State of Implementation 2000).

²⁹ As noted by the Commission in its 2000 State of Implementation, *ibid.*

³⁰ *J.R. Bowden e.a. v. Tuffnells Parcels Express Ltd.*, C-133/00, [2001] E.C.R. I-7051, considered the scope of exclusions in the Directive's Article 1(3); while *The Queen v. Secretary of State for Trade and Industry*, C-173/99, [2001] E.C.R. I-4881, considered the possibility of laying down qualifying periods for the Article 7 annual leave entitlement.

³¹ *Sindicato de Medicos de Asistencia Publica v. Conselleria de Sanidad y Consumo de la Generalidad Valenciana*, C-303/98, [2000] E.C.R. I-7963 [SIMAP]. This case was considered together with another case that concerned the definition of “working time” under the Directive in the context of “on-call” activities of medical emergency personnel, *Confederación Intersindical Galega (C.I.G.) v. Servicio Galego de Saude*, C-241/99, [2001] E.C.R. I-5141 [SERGAS], both of which concerned the definition of 'working time' under the Directive in the context of 'on-call' activities of medical emergency personnel.

³² *Landeshaupstadt Kiel v. Norbert Jaeger*, C-151/02, [2003] E.C.R. I-8415 [Jaeger].

intermediate category. However, in several Member States legislative provisions or national practice specifically differentiated between “active” and “inactive” parts of working time, particularly in the context of on-call work. Moreover, periods of inactivity during the on-call duty were typically excluded from the scope of working time, and thus from the calculation of the average 48-hour weekly norm.

Whether this type of exclusion was appropriate and consistent with the 1993 Directive was first considered in the 2000 *SIMAP* case referred by the Spanish court. The case concerned national regulations which required on-call medical staff to be either present at their health establishment or to be otherwise contactable. In both cases, only those on-call periods during which doctors were actively engaged in the performance of their duties were regarded as working time, and the Spanish regulations classified the inactive portion of on-call as falling within the category of rest. In ruling on whether Spanish regulations were in compliance with the 1993 Directive, the Court had to first clarify the meaning of working time, as defined by the Directive’s art. 2.

One of the key legal issues was whether the particular elements of the definition in art. 2– “... working ... at the employer’s disposal... carrying out duties...” – should be interpreted in a cumulative or independent manner. Seeking to support the distinction between active and inactive parts of working time, the Spanish authorities advanced a cumulative interpretation that required the fulfillment of all three elements, including the actual performance of duties. By contrast, pointing to the imprecise nature of the definition in art. 2, the Advocate General put forth that the elements should be interpreted independently, nonetheless making a distinction between doctors who were required to be on and off-premises. In the Advocate General’s opinion, the definition of working time

encompassed periods of inactivity for doctors required to be physically present at the health establishment, but not for those able to remain off-premises. In the latter case, designation of the inactive parts of on-call as rest-periods was not inconsistent with the Directive.

Contrary to the Advocate General's submissions, the Court decided that the appropriate interpretation of the wording in art. 2 was indeed cumulative. Nonetheless, in opposition to what the Spanish authorities argued, the Court found that the cumulative interpretation did not preclude the inclusion of inactive periods of on-call into the scope of working time for those doctors who had to remain on the premises. According to the Court, if doctors were obliged to be "present" and "available with a view to providing their professional services" they were automatically "carrying out their duties in that instance." Crucially, the Court justified its interpretation by reference to the Directive's health and safety objective, which would be "seriously" undermined by the exclusion of the on-call duty from working time, particularly where a worker's physical presence was required.³³ Thus, in emphasizing the worker's physical presence at the health-care establishment, the Court followed the Advocate General distinction between doctors who needed to remain at the health-care establishment or could be off-site.³⁴ Since the latter, in the Court's opinion, experienced fewer constraints on time and could "pursue their own interests" during the inactive parts of on-call,³⁵ their own periods of inactivity were properly designated as rest. Beyond clarifying the definition of working time, the Court's affirmation of the health and safety objective of the Directive and, indeed, its fairly

³³ *Supra* note 31 *SIMAP*, para. 49.

³⁴ *Ibid.*, para. 50.

³⁵ *Ibid.*

generous interpretation, was a significant development with potentially far-reaching consequences for organization of working time in health-care establishments and other sectors where on-call work was commonly utilized. According to the European Commission's report on the implementation of the Directive, intermediate categories that were not explicitly defined by the Directive – similar to those in the Spanish regulations – had been implemented in several Member States, and would likely be caught by the ECJ's ruling (State of Implementation 2000, 7).

Indeed, the on-call issue came up again in the 2003 *Jaeger* reference from the German court, which sought the clarification of the *SIMAP* ruling and its application to the on-call provisions under German law. Unlike the Spanish regulations at issue in *SIMAP*, which permitted on-call staff to be either on or off-site, German labour law explicitly defined on-call as the period during which an employee was required to be present at a place determined by the employer and had to be available to answer the employer's call. However, as the Court pointed out, the German on-call staff was also authorized to rest so long as their services were not required, and indeed, as was the case in *Jaeger*, accommodations were made for on-call staff to do so when they were not actively discharging their duties.³⁶

Inter alia, the referring German court asked the ECJ to clarify whether its previous *SIMAP* ruling – that entire period of on-call duty was working time where workers presence was physically required – still applied under these somewhat different circumstances, or whether periods of inactivity could properly be designated as rest periods in the German case. In addition, Germany (supported by four other Member

³⁶ Supra note 32 *Jaeger*, para 15.

States) also submitted evidence of the significant economic and budgetary impact that a positive ECJ finding on the first issue would have in the context of health care administration. Specifically, the German government contended that such a ruling might lead to a 24 percent increase in staffing requirements, meaning that an additional 15,000 to 27,000 doctors would be needed (with only 7,000 doctors being out of work in the country), and estimating the extra costs at EUR 1.75 billion (Kenner 2004, 596).

Albeit there was some expectation that the Court might take the opportunity to “rein back” on its expansive interpretation of the Directive in *SIMAP*, particularly given this political and economic context (Kenner 2004, 595), in its 9 September 2003 ruling, the Court not only followed its previous judgment, it took the opportunity to strengthen and expand its interpretation of working time and the health and safety rationale. More specifically, the Court reaffirmed the overarching importance of health and safety as a fundamental right embedded in the Community’s commitment to the improvement of living and working conditions, the 1989 *Social Charter* and the *EC Treaty* (its Article 118a). In rejecting the German suggestion that the Directive should be interpreted by reference to national law and practice, the Court emphasized its primacy over national regulations as being necessary for securing its “full efficacy and uniform application” by Member States.³⁷ Any other interpretation, according to the Court, frustrated the objective of harmonizing the protection of health and safety of workers by means of minimum requirements.³⁸ Turning to the specific issue of the German on-call regulations, the Court followed *SIMAP* in finding that the necessity to remain at the workplace and ready to carry out one’s employment duties meant that the doctors were, in fact, working.

³⁷ *Ibid.*, para 58.

³⁸ *Ibid.*, para 59.

Even where an employer provides a rest room, such as was the case in *Jaeger*, “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,” particularly since “periods during which their services are not required... may be of short duration and/or subject to frequent interruptions.”³⁹

Significantly, reaffirming its broad conceptualization of “health and safety” already adopted in *SIMAP*, the Court emphasized that the necessity to remain at the workplace and the lack of effective control over one’s time due to the intermittent and unpredictable nature of on-call, had a negative effect beyond one’s ability to rest, as it also interfered with one’s ability to participate in family life and/or engage in social activities.⁴⁰ Indeed, *contra* Germany’s economic arguments, the Directive’s protective health and safety objectives, as broadly construed to include one’s ability to engage in the life of the community and family, were so important that they could not be “called in question by the objections based on economic and organizational consequences,”⁴¹ or “subordinated to purely economic considerations.”⁴²

Thus, although the different facts in the *Jaeger* reference provided the Court with an opportunity to distinguish its earlier ruling in *SIMAP*, the Court not only affirmed its earlier interpretation of working time, it, in fact, took the opportunity to strengthen it and expand its reach. The effect of these rulings was mixed. On the one hand, the Court’s affirmation of the fundamental importance of the health and safety objectives and the recognition that long and intermittent on-call hours of work had a deleterious impact on

³⁹ *Ibid.*, para 70.

⁴⁰ *Ibid.*, para. 65.

⁴¹ *Ibid.*, para 66.

⁴² *Ibid.*, para 67.

the worker's ability to partake in family and social activities, was an important step towards broadening the universe of political discourse around more traditional working-time instruments like the *Working Time Directive*. This more expansive vision of the relationship between working time and the protection of the workers interest in health was in line with the more holistic definition of health adopted by the World Health Organization (Kenner 2004, 594-595), and recognized that the maintenance of social and affective bonds was just as significant to workers wellbeing as adequate sleep and adequate rest. Particularly, in raising the crucial issue of family life, previously absent in the context of *Working Time Directive* but already a prominent component of the broader political discourse, the Court was also opening doors to potential future re-casting of traditional norms of working time in terms of their impact on the ability to balance work and family obligations. As Deidre McCann (2005) observed, the Court's analysis revealed an awareness of the complexities and value of workers' lives beyond paid employment, and the fact that long hours not only posed the danger from the perspective of workers health and safety but also because they removed workers from the rest of their lives (McCann 2005, 136). Somewhat paradoxically, however, the Court's interpretation and reasoning tended to nonetheless reaffirm the binary, mutually exclusive construction of work and rest time inherent in the Directive, which was based, after all, on the traditional conceptualization of "work" and "leisure" or "work" and "home" as discrete spheres of (productive and reproductive) activity. Thus, despite the fact that the Court's reading of the Directive's key terms and objectives was more holistic and its rulings in *SIMAP* and *Jaeger* generally beneficial to workers wellbeing and interests, both judgments ultimately reified standard conceptions of work as an activity that takes place

at the employer's premises⁴³, and that the opposite of work time is the "non-work" time of leisure and family engagement, that clearly underlined the Directive (Supiot 2001, 53).

Beyond these conceptual issues, however, perhaps the most immediate and practically problematic consequence of the *SIMAP* and *Jaeger* rulings was the challenge they posed to the national systems of law. Specifically, the court's interpretation of working time "forced" a number of Member States, Germany and Spain included, to resort to the application of the Directive's art. 18 derogations in the health care sector, or other sectors where on-call work was common, in order to deal with the budgetary and staffing problems caused by the inclusion of on-call as working time (Re-Exam Communication 2003). By 2004, Germany, Netherlands, Spain, as well as several of the new Member States were preparing to adopt legislation that would enable the application of the opt-out provisions in the health care sector (Re-Exam Communication 2003). Moreover, the opt-out was already partially adopted in France and Luxembourg.⁴⁴ This new development significantly altered the context for the discussion on the opt-out, which was now no longer a UK-only issue.

The danger that the application of the opt-out would be extended even further was also related to the issue of "social dumping" and Eastern enlargement of the EU. As of 1998, the EU began official negotiations with several potential accession states, mostly those states that formerly had planned economies.⁴⁵ Their much weaker economic

⁴³ This was particularly clear from the fact that the Court distinguished between on-call workers who were able to remain at their homes, or at the least not required to be at the health-care establishment, and those who were required by national regulations to be at the employers' premises.

⁴⁴ Although in France, the opt-out was adopted within a framework of national working-time standards that were more protective than those offered by the *Working Time Directive*, and in Luxembourg it was applied in a single sector only (hotels and catering) and with fairly strict and short reference periods.

⁴⁵ On 31 March 1998, accession negotiations were started with six applicant countries – Cyprus, the Czech Republic, Estonia, Hungary, Poland, and Slovenia. A year and a half later, on 13 October 1999, the

position, significant deregulation of their labour markets, and the diminished collective bargaining coverage resulting from the process of political-economic transition, brought up concerns about unjust competition, resulting in movement of capital and trade redirection from old to new Member States (Vaughan-Whitehead 2003). Indeed, since similar concerns had already been raised as a result of UK's application of the opt-out in its national working time regulations (Mills 1996),⁴⁶ there was a concern, particularly among organized labour in Europe, that the potential application of the opt-out by new accession states would lead to further "race-to-the-bottom" in working-time standards.

3.3.2 Working Time Directive Revision Process

In light of these new developments and as required by law,⁴⁷ on 15 January 2004 the Commission issued its official Communication on the Re-examination of the *Working Time Directive*.⁴⁸ The review was to take the form of a Community-wide consultation

Commission recommended Member States to open negotiations with Bulgaria, Latvia, Lithuania, Malta, the Slovak Republic, and Romania.

⁴⁶ One of the most famous cases involving the UK was the 1993 move of the American-owned Hoover from Dijon, France to Scotland. As many as 600 jobs were lost in France and 400 fixed-term contract workers were hired in the Scottish operation (Mills 1996, 137). In 1998 the European Commission also received complaints related to the transfer of the Swedish-owned Ericsson from Norrköping (Sweden) to Scotland. Ericsson's decision to move operations was attributed to the fact that the UK had chosen to implement the opt-out, and thus provided more flexible and cheaper regulatory environment. The Commission was asked to investigate and consider the revision of the opt-out prior to its scheduled re-examination in 2003. See: Official Journal of the European Communities, 21.02.1999, 1999/C 142/197, 1999/C 142/198. Most recently, the ECJ imposed stringent limitations on attempts to use collective bargaining and the right to strike as measures against social dumping in the *Laval un Partneri Ltd v. Svenska Byggnadsarbetareförbundet*, C-341/05, [2007] E.C.R. I-11845 [*Laval*] and *International Transport Workers Federation v. Viking Line ABP*, C-438/05, [2007] E.C.R. I-10806 [*Viking*] cases.

⁴⁷ The original and the amended Directive contained two provisions that the Commission was required to review prior to the expiry of the seven-year period from the 23 November 1996 deadline for transposition into national law. These provisions were: 1) the individual opt-out provision contained in article 18; and 2) the derogation (by collective agreement or agreement between social partners) from the prescribed reference period for application of the maximum workweek, contained in section 16 of the Directive.

⁴⁸ *Communication from the Commission to the Council, the European Parliament, the European Economic and Social Committee and the Committee of the Region and the Social Partners at Community Level concerning the Re-examination of Directive 93/104/EC concerning certain aspects of the organization of working time*, [2004] COM 843 final/2 (15 January 2004) (hereinafter Re-exam Communication 2004)

with the European Parliament (EP), the Council, the European Economic and Social Committee (EESC), the Committee of Regions and the social partners. Aside from reviewing and assessing the impact of the art. 18 opt-out and the extended reference period provisions (art. 16), as required by the Directive, the other major issue on the Commission's re-examination agenda was to address the ECJ's redefinition of "working time" in the context of on-call work, in the *SIMAP* and *Jaeger* cases. This was, in part, related to the opt-out because the redefinition of working time by the Court had caused other Member States to implement it in the sectors where on-call work was common. In addition to these issues, the Commission also flagged its interest in considering how the Directive's revision could be "exploited" to enhance the reconciliation between work and family life (Re-exam Communication 2004, 20-21).

The other issues notwithstanding, the discussion around the use of the individual opt-out provision (art. 18(1)(b)(i)) dominated the 2004 Communication. While it was clear that this was no longer just a UK issue, the UK remained the key focus of the Communication because it was the only Member State to have *generally* applied the provision. Indeed, the Commission decided to review the opt-out on the basis of the UK data on implementation, as the data suggested that the opt-out had been applied in a way that jeopardized the key objectives of the protection of health and safety (Re-exam Communication 2004, 7, citing Barnard, Deakin, and Hobbs 2002).⁴⁹ The data indicated that as many as 33 percent of UK workers had already signed the opt-out, of whom nearly half had reported working in excess of 48-hours.⁵⁰ However, there was no

⁴⁹ The data came from an extensive report prepared by Barnard, Deakin, and Hobbs (2002).

⁵⁰ According to figures cited by the Commission half of that 33%, or 16%, represented the portion of *all* UK workers, including those in part-time jobs. In addition, the report cited statistics indicating that over 20% of full-time UK workers worked in excess of the 48 hour maximum, eight percent worked over 55 hours, 3.2

evidence that all remaining employees who had opted-out actually worked in excess of the prescribed maximum, and indeed, there was some evidence that the opt-out was being used on a largely precautionary bases in environments where long hours were already the norm (Hogarth et al. 2003). The Commission also noted that one of the most common reasons for the use of the opt-out in the UK was the workers' expressed preference.⁵¹ Nonetheless, the Commission was concerned that the manner in which the UK transposed some of the opt-out related provisions⁵² was insufficient and that the application of the opt-out could lead to problems with reporting and undermine the overriding objective of the worker's health and safety (Re-Exam Communication 2004). Indeed, as Catherine Barnard, Simon Deakin, and Richard Hobbs (2003), some of the leading UK experts on working-time law and the authors of the UK Report to the Commission noted, the widespread application of the opt-out by UK employers was one indication that the provision managed to dilute the regulatory stimulus for employers to implement actual changes in organization of work practices.

Unlike the discussion of the opt-out, which almost exclusively focused on the health and safety aspects, the Commission's analysis of the reference periods and the

percent over 60 hours, and one percent of workers spent 70 hours at work (Re-Exam Communication 2004, 10).

⁵¹ According to the data cited in the European Commission Re-examination Communication, the reasons for the use of the opt out included: 1) UK workers who habitually worked in excess of 48 hours expressed the preference for being able to continue doing so; 2) the prescribed reference period did not allow sufficient flexibility to enterprises, given the requirement that extensions to the reference period be only made through collective agreements and the UK's low rates of collective coverage; 3) the lack of clarity in some of the derogations which could likely be applied; and 4) the minimization of the administrative costs.

⁵² The 1998 *Working Time Regulations* (SI 1998/1833) implementing the Directive in the UK were revised in 1999, in order to reduce the administrative requirements/costs (in response to complaints from the British industry and employers). First, the UK government proposed to extend the "unmeasured working hours" derogation to include hours worked voluntarily, typically by managers and senior executives whose working hours may have been set by contract. The other key change concerned the record-keeping requirements in respect of opted-out workers. Specifically, the requirements were relaxed, making it sufficient to keep a list of names of those who have opted out (Barnard 1998; 1999; Hall 1999).

fallout from the *Jaeger* and *SIMAP* cases was more obviously tied to the rationales of business flexibility and broader economic considerations. On the issue of the art. 16 derogations, the Commission cited examples of national practice as confirmation that such extensions were not uncommon, suggesting that maintaining the possibility of extending the basic four-month periods through collective agreements was necessary to ensure that sufficient flexibility was available to enterprises (Re-exam Communication 2004, 5-6). With respect to the ECJ rulings, the Communication stressed the considerable expenses that would be incurred by the Member States if the ECJ's re-definition of working time were indeed to be applied in the health care sector (2004, 17-20).⁵³ The recent extension of the *Working Time Directive* to other sectors previously not covered, including doctors in training, by way of the 2000 *Horizontal Directive*, would only exacerbate this issue.⁵⁴ Thus, the Commission invited the consulted parties to opine the proposal and make suggestions on overcoming these issues. Finally, there was the issue of work-family reconciliation. The Commission suggested that, "the revision of the Directive could be exploited in such a way as to encourage the Member States to take steps to improve the compatibility of work and family life" (2004, 21). While the focus on inclusion of work-family concerns echoed the Commission's previously more expansive approach during the 1980s (i.e. *Draft Council Recommendation* 1983), what could compel moving beyond the narrow and traditional conceptualization of working

⁵³ Several Member States noted the costs of applying the expanded definition of working time (so as to include time on-call). The UK estimated that to keep the current level of care, its costs would be between GBP 380 and 780 mln, Germany's estimate was EUR 1.75 billion, and the Netherlands, EUR 400 mln. In addition to the financial "burden", the Member States identified lack of qualified personnel, as a major problem of the inclusion of on-call into the definition of work time.

⁵⁴ In its follow up report, and the second phase, the Commission attributed the ECJ redefinition to the "binary" nature of the working time/rest period definitions and suggested that the introduction of an intermediate term – i.e. the inactive portion of on-call – would provide the most appropriate solution to the fallout of the ECJ judgments.

time that was at the heart of the 1993 Directive at this stage? One explanation that can be suggested is that the Commission was operating in a very different policy environment than before; emphasis on employment activation was now paramount and the EU's role in employment policy much more defined. Taking the "long-term view" of the 1993 and 1997 White and Green papers⁵⁵, the Commission cited sociological changes, including "the mass influx of women into the labour market, increase in divorce rates, instability and heterogeneity of household structures and demographic phenomena" (Re-exam Communication 2004, 21). Moreover, in line with the European Employment Strategy and post-Amsterdam guidelines, the Commission urged that in addition to benefiting workers, measures enabling better work-family reconciliation and equal opportunities would ultimately lead to higher quality labour force and serve to improve productivity, motivation, availability, and open up greater opportunities for training and professional development (Re-exam Communication 2004, 21).

Thus, in setting the overall tone for the re-examination and revision of the Directive, the Commission continued to emphasize the balancing between health and safety and economic needs of employers, but the inclusion of work-family reconciliation was an attempt to broaden the discussion on working time or perhaps justify further flexibilization on the basis that it was necessary for more compatibility between work and family obligations. It was particularly this attempt to expand the scope of discussion that did not meet with the widespread approval of the consulted parties, particularly those representing the interests of European labour and employers.

⁵⁵ Supra notes 19 and 23.

When responses to the first phase of consultation arrived, it was apparent that save for the uniform consensus on the necessity of the revision itself, there was considerable disagreement on most of its aspects. The majority of labour organizations, but particularly the European Trade Union Congress (ETUC) expressed support for revision of the Directive with the view to improve work-family reconciliation; however, the ETUC chastised the Commission for not having provided any concrete propositions on how this could be achieved. The ETUC characterized work-family reconciliation a “health and safety” issue, and urged that the only flexibility that could be of assistance to workers was one that was exercised within an overarching protective framework and limits on working hours. The organization accused the Commission of creating the “false illusion” of employers and employees having “joint interests” in flexibility (ETUC Position Paper 2004a). Similarly, the European Federation of Public Sector Unions (EPSU) called for the abolition of the opt-out, as, in part, a work-family reconciliation issue (Second Phase Consultation 2004, 6). On the side of the employers, the Union of Industrial and Employers’ Confederations of Europe (UNICE, currently Business Europe), the European Centre of Enterprises with Public Participation (CEEP) and many other employer or business organizations rejected the idea that work-family reconciliation be incorporated into the Directive (Second Phase Consultation 2004, 4). While UNICE and CEEP did not dispute the importance of work-family reconciliation measures *per se*, both disagreed that a “health and safety” Directive was the appropriate context for regulation on these issues (UNICE Position Paper 2004a, 6).

Aside from the issue of work-family reconciliation, the social partners also took different positions on the opt-out, the reference periods, and the issue of the redefinition

of working time. According to the Commission's summary in its Second Phase of Consultation document, employer and business organizations (UNICE, CEEP) strongly advocated for the retention of the opt-out. Indeed, UNICE called on the Commission to retain the opt-out and "resist any calls to introduce new rigidities" (UNICE Position Paper 2004a, Executive Summary). In its view, the opt-out was "crucial" for flexibility and competitiveness in all, but particularly new Member States, where the opt-out helped companies "to absorb the shock of compliance with the legal *acquis* on working time" (UNICE Position Paper 2004a, 5). Also in the interests of promoting flexibility, the organizations of employers requested the legislative extension of the reference period to twelve months with the option of negotiating even longer reference periods by way of collective agreement. Finally, both UNICE and CEEP sought the inclusion of the concept "inactive time" and a declaration that the on-call work ought not be considered for the purpose of calculations of the 48-hour weekly average, contrary to what the ECJ suggested in the *SIMAP* and *Jaeger* cases (Second Phase Consultation 2004; UNICE Position Paper 2004a, 5-6). All of business' proposals were essentially countered by the ETUC and other organizations representing labour (Second Phase Consultation 2004, 3-4, 6; ETUC Position Paper 2004a), leading Phillipe de Buck, the UNICE's Secretary General to remark that he saw no prospects of negotiations between the social partners (UNICE Press Release 2004c).

Indeed, the position of labour was very much represented by a resolution adopted by the majority of the European Parliament on 11 February 2004.⁵⁶ Like the ETUC, the Parliament supported the Commission's broadened focus on the health and safety

⁵⁶ Resolution on the Organization of Working Time (amendment of *Directive 93/104/EC*), 2003/2165 INI, (11 February 2004) (hereinafter European Parliament Resolution 2004), adopted on the basis of a Report prepared by Alejandro Cercas (PES)

objective and work-family reconciliation and sought the gradual phasing out of the opt-out provision,⁵⁷ with curbing abuses and strengthening the voluntary nature of the opt-out serving as necessary temporary measures. In addition to voicing its opinion on the key issues of consultation, the European Parliament urged the Commission to encourage more negotiation between the social partners as the preferred manner in which the revision should be achieved.⁵⁸

In its follow-up Second Phase Consultation (2004), the Commission summarized the positions and opinions and reiterated that it was prepared to work with the social partners on crafting a “global and consistent approach” to the issues subject to review, with the view to crafting a “solution that takes account of totality of the amendments” (Second Phase Consultation 2004, 8). While it underscored that the review should be guided by the overarching “health and safety” objective of the Directive, it emphasized that the revision should also take into account broader context and goals set out by the Lisbon Strategy and the Wim Kok report⁵⁹ regarding the need to increase and promote competitiveness (Second Phase Consultation 2004, 8). In requesting social partners input, the Commission flagged nonetheless that in absence of negotiations and/or agreement, the Commission would go ahead with its own proposal for a revised Directive.

Based on the consultation responses, which were, in the Commission’s words, “rather divergent,” and the failure of social partners to enter negotiations, the

⁵⁷ Parliament voted on the report from Alejandro Cercas (PES), which was adopted by 370 votes, with 116 against and 21 abstentions. On the particular issue of the opt-out, 275 votes were cast in favour of removing the opt-out, with 229 votes against and 9 abstentions.

⁵⁸ The Commission’s initial lack of clarity on the inclusion of social partners in the revision process was also critiqued by the ETUC in its Position Paper (2004a).

⁵⁹ *Facing the Challenge: the Lisbon Strategy for Growth and Employment*. Report from the High-Level Group Chaired by Wim Kok, November 2004. Luxembourg: Office for the Official Publications of the European Communities (hereinafter Wim Kok Report); see also *Enlarging the European Union: Achievements and Challenges*. Report of Wim Kok to European Commission. 26.03.2003.

Commission published its proposal for amending the Directive on 22 September 2004.⁶⁰

As flagged in the first and second phase of consultation, the three key issues addressed in the proposal were: 1) the individual opt-out of the weekly 48-hour maximum; 2) the reference period over which the average maximum time is calculated; and 3) the redefinition of working time to incorporate time spent on call (Commission's Revision Proposal 2004). The issue of compatibility between work and family became one of the overarching criteria to be taken into account, with others being "a high standard of protections of worker's health and safety", "greater flexibility in managing working time" for companies, and avoiding excessive restraints on small and medium enterprises (Commission's Revision Proposal 2004, point III (9)). The issue of work-family compatibility was included in points five and six of the preamble, with the first being the general acknowledgement of its importance, and the second being the call to social partners to negotiate on establishing rules to ensure better compatibility between work and family life. Lack of a concrete provision on work-family reconciliation was likely a result of the strong opposition voiced by the business lobby, which reminded the Commission that the Directive was a "health and safety" measure, not a broader social one and thus, was not an appropriate context for the consideration of work-family reconciliation (UNICE Position Paper 2004a, 6; 2004b, 5). Indeed, the ETUC also urged the Commission to take more seriously the legal framework within which it was operating, partly because it was concerned to not jeopardize the Directive itself (Passchier Interview, February 2010, Brussels). Hence, to ensure that work-family

⁶⁰ Proposal for a Directive of the European Parliament and the Council Amending *Directive 2003/88/EC concerning certain aspects of the organization of working time*, SEC (2004) 1154, [2004] COM (2004) 0607 final - COD 2004/0209 (22 September 2004) (hereinafter Commission's Revision Proposal 2004).

compatibility issues were considered, the ETUC characterized them as aspects of health and safety (ETUC Position Paper 2004a, 2004b).

Despite the tone of its earlier consultation document, the Commission now proposed to retain the individual opt-out (art. 22), but proposed to make it subject to collective agreements (Commission's Revision Proposal 2004, point 52, art. 1(8)(a)). Nonetheless, where such agreements were not possible as a result of national practice or legislation, the Commission proposed to retain the individual opt-out by consent with the proviso of reinforced conditions (Commission's Revision Proposal 2004, point 52, art. 1(8)(b)). The decision to retain the opt-out likely came as an acknowledgement of what several studies also confirmed, namely that some workers, particularly in the UK, expressed the preference not to have their working hours statutorily limited. As was reported by Barnard, Deakin, and Hobbs (2002) and other British experts, the motivations to work long hours expressed by employees varied from extra pay, the prospect of promotion and higher rewards in future, or a sense of autonomy. However, there was also evidence suggesting that employees are sometimes pressured into signing the provision. Moreover, UNICE, in its Position Paper also argued that flexibility to work longer hours was "crucial" for both employers and workers; the former, on the account of competitiveness and adjusting to demands of the market, and the latter, on the account of their "right" to work longer hours in order to increase their purchasing power (UNICE Position Paper 2004b, 4).

To control against the potential instances of abuse such as those reported in the UK and to curb the default or blanket reliance on the opt-out, the amendments suggested by the Commission intended to make the use of opt-out less attractive to the employers.

These amendments included: 1) the requirement that the opt-out be annually renewed; 2) an explicit obligation on employers to record the number of hours actually worked by those employees opting out; and 3) a provision rendering invalid those opt-out agreements that were entered into at the time of the signing of the employment contract (Commission's Revision Proposal 2004, point 52, art. 1(8)(b)). Since there was evidence that as a matter of administrative efficiency many employers automatically request that employees sign the opt-out, the amendments were aimed at discouraging this practice through increasing the costs of administration (by requirement of annual renewal and more detailed record keeping) and ensuring that employees agree to the opt-out as a matter of free choice and not implicit coercion (by the requirement that the opt-out and employment contract be signed on separate occasions). In addition to these amendments, the Commission also suggested introducing an additional standard in the form of a 65-hour maximum limit on the duration of the workweek, unless otherwise provided by the collective agreement. While this rule would not have affected the majority of employees, since work in excess of 65 hours in a week is rare,⁶¹ it would have nonetheless addressed the most extreme cases of long hours. According to the Deputy Head of the Unit for Equality, Action against Discrimination and Legal Questions of DG Employment, Fernando Pereira, although the impact assessment carried out by the Commission confirmed that the opt-out was a gender issue and that it needed to be removed or better regulated, this was again, not particularly influential in the decision about whether or not to retain it (Pereira Interview, 17 February 2010, Brussels).

⁶¹ Labour Force Survey data indicated that only 0.4 million UK workers exceed 65-hour workweek, in comparison to 4 million who exceed 48-hour week.

Other changes suggested in the Commission's review proposal included the option for the Member States to extend by statute the reference period from the four months prescribed by the original Directive to 12 months, thereby infusing significant flexibility into the organization of working hours. This option was seen as a tradeoff potentially providing the incentive for more employers to move to a system of annualized hours, and, thus, reducing their reliance on the opt-out (Hobbs and Njoya 2005, 311). Although this option was much in line with what the European business lobby had requested, significantly, the Commission's proposal provided that only one of the options – the opt-out or the reference period extension – could be utilized by the Member States.

On the issue of the definition of “working time” and specifically that of “on-call time,” which has been given an expansive interpretation by the ECJ in the *SIMAP* and *Jaeger* decisions, the Commission proposed to include a third, intermediate definition of the “inactive part of on call” time (Commission's Revision Proposal 2004, points 8, 19, 22). This definition would essentially neutralize the ECJ's decisions, which held that the time spent “on call” was to always count towards “working time” for the purpose of the weekly norms set out by the Directive and compensation, regardless of whether or not it was spent on active duty or not. Moreover, to strengthen negotiations between the social partners as the European Parliament had requested during the first phase of consultation, the Commission's proposal also made a number of provisions designed to “provide a significant regulatory stimulus for collective negotiations over innovation in working-time arrangements, pay and productivity” (Hobbs and Njoya 2005, 312). Specifically, the proposal required broad consultation with the social partners on the issue of the extension of the reference period to twelve months, and required their authorization in

implementing the individual opt-out. While this was an important reiteration of the commitment to collective negotiations and reinforcement of the collective framework, it was not likely to have a significant impact in those contexts where collective agreement coverage was low, and where opt-outs have already been collectively negotiated (Hobbs and Njoya 2005, 312).

3.3.3 The 2010 Revision Debacle

The issuing of the 2004 Commission Revision Proposal marked the beginning of a prolonged period of consultations, negotiations, and amendments, during which the proposal moved between various committees (Committee of Regions, Economic and Social Committee), the European Parliament, and the Council. Finally, in 2008, within three months of each other, both the Council and the European Parliament adopted their respective common positions. Much as in the positions adopted by the social partners during the consultation, the Council and the Parliament's were also significantly distinct, particularly with respect to the key issues of contention: the opt-out, the extension of the reference period, and the redefinition of working time. Moreover, there was dispute over the extent to which work-family reconciliation should feature as an element of the Directive or the manner in which it should be implemented.

The final position of the European Parliament was based on the report prepared by the European Parliament's Special Rapporteur Alejandro Cercas, the Spanish Member of European Parliament and the delegate of the Party of European Socialists (the Cercas Report).⁶² The Cercas Report maintained that the revised Directive should phase out the

⁶² Report of the on the Proposal for a Directive of the European Parliament and of the Council amending Directive 2003/88/EC concerning certain aspects of the organization of working time, COM (2004) 0607 –

opt-out provision, since the latter, according to Cercas, was essentially incompatible with the health and safety objective underlying the Directive. Retaining the opt-out was unacceptable, as it would not entail “making the regulations more flexible, but doing away with them completely” (European Parliament Cercas Report 2005,17). Prior to the completion of the phase out, Cercas recommended that the renewable opt-out agreement between employer and employee proposed by the Commission to last a year should be valid for only six months at a time. The Cercas Recommendation for Second Reading⁶³ including proposed changes to the Council’s common position largely maintained the thrust of his original report.

By contrast, the Council⁶⁴ supported retaining the opt-out (Common Position of the Council 2008). It also largely reflected the business lobby’s requests for extending the reference period to 12 months or beyond, and providing for the exclusion of on-call work from the scope of the working-time definition (BusinessEurope 2008a; 2008b). On both of those issues, its position differed significantly from that of the Parliament. The two were also divided on the issue of work-family reconciliation. The Parliament saw the issues of long hours (enabled by the opt-out) and work-family reconciliation as essentially connected. The Opinion of the Committee on Women’s Rights and Equal Opportunities, attached to an earlier version of the Cercas Report,⁶⁵ noted that, although

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

⁶³ Recommendation for Second Reading on the Council Common Position for Adopting a Directive of the European Parliament and the Council amending *Directive 2003/88/EC concerning certain aspects of the organization of working time*, 10597/2/2008, C6-0324/2008, 2004/0209 COD (11 November 2008).

⁶⁴ Common Position of 15 September 2008 adopted by the Council of 15 September 2008, with a view to the adoption of a Directive of the European Parliament and of the Council amending *Directive 2003/88/EC concerning certain aspects of the organization of working time*, [2008] O.J. C 254 E/3/18.

⁶⁵ Opinion of the Committee on Women’s Rights and Equal Opportunities, 20.01.2004 for the Committee on Employment and Social Affairs on Organization of Working Time (revision of *Directive 93/104/EC*),

the long-hours culture had adverse effects on all workers, its impact on women workers was particularly harmful. Specifically, women's "double burden" of work and family obligations and the fact that women are more likely than men to combine several part-time jobs to accommodate their caring obligations meant that the impact of long hours of combined work was in fact more detrimental to them. The Committee noted that, in both cases, women's cumulative weekly hours often exceed 48, yet women were not protected by the 48-hour maximum because their weekly hours in any single job would likely fall below that limit since the limit does not apply on a cumulative basis (Committee on Women's Rights Opinion 2004). Significantly, the Committee also observed that the long-hours culture predominant in some professional and managerial jobs constituted a serious obstacle for women's upward mobility, and helped to sustain gender segmentation in the workplace (Committee on Women's Rights Opinion 2004). While these specific suggestions of the Committee were only partially incorporated into the Parliament's position, in the 2008 Recommendation for the Second Reading,⁶⁶ Cercas urged that in order to ensure that the references to work and family reconciliation replete in the Commission Proposal be more than "empty rhetoric," specific provisions should enable employees to request changes in working hours and patterns, and oblige employers to consider such requests and refuse them only in the circumstances where the organizational disadvantages would be disproportionate to workers' benefit (2008, 11). In addition, Cercas proposed that employers should be required to inform workers of "any

2003/2166 INI, appended to Report of 29 January 2004 on the Organization of Working Time (amendment of *Directive 93/104/EC*), 2003/2165 INI (hereinafter Committee on Women's Rights Opinion 2004).

⁶⁶ Recommendation for Second Reading on the Council Common Position for Adopting a Directive of the European Parliament and the Council amending *Directive 2003/88/EC concerning certain aspects of the organization of working time*, 10597/2/2008 – C6-0324/2008 – 2004/0209(COD), 11.11.2008 (hereinafter Recommendation for Second Reading 2008).

changes” to the working schedule “well in advance” of any changes to hours or patterns of working time (Recommendation for Second Reading 2008, 10-11).

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

The discrepancies between the Council and the Parliament’s positions mirrored the lack of consensus between the social partners. BusinessEurope had a firm stance on all the issues at stake, and its position was mostly focused on its own interests in enterprise flexibility, albeit it now also claimed that workers too had a “right” to flexibility (UNICE 2004a, 2004b; BusinessEurope 2008b) so as to increase their “purchasing power” (BusinessEurope 2009b, 2). The ETUC on the other hand, while certainly more open to flexibility than before, emphasized an approach to flexibility that was more inclusive of individual workers’ needs, yet still protective (ETUC 2004a, 2004b, 2005a, 2006a). Moreover, the ETUC’s approach to flexibility within the context of the *Working Time Directive* was now clearly gendered (ETUC 2004a, 2004b, 2005a). That the ETUC had adopted this type of an approach was in a large part an accomplishment of Cathelene Passchier, the Confederal Secretary of the ETUC. Passchier suggested that gendering

working time was a key priority for her since she came to ETUC in 2003 (Passchier Interview, 16 February 2010, Brussels). From the start, she fought to have this “new vision” integrated, and the ETUC’s position during the Directive’s revision was a testament to her efforts. Importantly, the ETUC continued to see the opt-out as the easy route to employer-friendly flexibility only and could not consider it as a sensible and appropriate feature of an employee-friendly working-time regime that was conducive to the protection of health and safety and reconciliation of work and family. Indeed, Passchier saw the Commission’s inclusion of work-family reconciliation in the preamble of the draft Directive as “hypocritical” in light of the opt-out and other derogation mechanisms (Passchier Interview, 16 February 2010, Brussels). For the ETUC, the opt-out was also dangerous in light of Eastern enlargement. Specifically, the Congress feared the application of the opt-out in the transitioning countries as a potential source of social dumping and an invitation to depressing social and employment standards, already severely compromised in some of the new members (Central Eastern European (CEE) countries) during the process of political-economic transition (Passchier Interview, 16 February 2010, Brussels).

This concern for the use of the opt-out to drive down social and employment standards was also expressed by Jean Lambert, the British Member of European Parliament and the Group of the Greens deputy. With her constituency in the city of London, the UK city with the most notorious long-hours culture in Europe, Lambert was the European Greens’ Rappporteur on the issue of health and safety and working hours, and she produced a number of reports on the issue.⁶⁷ A strong proponent of the

⁶⁷ For example, the 2004 report entitled *Flexible Working. A work-life balance or a balancing act?* and the 2006 *I Must Work Harder? Britain and the Working Time Directive*, both published by Lambert’s office.

elimination of the opt-out provision, she was also concerned about the ratcheting up of hours and the long-hours culture that the opt-out could potentially promote in the new accession states. She was well aware of her own national government's efforts to ensure that new accession states, such as Poland, come on board on the issue of working time and adopt the UK's approach. The "ministerial road-show" that the UK Labour Government had taken to Poland and other CEE countries, according to Lambert, was one way to ensure that outcome (Lambert Interview, 23 February 2010, Brussels). According to Lambert, however, any focus on gender was too "politically risky" given the already delicate situation, and as a result not much of the discussion or negotiation was taking place on this front (Lambert Interview, 23 February 2010, Brussels).⁶⁸

Thus, aside from reaching the basic agreement that work-family reconciliation should be a feature of the new *Working Time Directive*, the Council, and the Parliament's Common Positions could not be any more discrepant. Despite the Commission's efforts to find the middle ground between them, the differences between the Council and the Parliament proved irreconcilable. Negotiating with the Council proved more difficult, because unlike during the negotiations leading to the adoption of the Directive in 1993, this time, the Member States' interests were more aligned with each other on the issue of revision. Faced with having to apply the opt-out in the medical sector to curb the costs associated with the staffing changes that the application of the Directive to on-call workers would result in, many Member States previously opposed to the provision were no longer prepared to give it up. While Greece and Spain championed the opt-out opposition, the UK managed to build support, with Germany, Latvia, Malta, Poland, and

⁶⁸ Though Lambert also added that the extremely long-hours are also bad for male fertility, something which she considered good evidence for the press (Lambert Interview, 23 February 2010, Brussels).

Slovakia joining as the “blocking minority” (Blair 2010, 21). Given the overarching emphasis on competitiveness of the Wim Kok reports (2003 and 2004) and the strict conditionalities of the EMU, new accession states had an interest in keeping the flexibility that current *Working Time Directive* engendered, because it helped to keep labour costs down for their still developing enterprises and provided them with competitive advantage. Indeed, as I will show in Chapter 5, the Directive’s flexibility provisions enabled Polish politicians to re-regulate the Polish working-time regime.

The Parliament’s 2008 vote rejecting the Council’s final proposal and the failure of the subsequent conciliation procedure⁶⁹ brought the revision process to a screeching halt in April 2009 – six years after the Commission issued its initial 2003 Proposal to amend the *Working Time Directive*. The disastrous working-time debacle was the first instance under the provisions of the Treaty of Amsterdam in which the Conciliation Committee was not able to reach agreement on a joint text (Codecision News 2009). The overall atmosphere at the Commission indicated that the failed negotiations were most certainly not the sort of climax they had in mind.⁷⁰ And, although, the Commission officers

⁶⁹ The conciliation procedure applied in the working-time case was prescribed by Article 294(10), (11) and (14) TFEU. The Conciliation Committee brings together members of the Council or their representatives and an equal number of representatives of the European Parliament, as well as the responsible Commissioner. The negotiations are conducted in small teams of negotiators, with the Commission playing a mediating role (trialogue). The participants report to their respective delegations and a resulting compromise (“joint text”) resulting from the triilogue is submitted to the delegations for approval. Each delegation must approve the joint text in accordance with its own rules: qualified majority for the Council delegation (or unanimity where the Treaty specifies so) and a simple majority European Parliament’s delegation. The Treaty stipulates a time limit of six weeks, which may be extended by two more, for the approval of the joint text (http://ec.europa.eu/codecision/stepbystep/text/index5_en.htm). According to the European Parliament’s May 2009 newsletter *Codecision News*, on 28 April 2009 (hereinafter Codecision News 2009), the Conciliation Committee had to concede that after several trialogues and three full meetings over the last three months, the positions of the Parliament and the Council were too far apart and reconciliation was not possible. This was confirmed in the Parliament Delegation with 15 votes against, 5 abstentions and none in favour of the latest Commission compromise package. In line with Article 251(6) TEC the procedure was thus concluded at this level and the Commission proposal for a new directive for the organization of working time lapsed (hereinafter *Codecision News* 2009).

⁷⁰ This statement of overall impression is based on my general observations during my visit to the European Commission’s DG Employment, Social Affairs, Inclusion in March 2010, when I conducted interviews

expressed a clear sense of the willingness to start from scratch and explore other possibilities, including a search for another, more time-appropriate and more politically savvy Treaty base, it was clear that another debacle of this sort would not be acceptable.⁷¹

The post-conciliation mood was rather different in the offices of the members of the European Parliament where the vision of the Directive prevailed, at least as far as getting the majority of the European Parliament onside and not giving in to the Council's pressure and the Commission's attempts at forging a compromise. Although the "old" Directive remained intact, with the opt-out still firmly embedded, there was nonetheless a clear sense of victory, although the celebratory mood likely concerned the assertion of the Parliament's political power, rather than the failure of the conciliation (Cercas Interview, 23 February 2010, Brussels; Lambert Interview, 23 February 2010, Brussels). In reference to the entire process and its outcome, Alejandro Cercas acknowledged that the story of the failed revision was a story of the "EP's political victory", just as much as it was a victory for European workers (Cercas Interview, 23 February 2010, Brussels).

As for the social partners, the ETUC most certainly had more to celebrate, given that the Parliament sided with the European workers and, thus, its position was very much in line with ETUC's own. Although the outcome was hardly a success for the ETUC since its proposals were not actually accepted, and the most controversial of provisions, the opt-out, remained and was, indeed, being applied by an increasing number of Member States, the ETUC staff were no doubt relieved that at the very least the old Directive was not weakened further (Passchier Interview, 16 February 2010, Brussels).

with three Commission officers (Anonymous Policy Officer, Anonymous Legal Staff Member, and Fernando Pereira, all 17 February 2010).

⁷¹ Early in 2010, the Commission issued another communication on the re-examination of the *Working Time Directive*, as part of its first phase of consultation.

However, it appeared that the ETUC expected this “qualified victory” to be the kind of calm that only comes before another storm, and that it was bracing itself for more working-time drama in the future (Passchier Interview, 16 February 2010, Brussels).

Moreover, the failure to incorporate gender meaningfully into the discussions of the Directive was something that really bothered Passchier. She was distressed by the fact that the debate so blatantly missed the issue of care and other unpaid work activities. One reason this issue was ignored, she believed, was because no one challenged the notion of “normal” worker. Pointing to a 1907 Dutch poster hanging on her wall that depicted the classic labour movement demand of “Eight Hours Work, Eight Hours Sleep, Eight Hours Leisure,” she observed that it completely missed the issue of care. She added: “we need a new poster, to integrate the new vision” (Passchier Interview, 16 February 2010, Brussels).

3.4 Regulating Working Time – Missing Gender?

As the story of the *Working Time Directive*’s original negotiations and unsuccessful revision demonstrates, what is politically possible and whose interests tend to hold most political sway in a particular context are important variables that act as “gatekeepers” for what makes it into the dominant political discourse and what remains on the sidelines. In case of the *Working Time Directive*, the decision to embed it in very traditional health and safety rationales should have been relatively uncontroversial, yet proved to be exactly the opposite. Although the controversy had much to do with the prominent, ongoing tensions between discourses of security and flexibility on the one hand, and, regulation and deregulation on the other, as well as the reach of Community competences, its political effect was also to construct a rather narrow universe of political

discourse around this particular instrument. Specifically, in focusing on the political goals of achieving working-time regulation at the EU level, other important rationales or considerations for regulation in this area were significantly marginalized.

Two such considerations that the original 1993 Directive failed to mention, for instance, were the impact of working-time organization on gender equality and the related goal of work-family reconciliation. Perhaps uncontroversial on its face, this oversight was remarkable, particularly since both of these issues were by the time of the Directive's adoption already fairly prominent in the broader EU political discourse. Indeed, as already noted, work-family reconciliation had come up in the context of working-time regulation by way of the Commission's failed 1983 *Draft Recommendation*, but never made it into the text of the 1993 Directive. More strikingly, gender equality was completely absent as a consideration in the 1993 Directive, although the framework agreements and Directives on part-time work and parental leave which followed within a few years of the *Working Time Directive*, and which also addressed particular elements of working-time organization, were adopted based on equal treatment and reconciliation rationales. One result of this differential rationalization and selective engagement with gender has led to what Deborah Figart and Ellen Mutari (2001, 53) characterized as a "bifurcated" Community approach to working-time and working-time flexibility. This characterization leads to a number of questions: What has caused this bifurcation and why have various aspects of working-time regulation been rationalized so differently? Why has work-family reconciliation received such a limited treatment and gender equality been almost entirely absent from the universe of political discourse in which the Directive has been embedded? Finally, with the foundation that has been set up

by the *Working Time Directive*, is there any potential for gender to be more meaningfully incorporated into the EU working-time universe going forward?

3.4.1 Completing the Working-Time Regime - Regulating Other Aspects of Working Time

Framework Agreement and Directive on Part-time Work

Adopted at the end of 1997, the *Part-Time Work Directive*⁷² implements the Framework Agreement on the Protection and Promotion of Part-time Work (Framework Agreement) concluded by the social partners on June 6, 1997. The *social* policy thrust of the Directive is evident in the preamble, which invokes the principles of the improvement of living and working conditions, elimination of all forms of discrimination and promotion of equal opportunities by reference to the *Social Charter* and the conclusions of the Essen European Council.⁷³ This language echoes that of the Framework Agreement, which also makes use of those same principles and additionally lists “facilitating access to part-time work for men and women” in context of retirement, reconciliation of work and family life, and continuing education/retraining as one of the general considerations. Thus, the *Part-time Work Directive* is an active attempt at promoting part-time work as a solution for workers seeking a better balance between work and other responsibilities and for the employers seeking a more flexible deployment of labour based on their business needs. That labour flexibility is of utmost importance is clear from references to “employment intensiveness,” “flexibility,” and “requirements of

⁷² Supra note 24.

⁷³ *Follow up to the Essen European Council on Employment*. Communication from the Commission to the Council, COM (95) 74 final Brussels (08 March 1995). The Conclusions of the Essen Council also stressed the need to take measures to promote equal opportunities for men and women but did so within the context of “measures with a view to increasing the employment intensiveness of growth in particular by a more flexible organization of work in a way that fulfills both the wishes of the employees and the requirements of the competition.”

the competition,” all hallmarks of the drive to economic efficiency and growth through employment activation of previously inactive workers, including workers with caring responsibilities, most of whom are women.

On a positive note, the protective and non-discrimination principles are meant to address the well-demonstrated fact that part-time work is often associated with low pay, few advancement opportunities, marginalization and a series of other problems that predominantly affect women workers. Further, although the *Part-time Work Directive* clearly speaks to equality between men and women and appears to promote part-time work regardless of gender, part-time work is predominately a female phenomenon and women are the workers to whom this Directive would most frequently apply. While promoting and protecting part-time work on the principles of equal treatment and work-family reconciliation would not seem to be problematic in itself, the problem becomes evident when this approach is juxtaposed with the seemingly gender blind approach of the *Working Time Directive*, wherein possibilities for working-time extensions abound (in particular sectors via derogations, through collective agreement via annual reference period or through individual agreement via the opt-out). When taken together, the two instruments seem to create the sort of bifurcated approach to working time in which polarization of working hours, or their uneven redistribution is likely. That sort of a working-time regime is unlikely to promote gender equality or to be able to facilitate better of work-family reconciliation for all workers with caring responsibilities.

Framework Agreement and Directive on Parental Leave

If the bifurcation of working time discussed above serves as one illustration that EU policy seems to be replicating a *Working Time Directive* consistent with a standard (if

somewhat modified) employment relationship, and an underlying breadwinner model of a family, the Directive on parental leave⁷⁴ takes a more egalitarian approach through a more explicit concern with gender equality and social change. Like the Directive on part-time work, the Directive on parental leave and the Framework Agreement that it implemented, also cite the *Social Charter* and invoke principles of equal treatment and reconciliation of “occupational and family obligations.”⁷⁵ As already noted, even more emphasis is placed on ensuring that the *Parental Leave Directive* applies to men and women equally. This interpretation is supported, for instance, by the non-transferability clause that ensures that the entitlement to leave cannot be transferred between parents,⁷⁶ as well as several references to guaranteeing equal opportunities for both men and women to take advantage of the leave provisions. This gender equality-based approach is an important step, although one which continues to be limited to parents of young children.

Without diminishing its importance, when viewed from the perspective of working-time discourse, the Directive on parental leave is another example of a somewhat selective engagement with gender. While equality principles make their way into those areas that clearly acknowledge gender and the need for better work-family reconciliation such as part-time work or parental leave for instance, they somehow get omitted in the key instrument dealing with working time, the *Working Time Directive*. Thus, it is as if the standard workweek, which is protected by the *Working Time Directive*, and the long-

⁷⁴ Supra note 24.

⁷⁵ See the preamble.

⁷⁶ See clause 2(2), *Parental Leave Directive*. This means that leave cannot be transferred from fathers to mothers, and then parents cannot make choices about which is going to remain at home for the duration of the entire leave. This clause was inserted to motivate fathers to take up their portion of the leave.

hours culture, which is paradoxically enabled by it, were not themselves gendered. What can explain this obvious bifurcation? Why has the *Working Time* been so tenuously connected with the goal of gender equality when this goal has featured so prominently in other regulations dealing with specific aspects of working time?

Bifurcating Working Time

One of the key differences between the *Working Time Directive* and the Directives on part-time work and parental leave is the fact that the latter two grew out of framework agreements first negotiated and agreed to by the social partners, and only then implemented by way of a Community instrument. Moreover, both Directives invoke the Council's 1994 statement of commitment to economic and social convergence in the Union.⁷⁷ As a result of their negotiated nature and the more obvious shift towards social convergence in the Community approach to integration, these instruments were not subject to the same legal and political limitations, controversies, and tensions that made the *Working Time Directive* so contentious. Moreover, during this time, reconciliation of work and family, adaptability of work to workers and gender equality were being highlighted by the 1997 European Employment Strategy and the post-Amsterdam employment guidelines. The necessity of facilitating more flexible organization of working time – from a worker's perspective – was also noted by the Commission's Green Paper on *Partnership for the New Organization of Work*.⁷⁸ Thus, it could be said that it was the historical moment of their adoption and the fact that the Community legal framework was more receptive to engaging with social policy than it was at the time of

⁷⁷ Council Resolution of 6 December 1994 on certain aspects for a European Union social policy: a contribution to economic and social convergence in the Union, [1994] O.J. C 368/6.

⁷⁸ Supra note 23.

the *Working Time Directive*'s negotiation that facilitated the more direct engagement with gender in the context of the *Part-time Work* and *Parental Leave* Directives. Since the *Working Time Directive* was introduced and justified as a health and safety instrument to take advantage of Article 118a and the qualified majority (QMV) rule, any reference to gender equality or similar "social" rationales would have likely met with opposition from the already reluctant UK and other Member States that sought to limit the social aspects of the European project. Indeed, as the debates over the Directive's revision suggested, it was the limiting role of the health and safety rationale and its narrow legal basis that has, in part, prevented more expansive interpretation of the need to regulate working time, which was possible in case of the other two instruments.

While these developments had a significant role to play, the more apparent gendering of the *Part-time Work* and *Parental Leave* Directives was not just a result of their different legal status, associated politics, and convenient timing. Another likely reason for the absence of gender focus – and one which probably would have kept gender language out of the text even if the political reasons for doing so had not existed – was the fact that the EU employment policy and regulation have historically evolved around the standard employment relationship (SER), in which they continued to be embedded. Standard working-time norms, even those most progressive from a social/worker protection perspective, have generally been associated with the SER and set on the presumption of exclusive engagement, with the subject of regulation being an unencumbered (male) employee. Consequently, regulations dealing with standard norms of working time – the daily and weekly limits – have not been seen as explicitly gendered even in the context of changing labour market realities. As Supiot (2001) observed, the

Working Time Directive was still committed to the Fordist-production model's conceptions of time and leisure. The Directive remained very much embedded in standard notions of employment; it provided the "gender neutral" fundament for the EU working-time regime.

It is only when this "inexplicit" approach is juxtaposed with the more explicitly gendered approaches taken by the Directives on part-time work and parental leave, that the SER-centric aspect of working-time becomes really apparent. The bifurcated approach that results demonstrates that the existing working-time regime at the EU level, rather than re-thinking the subject of regulation in the increasingly feminized labour market, has attempted to "fit" and *accommodate* women into the male patterns of employment and merely *adapt* legal standard based on these patterns. While this approach has indeed involved some acknowledgement of the needs of the workers with caring responsibilities (predominantly women), it has failed to reconceptualize regulation in a way that would place those workers at the centre (or "core"), not at the fringe (or "margin") of employment regulation (Vosko 2010).

As the *Working Time Directive*'s revision consultation demonstrated, some attempts have been made to expand the universe of political discourse surrounding standard conceptions of working time to include the references to work-family reconciliation and gender equality, thereby challenging the standard conceptions of work and their gendered consequences. However, the same example shows that doing so in the context of the *Working Time Directive* has proven quite challenging for those social and institutional actors promoting such an expanded view of working-time. Both the European Parliament (Employment and Social Affairs and Women's Rights and Equal

Opportunities Committees) and the ETUC sought to mainstream the relationship between equal opportunities and working time, drawing on expert reports also available to the Commission staff and other actors involved in the negotiations (Pereira Interview, 17 February 2010, Brussels; Anonymous European Commission Policy Officer Interview, 17 February 2010). Indeed, the relationship between the opt-out's promotion of long hours and women's opportunities was also something that got flagged by the European Economic and Social Committee's in their consultation/re-examination opinions as a matter that should be analyzed in greater depth.⁷⁹ However, even the best intentions can be abandoned in light of political pressures. Rhetoric and official submissions aside, even those parties acknowledging the link between equality and working time were quite willing to drop it under political pressure. As the Rapporteur Alejandro Cercas and Jean Lambert, the UK MEP and a member of the EU Green Party, both outspoken supporters of the removal of the opt-out, noted, the political debate on the working-time – at least in the context of the *Working Time Directive* – became dominated by the balancing of the health and safety and economic efficiency/flexibility rationales. In its almost exclusive focus on these rationales, the actual discussion of the opt-out completely failed to engage with and draw the link between the adverse effects of long hours on women's employment and advancement opportunities or even on the fact that long hours are incompatible with balancing professional and familial responsibilities. According to one

⁷⁹ Opinion of the European Economic and Social Committee on the Communication from the Commission to the Council, the European Parliament, the European Economic and Social Committee and the Committee of the Regions and the Social Partners at Community level concerning the Re-exam of *Directive 93/104/EC concerning certain aspects of the organization of working time*, [2004] O.J. C 302; Opinion of the European Economic and Social Committee on the Proposal for a Directive of the European Parliament and of the Council amending *Directive 2003/88/EC concerning certain aspects of the organization of working time*, COM (2004) 607 final — 2004/0209 COD, [2005] O.J. C 267. However, in its 2005 opinion, the EESC also noted that it does not intend to take a stance towards the opt-out, choosing instead to defer to the social partners' negotiations and calls on the issue.

senior Commission employee, Fernando Pereira, who appeared well aware of the connection between gender and working-time, these issues were never brought up in the Council discussions on the Directive's revision (Pereira Interview, 17 February 2010, Brussels), which were entirely dominated by the balancing of economic efficiency and basic health and safety objectives. According to him, the discussion quickly shifted from technical considerations to purely ideological and political ones (Pereira Interview, 17 February 2010, Brussels).

Similarly, those discussing the contentious issues of the reference period and on-call work failed to link the impact of long hours on women's equal access to employment and to the perpetuation of gendered patterns of work. Long-hours working was at the heart of both the issue of long reference periods and the redefinition of on-call work, with the latter actually operating in the sectors dominated by women, and with both having a potentially adverse impact on the issues of work-family reconciliation. Yet the negative effects of these provisions were not really taken into account either. The entire discussion of on-call work was dominated by financial considerations. Despite all the work-family reconciliation rhetoric, the ultimate dispute was not over employee-friendly forms of flexibility but rather over the ability to extend working hours – the classic form of negative flexibility – and about money. The promotion of gender and equal opportunities might have been related issues, but they did not make it into the universe of political discourse and onto the bargaining table even at the midnight hour of negotiations. Under political pressure, even those parties such as the ETUC and the Commission, both of which attempted to broaden the debate on working time to include gender, were not quite able to do so. In Passchier's view, one of the reasons for the Commission's failure was

the lack of what she referred to as “policy coherence”: “If you talk to [the] equality departments [within the Commission] they always have a nice position, but are they able to get this position into the mainstream? That is the real issue” (Passchier Interview, 16 February 2010, Brussels).

3.5 Conclusion: Moving Forward, with or without Gender?

The 2010 Commission Communication issued after the debacle of the revision negotiations more squarely acknowledges that there is a link between working time – as regulated in the *Working Time Directive* – and equal opportunities:

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.⁸⁰

Moreover, in its 2009 *Report on Equality Between Men and Women*⁸¹ the Commission acknowledges that periods of recession and crisis, which are often used to claw back specific gains, should be seen as opportunities to reflect on the established, if altered, standards, and rethink them in a way that may be more socially, and ultimately economically, sustainable.⁸²

⁸⁰ *Reviewing the Working Time Directive*. First-phase Consultation of the Social Partners at the European Union level under Article 154 of the TFEU. Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee, and the Committee of the Regions, COM (2010) 106 final, (24 March 2010).

⁸¹ COM (2009) 0694 final (18 December 2009).

⁸² *Ibid.* At page 17, the Commission notes: “The political responses given to the recession represent an opportunity as well as a potential threat for women’s employment and gender equality. There is a risk that the current recession will delay advances, or even reverse progress, with longer-term consequences on the sustainability of the economy and the social protection systems, social inclusion, and demography.”

Such references to rethinking standards are important, even if they are more symbolic than concrete. Nonetheless, the nesting of the reconciliation, and employee-friendly flexibility in the context of competitiveness and the concern not to overburden enterprises, tends to suggest that the transformative potential that crystallizes during crisis moments is unlikely to take the form of an EU solution, at least not at this time.

As this and the previous chapters had shown, the *Working Time Directive* was a product of an uneasy balance between the security and the flexibility rationales, the Community's limited competences, and the fragmented consensus between the major actors shaping the universe of political discourse: the Member States, the Council and the Parliament, the social partners representing labour and management at the EU level. While the Commission's reframing of the working-time issue to fit the EU's developing health and safety competences was sufficient for the instrument's adoption in 1993, and the ECJ's subsequent interpretation of the Directive's provisions affirmed and strengthened the legitimacy of this legal basis, both nonetheless posed a series of political problems. As the Directive's revision process made apparent, this legal framing also significantly narrowed down the universe of political discourse on working time and made the Directive an uneasy foundation for the wider EU working-time regime. Consequently, actors interested in broadening the universe of political discourse around this instrument – particularly the European Parliament, the ETUC and, to some extent, the Commission – have been only partially successful in doing so.

While the Directive's future is uncertain and there is concern about further erosion of this already very limited instrument, the Directive is also ripe with possibilities. Given

the pronounced shift towards work-family reconciliation in EU policy, the increased focus on redressing the effects of demographic shifts and preventing a demographic crisis, and the new attention to gender equality and promotion of equal opportunities, the Directive could potentially be revised in a manner that extends the political discourse around working time. The enshrining of rights to reconciliation and limitation of work hours by the *Charter of Fundamental Rights* may also prove game changing. Noting the transformations in the realm of work and the broader social and economic situation in its Communication on *Reviewing the Working Time Directive*, 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?” Ripe with opportunities, this question opens the doors to possibilities, but the extent to which the proposed solutions will be transformative remains to be seen. Perhaps with more vigilance or the possibility of finding another treaty base,⁸³ the *Working Time Directive* can become part of a more coherent approach to working time at the EU level, one which would fully acknowledge the essentially gendered nature of working time and the necessity of refashioning working-time standards to achieve gender equality in the workplace, in society generally, and more sustainable working-time arrangements from the perspective of social reproduction. As the next two chapters will elaborate, such a more comprehensive vision of working time is particularly crucial in Poland, where social reproduction has been significantly undermined as a result of

⁸³ It was suggested to me during the interviews I conducted in Brussels that finding a new treaty base to justify the *Working Time Directive* is as a potential direction for the new Directive revision proposal. Officials of the European Commission DG Employment, whose names I have agreed to not identify, voiced this opinion. Moreover, trade union representatives and Members of the European Parliament with whom I had a chance to talk on this subject also anticipated this.

broader political-economic changes, and where EU regulation has had particular impact on the labour law reform.

Chapter 4

Polish Working-Time Regime from Socialism to the Liberal Democracy – Long Hours, Women’s Double Burden, and Social Reproduction

4.1 Introduction

Despite the sea change that Polish workers have experienced in the last several decades, two things have been remarkably persistent: long hours of work and the double burden for women. Compared to Western Europe (WE) and even other Central Eastern European (CEE) countries, working-time reductions proceeded at a much slower pace in Poland, particularly since the end of World War II. Although legislation introduced in 1918 and 1919 placed Poland among the leading group of countries that adopted the 46-hour weekly norm,¹ this progressive trend was reversed several years later by legislation reinstating the 48-hour week² (Szubert 1976). The 46-hour norm, legislated once again after World War II,³ remained the standard for nearly four decades, making long hours of work the key feature of the working-time regime that developed in the People’s Republic

¹ According to Waclaw Szubert’s (1976, 24-25, 209) seminal text on People’s Republic-era labour law, the 8-hr day was introduced by decree on 23 November 1918, several days after the date of Polish independence. One year later, on the 18 December 1919, this decree was replaced by a statute introducing the 46 hour work week, with an “English” 6 hour Saturday, and an increase in the overtime premium from 25% to 50% for the first 2 hours and from 50% to 100% for all hours in excess of two or more, and hours worked during the night or holidays. This Statute remained in force until 1975. In the period between 1918 and 1924, other progressive statutes and regulations on aspects of working time were introduced, including the annual leave statute, provisions on leaves for pregnant workers, and the creation of factory crèches and kindergartens (Szubert 1976, 25).

² Szubert (1976, 27) notes that the economic crisis of the 1930s gave rise to a very regressive trend in labour legislation, working time rules in particular. Overtime abuses became common and bad employer practices found support in judicial decisions. In 1933, the 48-hour week and the previous levels of overtime premiums were reinstated. Negative changes also affected the duration of and pay for annual leave.

³ Many of the regressive legislative changes from the 1930s were repealed starting in 1945. The 46-hour week and overtime compensation were reinstated to the 1919 levels.

of Poland (People's Republic).⁴ Working time was finally reduced to 42-hours in 1986.⁵ The 40-hour workweek – one of the key demands of the general strikes that swept the country in the August of 1980⁶ and, by then, a long-time reality in most industrialized countries – was never achieved in the People's Republic. In fact, it was not achieved until 2003, well over a decade after Poland's transition to a liberal market economy. By this time, however, cycles of recession and the economic pressures of EU conditionality contributed to significant flexibilization of the Polish working-time regime.

The second persistent and related feature of the Polish post-war reality, and, in part, the product of the working-time regime that developed there, has been the double burden experienced by women. The presence of the double burden, although to some extent mediated by the provisioning role of the state and nationalized enterprises during the People's Republic period, was nonetheless a clear indication that the existing provisions were not sufficient, and that the traditional gender contract that had historically existed in Poland was substantially untransformed by socialist egalitarianism and women's employment activation.⁷ The double burden also attested to the fact that the standard

⁴ Officially, Poland changed its name from Republic of Poland (Rzeczpospolita Polska, or RP) to People's Republic of Poland (Polska Rzeczpospolita Ludowa, or PRL) in the *Constitution of the Polish Republic of 22 July 1952*, (1952) Journal of Laws, No. 33, item 232 (Konstytucja Polskiej Rzeczypospolitej Ludowej uchwalona przez Sejm Ustawodawczy w dniu 22 lipca 1952 r., Dz.U. 1952 nr 33 poz. 232) [all statute names translated by author]. However, for my purposes here, I will use the term People's Republic to refer to the period after WWII and up to 1989. I will use the term Poland in general reference to the country as well as to specifically refer to pre and post-1989 period.

⁵ Although the process of working time reductions begins in the 1970s by phasing in additional "free" Saturdays, the actual reduction of working time to 42-hours is introduced in 1986.

⁶ In August 1980, a series of workers strikes and non-violent demonstrations swept Poland. Organized by the NSZZ "Solidarność", the first independent and, at the time, unsanctioned, trade union in Poland, the strikes focused on traditional worker demands but also moved beyond them by making demands for political and economic liberalization, and the improvement of general living conditions of the population. While the strikes were temporarily quashed by the imposition of the Marshal Law in 1981, and Solidarity was forced underground, its activism and social mobilization contributed to the political-economic reforms that initiated Poland's transition to market economy at the end of 1980s/early 1990s.

⁷ For the discussion on the persistence of traditional gender roles in Poland see section 4.2.3 entitled "Institutional Supports and the Double Burden".

employment relationship (SER) and the norms associated with it – standard working hours being one – were not fully compatible with the essential yet unpaid work of social reproduction because these norms took this work for granted. Instead, these norms penalized women who were traditionally charged with carrying the bulk of unpaid work. In the People's Republic, standard norms of working time penalized women not by excluding them from the labour market, because some provisions for their full and life-long participation were made, but by substantially adding to their workloads.

Remarkably slow progress on such a key labour issue as reduction of working time demands some consideration, particularly given the ideological foundation of the People's Republic and the fact that both long working hours and women's double burden continue to be endemic in contemporary Poland. Thus, this chapter begins with an overview of the developments in the universe of political discourse and working-time regulation in the People's Republic, encompassing the period between the end of the WWII and the start of the political-economic transition in 1989. It highlights the key discourses, rationales, and institutional constraints that influenced the organization and regulation of work hours during this period, and describes the key features of the People's Republic's working-time regime, the ways in which it was supported by the state, and shows how it contributed to women's double burden. Next, the chapter examines the impact of Poland's transition to market economy on the country's universe of political discourse; it also considers how the changes in the country's institutional architecture affected the terms and conditions of women and men's labour market engagement and the process of social reproduction. This discussion sets the context for the analysis of the post-transition changes in working-time regulation, particularly in light

of Poland's 2004 EU accession in Chapter 5. Chapter 5 also undertakes an assessment of Poland's "new" working-time regime from the perspective of its gendered impacts. This chapter concludes by considering the logics employed to justify long hours during the course of Polish post-war history, focusing on the patterns of continuity and change, and assessing their comparative outcomes from the perspective of gender equality and social reproduction.

4.2 "What Have You Done to Achieve the Plan?" – the Discourse of Civic Duty and the Structural Causes of Long-Hours Work in the People's Republic of Poland.

4.2.1 Introduction

Reconstruction, industrialization and economic growth – the key goals of the post-war period – had a crucial impact on shaping Poland's post-war universe of political discourse and the development of labour regulations, including working-time standards. The primacy of "the Plan" meant that social objectives, such as working-time reductions, became, at least temporarily, subordinated to economic rationales, and growth indicators. Encouraged by the success of the *Three-Year Economic Reconstruction Plan (1947-1949)*,⁸ which went a long way towards rebuilding Poland's economy and infrastructure after the World War II and substantially improved the living conditions in the country,⁹ the *Six-Year Plan of Economic Development and Construction of the Socialist System of*

⁸ *Three Year Economic Reconstruction Plan (1947-1949), Act of 2 July 1947*, Journal of Laws 1947, No. 53, item 285 (hereinafter *Three Year Plan*).

⁹ The goal of the *Three Year Economic* was the reconstruction of Poland after World War II by focusing on the reconstruction and maintenance of three equivalent sectors: the public, the cooperative, and the private. At the end of 1949, the GDP increased by 43%, exceeding the 1938 figures, and the per capita GDP was 2.5 times higher than in 1937. Total employment increased from 3.4 mln to 4.4 mln between 1947 and 1949. The plan also succeeded in raising living standards and was generally regarded as the only successfully carried out Plan in People's Republic history (Gajos 2009, <http://Historia.org.pl/>).

1950-1955¹⁰ aimed to expand significantly the industrial base in Poland, further increase production and build the foundations for socialism.¹¹ The Plan's objective was to elevate the economic growth in the industrial sector by a staggering 158 percent and raise the agricultural production by 50-60 percent.¹² Such ambitious goals required enormous human effort, particularly given the very low technological capacity at the People's Republic's disposal. Hence, the authorities engaged various methods to ensure that there were plenty of hands to do the job. The contribution to rebuilding the country, building socialism, and assisting the rapidly growing industrial economy came to be regarded as matters of civic duty; nestled in and supported by a powerful ideological discourse best summed up by the poster slogan "What have *you* done to achieve the Plan?" (See Figure 1). The young, eager worker gazing from the poster – his finger pointed and his probing question – embodied the sense of civic duty and the level of commitment that was expected from workers. Importantly, as this call to engagement was also directed at women, who were similarly depicted in these calls to action, the universe of political discourse valorized women's contribution to the productive process above their more traditional domestic roles. As Fidelis (2010, 74) points out, women were not only to play a key role in the expanding textile industry and other feminized sectors, but also in those previously reserved for men (see Figure 1). Accordingly, pre-war protective legislation

¹⁰ *Six Year Plan of Economic Development and Construction of Socialist System 1950-1955* was adopted by the People's Republic Parliament on 21 July 1950, Journal of Laws 1950 No. 37 item 344 (Ustawa z dnia 21 lipca 1950r o 6-letnim planie rozwoju gospodarczego i budowy podstaw socjalizmu na lata 1950-1955, Dz.U. 150 nr. 37 poz. 344) (hereinafter *Six Year Plan*).

¹¹ After the positive results of the *Three Year Plan*, the *Six Year Plan* set out even higher objectives. The Plan projected a 50-60% increase in the standard of living. It also set to triple the industrial production of 1938 by 1995, and the construction of 350 new industrial plants – employing one million workers in total. In addition to increased output in agricultural sector, the Planners foresaw implementation of a gradual collectivization of agricultural properties.

¹² *Ibid.*, 430.

that excluded women from certain occupations or from work under specific conditions, such as truck transport or underground mining, was repealed in 1951 (Szubert 1976, 36).¹³

Besides being ideational, the duty to work was a concrete legal obligation¹⁴ that took-on particularly coercive dimensions during this period. Save for a few,¹⁵ many of the regulations introduced in the 1950s were specifically designed to achieve high levels of labour market participation, maintain industrial discipline and subordinate workers' demands to the economic goals set by the Plan. To that effect, statutes and decrees curbing the disruptive potential of trade unions by limiting their functions to more administrative and organizational ones (Zieliński 1997, 13), provisions limiting the movement of workers in some occupational categories, and punitive disciplinary penalties for absenteeism (Szubert 1976; Seweryński 1999) were legislated at the outset of the *Six Year Plan* period.¹⁶

¹³ This legislation was reinstated in 1959.

¹⁴ The right to work was enshrined in the 1952 *Constitution of the Polish People's Republic*, supra note 4. This right obligated the State to ensure full and life-long employment of all citizens but also obligated citizens to participate in the labour process, with the ethos of work being deeply incorporated into the official discourse. Practically, most social entitlements, provisions, and benefits stemmed out of employment and were organized at the level of the enterprise.

¹⁵ Two statutes legislated in the 1950s introduced protective working-time provisions. The first, amended the existing annual leave statute by extending the length of annual leave for blue-collar workers and providing for potential additional leaves (20 March 1950). The second statute, introduced on 19 April 1950, created the basis for reductions of working time where work was being carried out in conditions particularly harmful to health.

¹⁶ *Act of 19 April 1950 concerning Protection of Socialist Work Discipline*, Journal of Laws 1950 No. 20, item 168 (Ustawa z dnia 19 kwietnia 1950 r. o zabezpieczeniu socjalistycznej dyscypliny pracy, Dz.U. 1950 nr 20 poz. 168), aimed at limiting absenteeism by prescribing severe monetary penalties for missing work. A court could order a 10-35% earnings cut for a period of up to 3 months, with the employee's right to unilaterally terminate the employment relationship being suspended for that period of time. Failure to submit to the penalty, as well as failure to impose the penalty by the director of the enterprise could lead to incarceration (Szubert 1976, 35).

Figure 1 People's Republic-era Propaganda Posters¹⁷



According to a Polish labour law scholar Tadeusz Zieliński (1997), the coercive nature of these regulations reflected the Stalinist influence in most areas of Polish social and economic policy at the time.¹⁸ Under this totalitarian work-rule, Zieliński observes, the labour process became no less exploitative and alienating than that of the 19th century capitalist enterprises (Zieliński 1997).

While many of the restrictive provisions and statutes enacted between 1950 and 1955 were repealed after 1956¹⁹ (Szubert 1976), no significant developments in the area of working time would take place for nearly two decades. In the early 1970s the legislature finally passed the long overdue working-time reform, partially phasing in the five-day workweek by eliminating Saturday work on several days of the year, beginning

¹⁷ People's Republic-era propaganda posters calling on men and women to contribute to the rebuilding of the country; women portrayed in typically masculinised jobs: "What have you done to contribute to the Plan?" (left) and "Greetings to the Women Working for the Peace and Development of the Country" (right) [translation by the author]. Authors of the posters unknown. <http://www.plakaty.poszukiwania.pl>

¹⁸ Industrial discipline was also maintained/ensured through the use of industrial spies, informers, and special security forces, who prowled factories (Fidelis 2010, 74-75).

¹⁹ It is generally accepted that the period of most coercive policies and practices of the People's Republic history ended with Stalin's death in 1953. The direct Soviet influence was also diminished after 1953.

with two in 1972,²⁰ six in 1974 and increasing to twelve in 1975 and 1976.²¹ This very limited reduction was accompanied by a number of other developments related to aspects of working time, reflecting a shift in employment policy towards a greater reconciliation of social and economic goals, and a renewed commitment to the improvement of living standards. The focus on maternity-leave extensions and granting mothers the right to a 60-day paid leave to care for a child²² (Szubert 1976), also marked the shift in the official family policy during this period. Nonetheless, the economic growth motives continued to play a key role in employment regulation and the organization of the nationalized enterprises. “Extensive managing” – the characteristic managerial method practiced in the People’s Republic state enterprises – equated productivity and efficiency with work intensification and overtime (Zieliński 1986, 222). Usually utilized to meet production goals, make up for outmoded technology, and particularly common during periods of economic crisis and shortage, these tendencies in managing the labour process were enabled by legislatively mandated weekly and daily working-time extensions in key industries.²³ These kinds of practices only served to slow down the process of working-time reduction (Zieliński 1986).

²⁰ *Decree of 20 July 1972 on Additional Holidays*, Journal of Laws 1972 No. 29 item 203 (Dekret z dnia 20 lipca 1972 r. o dodatkowych dniach wolnych od pracy, Dz. U. z 1972 r. Nr 29, poz. 203); *Decree of 20 July 1972 on Additional Holidays*, Journal of Laws 1973 No. 29 item 160 (Dekret z dnia 14 lipca 1973 r. o dodatkowych dniach wolnych od pracy, Dz. U. z 1973 r. Nr 29, poz. 160).

²¹ *Act no. 41 of the Council of Ministers of 6 February 1974 concerning the Rules and Timelines for Introduction of Additional Holidays during 1974 and 1975*, Law Monitor No. 6, item 43 (Uchwała nr 41 Rady Ministrów z dnia 6 lutego 1974 r. w sprawie zasad i terminów wprowadzania dodatkowych dni wolnych od pracy w latach 1974 i 1975, M.P. Nr 6, poz. 43).

²² *Act no. 14 of the Council of Ministers of 14 January 1972 concerning Child-care Social Assistance*, Law Monitor No. 5, item 27 (Uchwała nr 14 Rady Ministrów z dnia 14 stycznia 1972 r. w sprawie zasiłków z ubezpieczenia społecznego za czas opieki nad dzieckiem, Monitor Polski, Nr. 5, poz. 27).

²³ In the 1980s, for instance, the *Labour Code*, as well as several other statutes, mandated working-time extensions in key industries for the purpose of meeting the production objectives (1986-1990) and/or overcoming the economic crisis (1983-86).

A related reason for the slow progress on working-time reductions was undoubtedly tied to the legal status and the structure of trade unions. Beginning with the early steps towards restricting union function and activity noted above, the People's Republic-era labour unions were controlled by the authorities and served more as extensions of the administrative and managerial apparatus than as independent representative bodies capable of collective bargaining (Seweryński 1995, 33-34; Zieliński 1997). Although the particularities of their legal status changed over the years, trade unions essentially functioned to organize productive activities rather than represent workers in negotiating conditions of work and defending their interests. One way in which union effectiveness was further impaired was through making strike activity, the fundamental tool of organized labour everywhere, illegal (Seweryński 1995).²⁴

Despite the peculiar status and role of the unions, workers nonetheless managed to achieve some concessions from the state and national enterprises. In fact, according to another labour law scholar, Michał Seweryński (1999), most of the progressive changes in employment regulation enacted by the People's Republic authorities resulted from the popular pressure exerted by workers' revolts and illegal strikes. Nonetheless, these concessions were partial and designed to temporarily pacify the periodic eruptions of unrest. It was not until 1982, a year after mass workers' strikes had swept the country, that the right to strike was finally recognized,²⁵ the legal status of trade unions began to

²⁴ Seweryński points out that since the political and legal doctrines prevailing in Poland and other communist countries excluded the possibility of social conflicts, there was no established procedure for dealing with labour disputes and the right to strike was not recognized. These procedures, including a circumscribed right to strike, were enacted in 1982 as an attempt to regulate the spontaneous mass workers' demonstrations that took place in 1981. Less rigorous dispute settlement and strike provisions that were more in line with international standards were enacted in 1991 (Seweryński 1995, 44).

²⁵ The trade union law passed in 1982 after the 1981 strikes introduced a right to strike, although with significant restrictions. See: Seweryński 1999, 28-29. This legislation remained in place until it was

change and the first independent trade union, NSZZ “Solidarność” (Independent Self-governing Trade Union “Solidarity”), was formally recognized (Seweryński 1999).

While Solidarity and the social movement that rallied around it have been credited with beginning the process of unravelling the Polish state-socialism and paving the way for the economic and democratic reforms that began at the end of 1980s, the extent to which Polish unions have been able effectively to secure changes in working time since then is less clear. Although the demand for the five-day and 40-hour workweek would eventually be met in 2003, the practice of long hours continued to be prevalent during the transition period. Interestingly, despite the change in Poland’s political-economic outlook, this practice of long hours was utilized for essentially the same reasons and justified in a very similar language as before.

4.2.2 The People’s Republic Working-Time Regime, 1945-1989

Working-time Regulations in the 1974 Labour Code

The legislatively prescribed long working-time norm of 46 hours over 6 days applied from the end of World War II until 1986. Prior to the 1974 codification of labour and employment law, rules on working time were contained in several statutes and numerous regulations and decrees issued by the Polish Council of Ministers (Seweryński 1999). The 1974 *Labour Code*²⁶ unified many of these rules. The *Labour Code* expanded the scope of possible daily and weekly working-time extensions, but also reduced some of the existing limits and included a broad provision permitting the Council of Ministers to take the steps towards further working time reductions. To that effect, art. 150 of the

modified by 1991 *Act regarding the Resolution of Collective Disputes*, Journal of Laws 1991, No. 55, item 236.

²⁶ *Act of 26 June 1974 concerning the Labour Code*, Journal of Laws 1974 No. 24, item 141 (Ustawa z dnia 26 czerwca 1974r Kodeks Pracy, Dz.U. 1974 nr 24 poz. 141) (the *Labour Code*).

1974 *Labour Code*, for example, delegated to the Council of Ministers the phasing in of additional Saturdays as days off, a practice that had already been initiated by regulations passed earlier that year. However, apart from the six, and later twelve “free” Saturdays per year, more substantial working time reductions would not take place for several more years.

In addition to art. 150, the 1974 *Labour Code* mandated working-time *reductions* for specific categories of workers and where the conditions of work were particularly straining or harmful to human health and safety. Unlike the 1950s legislation that it replaced,²⁷ the 1974 *Labour Code* did not provide specific reduced norms; instead, art. 130 mandated the Council of Ministers, by regulation, temporarily to reduce the existing maximum working time in the specified circumstances either by setting lower daily and weekly norms or by introducing additional breaks. Workers, whose working time was reduced pursuant to art. 130 of the *Labour Code*, were entitled to full compensation, since the new norm would be the maximum permissible norm in their industry or job classification.

In terms of working-time *extensions*, the 1974 *Labour Code* provided that maximum daily working time could exceed eight hours for specific occupational categories or if specific conditions or types of work organization necessitated such extensions. In these situations, the *Labour Code* specified permissible daily (up to 10 or 12 hours) and weekly (up to 56 hours) extensions and reference periods (two, three, and four weeks) for averaging working time. For workers employed in surveillance, security, and to guard property, for instance, the daily working time could be increased to 12

²⁷ Supra note 16.

hours, provided that the average number of weekly hours did not exceed 56 over a three-week reference period. The 56-hour maximum was introduced by a 1974 Council of Ministers regulation, and was a significant reduction from the previous maximum limit of 72 hours (Szubert 1976). Workers employed in essential services and retail, as well as drivers in transport could work up to 10 hours per day, provided that their working time equalled an average of eight hours a day and 46 hours per week over the reference periods of four weeks and two weeks respectively (art. 141). Ten-hour days (with one month reference periods) were permitted for workers whose work depended on seasonal and atmospheric conditions (such as workers in agriculture and sea voyage or faring), as well as workers in hospitality and tourism, aviation, postal services, and railways (art. 141). For all of these workers, time in excess of the norm established in their particular workplace was compensated with overtime pay (art. 134 set this at 50 percent for the first two hours in excess of the set norm, and 100 percent for additional hours or overtime night work, or work on Sunday or during statutory holidays) or, on the worker's request, by equivalent time off (art. 143). Finally, the *Labour Code* provided special working-time rules for workers employed in industries where the technological process mandated that the work be uninterrupted (art. 132). Here, daily hours could be extended to 12 and weekly to 48 over the reference period of four weeks,²⁸ with overtime compensation for any hours in excess of the eight/46 *Labour Code* standard, calculated at the end of the reference period of four weeks (art. 132 para. 4).

In addition to the specific exceptions and provisions for longer daily and weekly working-time norms, *overtime rules* also provided for extensions of the daily and weekly

²⁸ This was a significant change from the previous regulation, which provided that weekly working time could be increased to 56 hours, without specifying any reference period for this type of work organization.

limits in three types of circumstances. First, the *Labour Code* permitted overtime for emergency situations, life-saving operations, or emergency repairs (art. 133 para. 1). No maximum limit on daily working time applied in these cases. Second, overtime was permitted when it was necessitated by circumstances broadly defined as the “particular needs of the employer” (art. 133 para. 1). No explanation or examples were provided for what such needs might comprise. Moreover, the 1974 *Labour Code* dispensed with a previously existing obligation to consult with the union or another representative body of the workers on this working-time extension, leaving this determination entirely to managerial discretion (Szubert 1976, 518). The only applicable limit imposed by the 1974 *Labour Code* in this case was that the annual overtime for each worker could not exceed 120 hours (art. 133 para. 2). However, the Code also contained a provision permitting the Council of Ministers to adjust (i.e. increase) this annual limit for particular enterprises or sectors (art.133 para. 3). Finally, overtime was also permitted in the above-mentioned continuous or uninterrupted mode of production or work organization.

Notwithstanding the fairly broad discretion of enterprise managers to request overtime, there was a prohibition on the overtime employment of certain categories of workers, including pregnant women (art.178). For example, mothers of children under one, could be employed overtime only with their express permission (art.178). Overtime premiums equalled 50 percent for the first two hours in excess of the maximum norm and 100 percent for additional hours beyond two (art. 135). These premiums were not available to managerial and supervisory staff, or other workers who exercised autonomy over their work organization (art.135 para. 1), as well as workers engaged in project or task-based work (art. 136).

With minor amendments, the working time rules of the 1974 *Labour Code* were in effect until the re-codification of 1996.²⁹ One important change that occurred prior to 1996, however, was the reduction in the weekly working-time norm to 42 hours. This reduction applied to the nationalized enterprises as of 1981. However, subsequent Council of Ministers regulations and decrees made provisions for additional working-time increases at the discretion of enterprise managers.³⁰ Such increases could be implemented in key industries and on the condition that they were necessitated by important production or efficiency needs. Consequently, working time could be extended to 46 hours or 48 hours per week, and from eight to 12 hours per day, provided that it averaged to 42 hours over an extended reference period of 24 weeks (Zieliński 1986). These extensions, introduced in 1983, as part of an anti-crisis bill,³¹ and then again in 1986, were examples of the “extensive managing” philosophy that employed overtime as a way of increasing efficiency and meeting production goals.

Special Working-time Rules Related to Women and Motherhood

Aside from the prohibition on overtime work for pregnant women and its restriction for women with children under one (art. 178 para. 1 and 2), the 1974 *Labour Code* also contained other rules dealing with aspects of women’s working time, which were listed in

²⁹ *Act of 2 February 1996 concerning the Amendment of the Labour Code and certain other Acts*, Journal of Laws 1996 No. 24, item 110 (Ustawa z. 2 Lutego 1996 o zmianie ustawy - Kodeks pracy oraz o zmianie niektórych ustaw Dz.U.1996 Nr 24, poz.110).

³⁰ *Decree of the Council of Ministers, 1986, regarding Increasing Working Time in Some Enterprises during the Period of 1986-1990*, Journal of Laws, No. 6, item 34.

³¹ *Act of 21 July 1983 concerning Special Legal Regulation during Social-economic Crisis and concerning the Amendment of certain Acts*, Journal of Laws 1983 No. 39, item 176 (Ustawa z dnia 21 lipca 1983 r. o szczególnej regulacji prawnej w okresie przewycięzania kryzysu społeczno-ekonomicznego oraz o zmianie niektórych ustaw, Dz.U. Nr. 39, poz. 176).

the Code's chapter addressing the "Protection of Women's Work,"³² and which remained mostly unchanged until the 1996 *Labour Code* re-codification. These special provisions included maternity leaves and other types of child-care leaves.

With respect to the first, art.180 of the *Labour Code* provided for an extended, paid maternity leave of 16, 18 and 26 weeks depending on the number of children born.³³

Women could partially determine how to spread the time available between the period of before and after childbirth, with the restriction that at least two weeks of the leave had to be taken before the set delivery date. Women had less control over the total duration of the leave, since the *Labour Code* prescribed that all but four weeks of the leave were obligatory. Thus, women who for some reason wanted to shorten their leave, were still required to take-up at least 12 (of 16), 14 (of 18), 22 (of 26) weeks respectively, depending on the number of children (art. 180 para. 3). In 1974, maternity leaves were also made available to adoptive or foster mothers, and their duration was 14 or four weeks, depending on the age of the adopted child (under four months or under one year old, respectively; art. 183 para 1 and 2).

In addition to the maternity leave, the *Labour Code* also provided for two other types of child-related leaves: an unpaid, job-protected leave for the care of a child, referred to as the "child-raising leave," and additional 60 days of paid leave for the care of a sick child ("child-care leave").³⁴ The child-care leave was provided for mothers only

³² The same chapter of the *Labour Code* also listed various protective provisions that were unrelated to working time, such as the prohibition against employing all women in certain specified occupations and conditions and special rules for pregnant workers.

³³ Prior to 1972, the Maternity leave was set at 12 weeks. The extension was enacted by way of the *Act of 6 July 1972*, Journal of Laws No. 27, item 190.

³⁴ Both leaves were initially introduced in 1958 and 1968, and then improved in 1972 following the 1970-71 strikes in Łódź and Gdansk, although not fully meeting the demands for a fully paid child-raising leave, one of the key demands of the women textile workers striking in Łódź. The extension of the leave to three

and guaranteed 100 percent earnings for up to 60 days per annum. The child-raising leave, in existence since 1968³⁵ and previously set at a year, was provisionally extended to three years in 1972,³⁶ and then more formally in the 1974 *Labour Code*. This unpaid leave could be requested by the *mother* at any time before the fourth birthday of the child and could be taken either in its entirety or in part. While the initial request had to be granted by the workplace manager, breaking up the leave into parts was contingent on the manager's agreement. Beside a guaranteed return to work, women who took the child-raising leave were also entitled to a family allowance (art. 189). Moreover, the time spent on leave also counted towards seniority for the purposes of annual leave calculations, retirement entitlements, and other benefits that were determined on the basis of labour market attachment.

Additional special rules related to working time that were available to women only included provisions for breastfeeding breaks (twice daily, 30 minutes each, or 45 minutes if more than one child; art. 187), paid medical examination leave for pregnant women, and paid leaves for a sick child (two per year) available to all mothers of children under 14 (art. 188). With the exception of the leave to care for a sick child, all leaves under the 1974 *Labour Code* were available solely to mothers. Art. 188 para. 2 extended the leave for a sick child to fathers, but only where the father was the sole parent.

years, without compensation but with a guarantee of job return and series of entitlements was the compromise that was struck (Heinen and Wator 2006). These improved provisions were incorporated into the 1974 *Labour Code*.

³⁵ *Act no. 158 of the Council of Ministers of 24 May 1968*, Law Monitor No. 24, item 154 (Uchwała nr. 158 Rady Ministrów z 24 maja 1968r, M.P. nr. 24, poz. 154).

³⁶ *Act no. 14 of the Council of Ministers of 14 January 1972*, Law Monitor No. 5, item. 27 (Uchwała nr. 14 Rady Ministrów z 14 stycznia 1972r. MP nr. 5, poz. 27.)

4.2.3 Working Time and Social Reproduction in the People's Republic – State's Provision and Women's Double Burden

As already noted, the post-war call to civic duty and to rebuilding the country was also directed at women, with their engagement in the productive process being supported by a number of rationales within the universe of political discourse. First, the egalitarian and proletarian ideology of socialism saw engagement in paid work as the only route to the attainment of full emancipation, thus policies supporting women's equal opportunities had an important ideological dimension. There were a number of pragmatic reasons that explain this as well. With the size of the male population seriously diminished by the end of World War II (Fidelis 2004, 309), the number of woman-headed households increased sharply and many women began to demand employment to support themselves and their children (Fidelis 2004, 310). While women's wage work was a highly contested issue in the early post-War period, by the late 1940s, women's labour market participation was encouraged and actively sought after to meet the economic planners' production goals and demands of industrialization (Fidelis 2004, 312-314), which dominated the universe of political discourse of the 1950s.

Indeed, that the objectives of women's equality were likely secondary to the latter was also confirmed by the authorities' changing approach towards protective regulations limiting women's access to certain occupations. As already noted, these regulations were completely repealed at the outset of the *Six-Year Plan*, and from 1950 to 1955 women were welcomed and, indeed, encouraged to enter all sectors of the economy. Subsequent changes in labour market composition, production needs, and lobbying by men's groups lead to the reinstatement of protective legislation in 1955, its further extension in 1959, and return of the discourse about the "natural" gender differences (Fidelis 2010). As

Fidelis details in her study on women workers of the People's Republic era (from 1945 to 1956), reinstatement of protective legislation left many women newly skilled in "male" professions unable to work in their chosen fields, and this change was implemented without any consultation with women's groups and without regard to their choices and preferences (Fidelis 2010, 319-322). The timing of this abrupt shift in the People's Republic's gender and employment policies confirmed that the principles of equal access to work and chosen occupations that dominated during the early 1950s were clearly subordinate to other considerations, particularly those of economic planning, availability of employment, pressures exerted by men's groups, and the need to maintain fertility rates and the residual social provision. Despite this setback, women's activation rates continued to grow in other sectors of the economy through the 1960s, and women's full wage employment became a permanent feature of the Polish labour market (Strzemińska 1970). By the 1980s, women constituted nearly fifty percent of the working population in the People's Republic, compared to thirty percent three decades earlier, and the thirty-two percent in contemporary Western Europe (Molyneux 1990, 26-7).

Patterns of Working Time

The policy of full employment in the People's Republic meant that standard hours of work were the norm regardless of the worker's gender. Long hours were common in both feminized and masculinised sectors, and thus, the level of working-time polarization – the discrepancies in working-times of different workers – remained relatively low. Although working-time extensions mandated by the 1974 *Labour Code* applied in many male-dominated sectors, "equivalent" system of working time permitted in essential services, retail, hospitality, and gastronomy – sectors that were feminized (Lobodzinska

1977; 2000) – diminished some of the differences that may have otherwise been caused by longer hours in heavy manufacturing and other male-dominated jobs. In fact, legislated working time *reductions* were often mandated in those sectors and jobs that by 1959 were entirely off limits to women due to potential exposure to harmful conditions.³⁷

The fact that the *Labour Code* extended special protections over women's work and working time did not translate into a gender gap in working hours either. Most of the protective provisions were related to accommodating pregnancy and early periods of maternity, and thus involved short-term leaves and absences. Although, the introduction of the three-year child-raising leaves could have significantly increased women's child-related absences, in practice many women did not take full advantage of this entitlement. Barbara Lobodzinska (1978, 691) reported that between 1969 and 1970 only 90,000 women went on the child-raising leave (at that time still only of one year duration). Based on the number of live births during this time period, she estimated the take-up rate of this leave to be only 8.3 percent (Lobodzinska 1978, 691 note 4). Moreover, according to Lobodzinska, blue-collar workers were more likely to take leave (40 percent) than their white-collar counterparts (20 percent), and that, in total, only 32 percent of Polish women stopped working for maternity-related reasons (Lobodzinska 1978, 692 citing Kurzykowski 1967).

Along with the relatively low take-up of child-related leaves, the low incidence of part-time work, even after childbirth, also kept the potential discrepancies between men and women's working hours to a minimum. Although part-time work was not prohibited, there were no regulations that governed it, and, in practice, it was unpopular and rarely

³⁷ Protective legislation reinstated in 1959 listed 90 occupations prohibited to women on the basis of health and safety, women's particular physical capabilities and protection of their reproductive functions. Some of these included: extractive industries, underground mining, and smelting, among others.

utilized. Of the very few studies that looked at its incidence, one reported that in 1971 only six percent of women workers were engaged in part-time work, with nearly half being women between ages of 60-64 (Sokołowska 1978, 261-262). Another author noted that, in 1970, of the 3,884,200 female public sector workers, only 103,300 worked part-time (2.7 percent), while in 1973 these numbers were 4,648,000 and 133,800 respectively (2.9 percent) (Wierzbńska 1978, 322). Although at the end of the 1980s, recorded rates of part-time work were somewhat higher, at 12 percent for women and 7.6 percent for men, they were still much lower and less polarized by gender than the rates of part-time employment in Western European countries (Poliwczak 2003, 18). Overall, the unpopularity of part-time work (much like the relatively low take-up of the three year child-raising leave) was related to the low wages paid and the fact that two full incomes were necessary to maintain a decent standard of living and sustain dependents. Beyond insufficient incomes, women also perceived part-time work as limiting in terms of future career advancement (Sokołowska 1978), and their preference for full-time work was inevitably influenced by the legal construction of work as a right and a duty, as well as the officially espoused philosophy of socialist egalitarianism and the related belief in paid employment's emancipatory potential (Pascall and Manning 2000).

While standard, "rigid" work organization based around a fixed schedule dominated in the People's Republic, some flexible forms of work organization were introduced in select state-run enterprises as early as 1973. These experiments in flexible work organization were motivated by social and economic considerations; though their ultimate objective was to increase productivity, they also sought to adjust the work to the workers and to the capacities of the social infrastructure.

As economists Lucyna Machol (1980) and Helena Strzemińska (1984) described, variable start and end times, and even arrangements which allowed individual workers or workers' teams to determine both the start and the length of their daily shifts, subject to the observance of particular timeframes and weekly averages ("own account" flexibility), were introduced as ways of decreasing absenteeism, increasing productivity and job satisfaction, and to take the pressure off the social infrastructure, including workplace canteens and public transportation. According to Strzemińska (2008a, 57; 2008b, 83), variable start and end times were also introduced in select Polish cities to accommodate working mothers and to synchronize their working schedules with the openings of day care or kindergarten facilities, as well as to accommodate late arrivals caused by transportation difficulties. Later, the recognition of the economic benefits of these and other forms of flexibility prompted their further expansion to address economic factors such as irregularities in resource and energy supply, production breaks, and the increase in paid overtime (Strzemińska 2008a, 57-58).

These experiments, although successful from the perspective of enterprise management and popular with workers (Machol 1980, 28-29; Strzemińska 1984), where nonetheless limited or entirely stopped by the State administration because of their apparent incompatibility with the existing *Labour Code* regulations on working time. Indeed, variable start and end times, and particularly the "own account" working-time flexibility, could be inconsistent with the definition of the working day under the *Labour Code*.³⁸ In reality, however, experiments in "own account" working-time organization were likely discontinued because they clashed with the accepted notion that only more

³⁸ For the purpose of averaging and overtime calculations, working day is defined as the 24-hour period.

work and longer hours would yield better productivity,³⁹ and because more flexible organization provided workers with a degree of autonomy that was inconsistent with the use of work as a form of control in the People's Republic.⁴⁰ Ultimately, as Machol (1980, 29-31) points out, some managers of state enterprises where working-time flexibility experiments were carried out, particularly those using "own account" systems, continued these practices unofficially because they recognized their benefits for production efficiency and meeting workers' personal needs. Although the practices of variable start and end times were retained officially, these times were pre-scheduled in order to avoid potential inconsistencies with the *Labour Code* definition of the working day (Machol 1980, 30). In neither case was there a significant difference between men and women's use of these arrangements.

To sum up, although some exceptions existed after maternity, women's working-time patterns were not significantly different from those of men. The discourse emphasizing productivity, existing *Labour Code* provisions, and actual workplace practices – particularly the practice of "extensive managing" and reliance on overtime – contributed to relatively long standard working-time norms for all workers. The legislatively prescribed working-time extensions were equally likely to affect male and female workers, and, indeed, the *Labour Code*-mandated reductions often benefited workers in occupations or sectors that women could not access.

³⁹ Helena Strzemińska (1984) negatively assessed the 1983 Council of Ministers, *supra* note 31, decisions to extend work hours by increasing weekly and annual overtime limits as a means to increasing productivity of state-enterprises. Among others, Strzemińska pointed to the likely social impact of these decisions, particularly the impact on work-family reconciliation. Instead, she recommended that forms of flexibility, such as "own account", variable start and end times, and individualized work schedules are most beneficial for productivity and most adaptable to workers' individual needs.

⁴⁰ The notion/belief that full employment was a means to controlling the population was shared with me by a number of Polish scholars with whom I had a chance to speak with during my fieldwork.

The few special accommodations that made the transitions between work and motherhood easier for women applied to relatively short periods of women's working lives. Even with the career breaks caused by maternity leaves and child-care obligations, women's rates of workplace absence were, on average, lower than those of men⁴¹ (Strzemińska 1970, 22), and generally fit within the *standard* norm for the majority of their working lives. Despite this reality, the very existence of special provisions contributed to the perception that women's rates of workplace absence were significantly higher than men's because of their familial duties. Women, particularly mothers, were also regarded as less committed to their jobs, because it was assumed and, even expected (particularly after the late 1950s) that their primary commitment was to their families. In a clear contradiction to the premises of socialist egalitarianism on which People's Republic was said to be based, these presumptions about women's commitment, together with the naturalization of gender difference in the mainstream political discourse (and the popular belief that men and women were differently predisposed), stifled women's advancement opportunities, contributed to occupational segregation, and the gender pay gap. In turn, women's secondary status in the workplace, tended to reinforce traditional gender contracts in the private sphere.

Institutional Supports and the "Double Burden"

At home, no one can replace a mother's care – regardless of the age of the children; similarly, not one can replace the homemaker in managing the household and tending to the daily needs of family members. Participation of the other members of the household in these duties may assist a

⁴¹ Strzemińska (1970, 229) notes that men's higher rates of absenteeism and their absence due to the mandatory military service (one year) essentially made up for any difference in workplace absences that would have otherwise existed due to women's maternity and child-care leave take up.

woman, but in most cases the main responsibility for the family rests on her. It is hard to imagine the existence of an institution that could replace women, and completely “free” them from their domestic duties. Nor do women desire this sort of emancipation.

Strzebińska (1970, 11) [translated by author]

As I explained in the previous section, beyond the periods of pregnancy and early maternity, no special working-time arrangements were available for female workers to reconcile full-time labour market engagement with family obligations. Instead, to support the existing model of employment and working time without detriment to fertility rates or the standards of living, the People’s Republic authorities had to accommodate women’s employment and make additional provisions for the process of social reproduction.⁴² In addition to legislating the paid or job-protected leaves described above, other forms of institutional support included providing and subsidizing child care, family allowances and family-support funds, and universal healthcare (Lobodzinska 1995, 7; Heinen and Wator 2006). Further, some subsidies were also available for food and housing, and education at all levels was publically funded. Many of these services, particularly kindergartens and crèches, canteens, and recreational facilities, were carried out at the enterprise level. As Kerry Rittich (2002b) observed, beyond practicality, this choice of delivery mechanism also fairly explicitly acknowledged the relationship between the interrelated processes of social reproduction and production.

⁴² The responsibility for social reproduction assumed by the Polish state was extensive relative to that assumed by many Western European states such as Germany or the UK where the post war gender-contract was primarily based on the male breadwinner/female carer model. However, the official policy was often out of step with reality and other planned economies, such as for instance Eastern Germany fared better than Poland in terms of state provisions and childcare facilities.

While the public infrastructure and support took some pressure off of working parents, particularly mothers, it often fell short of being sufficient, and the residual work of care and maintenance had to be carried out within the household (Einhorn 1993; Fidelis 2004). Since the traditional gender contract assigning the performance of these activities to women was remarkably persistent, regardless of the formal equality and women's high visibility in paid employment, the bulk of this residual work fell to women. Given the already long-hours of paid work and the People's Republic economy of shortage, this was not an easy task. Busy, weighed-down, tired, yet always capable of juggling it all, the iconic image of a Polish woman widespread in People's Republic-era TV series and the popular press – although somewhat exaggerated and ironic – did, in fact, convey the reality of the double burden most Polish women coped with on a daily basis. Scarcity of many foodstuffs and other necessities, the unavailability of household appliances, and the underdeveloped service sector made everyday tasks such as procuring and preparing food, or household maintenance, very time-consuming (Strzemińska 1970; Lobodzinska 1977).

Sociological research and time-budget studies attested to women's double burden and to the fact that their total hours of work exceeded those of men. Sociologist Barbara Lobodzinska's (1977) comprehensive survey of early Polish studies on women and men's respective involvement in domestic and child-rearing duties concluded that according to most available data, women's domestic contributions exceeded those of men regardless of whether both partners were employed or the household was based on the traditional breadwinner model. While a woman's level of education and skills appeared to be a predictor of her partner's involvement in the domestic and child-rearing duties, even in

households with highly educated and skilled women, men's involvement was limited to the more "technical" aspects of domestic work, limited assistance with childrearing, and taking out the garbage (Lobodzinska 1977, 413).

One of the key studies that Lobodzinska cited was Helena Strzemińska's (1966; 1970) research on the total working time of white and blue-collar women, which found them to differ but also identified pronounced discrepancies between working times for all women and men. According to Strzemińska's figures, blue-collar women workers in the 1960s spent, on average, five hours and 38 minutes on daily household chores, while their white-collar counterparts spent three hours 34 minutes (Strzemińska 1966, 261; 1970). This additional work was carried out on top of the 10 to 11 hours spent on paid work (including the time spent on commuting), leaving women, depending on their occupation, between six hours 30 minutes to eight hours for sleep and between one and two hours 30 minutes for leisure activities. Strzemińska's estimates also showed that all women had between 60 and 70 percent less leisure time than men, due mainly to their unequal investment in domestic and caring activities.⁴³ This estimate confirmed the trend noted by an earlier study carried out on a representative sample of Warsaw residents, which found that nearly 60 percent of women, compared to 40 percent of men, reported having no leisure time at all. According to that study, most women reported less than one hour of leisure time daily (Szkorzyński 1965 cited in Lobodzinska 1977, 412).

⁴³ Although pointing out the highly problematic situation of the female double burden, in these early studies Strzemińska (1970, 226) did not necessarily question the traditional gender roles and the women's "natural" predispositions for domestic and caring labour. Rather, she pointed out that in light of women's increased labour market engagement and their shrinking family and leisure time, there was a growing need to provide additional services such as affordable canteens and various types of domestic help such as housekeeping services, laundry, and small appliances, all of which were in short supply. She also pointed to flexible forms of working-time organization, including part-time work and flexible start times, as ways to enable women to better combine their domestic and professional duties. Finally, she advocated that women who would rather remain at home to care for their families, particularly if those families were larger than average, should be, by policy, enabled to do so.

Aside from diminishing women's rest and leisure time, the double burden also contributed to women's lagging position in the labour market, the existence of a wage gap, and marked occupational segregation. Strzemińska (1970) noted that beyond the detrimental impact that women's time poverty and related exhaustion had for their productivity, it also significantly limited their time for human capital development, and, thus, future career advancement opportunities. At the same time, she urged that double burdens also made it difficult for women to fulfill their traditional roles as mothers and wives; something she did not necessarily dispute as a woman's duty (Strzemińska 1970, 226; see also the quote above). Strzemińska advised policymakers that providing opportunities and arrangements for better reconciliation of these roles was of great social and economic importance (Strzemińska 1970, 11). In her recommendations, she listed working-time flexibility, improved and more extensive service provision, and better public transit infrastructure as steps that could alleviate some of the pressure that women were experiencing. In the process, she urged, it could also improve the well-being of their families and make women more productive and valuable employees (Strzemińska 1970, 230-233).

The fact that the trends identified by Strzemińska and other researchers in the 1970s continued to be confirmed by time-use studies in subsequent years suggests that her recommendations were being ignored or that few measures were taken to change this situation. According to Poland's Central Statistical Office (GUS) data, nearly a decade and a half later, in 1984, women were still committing more hours to daily household chores, spending on average six hours six minutes on domestic and caring work, compared to the one hour and 24 minutes that men spent on the same work (GUS 2005).

Not only was the Polish state unsuccessful in easing women's double burden by accommodating their dual duties more meaningfully; it also failed to challenge the traditional gender contract that contributed to the double burden in the first place (Heinen and Wator 2006; Matysiak and Steinmetz 2006).⁴⁴ Indeed, no particular efforts were made to encourage some reassignment of responsibility for the unpaid work of care and maintenance or to challenge men's unequal involvement in the domestic sphere. On the contrary, the notion that women could not be fully replaced in their duties, and indeed, were unwilling to let go of domestic and care-giving responsibilities was quite prevalent in the universe of political discourse. Some researchers have gone as far as to suggest that the People's Republic's authorities actively exploited traditional values and helped to institutionalize them to a greater or lesser extent. Jacqueline Heinen and Monika Wator (2006), for instance, found that the official People's Republic discourse and policy practice promoted several different ideal-types of womanhood depending on the needs of the state-run economy, the ebbs and flows in productivity, and staffing demands, as well as demographic changes. They found that the primary roles assigned to women ranged between those of "worker mothers," "mother workers," and, at times, simply "mothers,"⁴⁵ (Heinen and Wator 2006, 192). During the economic crisis of the 1970s, for instance, the duration of the child-raising leave was extended to three years and women were actively encouraged to remain at home with their children. This policy change – itself a response

⁴⁴ Unlike, for example, Eastern Germany, where even more extensive provision of childcare services combined with strong encouragement of the dual-earner model (and arguably the absence of strong underlying Catholic values), had a more lasting impact on women's labour market participation and attitudes towards paid employment (see Matysiak and Steinmetz 2006).

⁴⁵ See also Zajicek and Calasanti (1995, 181-182) who describe the contradictory and changing ideologies and policies promoted by the Polish state in terms of the productive and reproductive gender ideologies. Similarly, Renata Siemieńska (1983) cites various Polish studies that identified similar changes in the perceptions of women's roles over the decades, though analyzing the portrayals of women in the Polish popular press, particularly the women's weekly *Przyjaciółka* [Friend]. The different roles assigned to women are also noted by Małgorzata Fidelis (2004).

to the workers' demands for the compensation of the one year leave already available – was designed in a manner that avoided additional social spending (in the conditions of financial difficulties) and that dealt with the unacknowledged job shortage⁴⁶ (Heinen and Wator 2006, 192). Of course, as was suggested earlier, the take up rates of these leaves were fairly low, in part due to the fact that the leaves were unpaid, or paid at a fairly low level, and that a single wage (men's) was insufficient to support a family. Although women were subsequently encouraged to work once again, the sociologist Maxine Molyneux (1990) suggested that by the 1980s the official discourse of gender relations in Poland was entrenching difference, not equality.⁴⁷ While the material effects of the gendered divisions in employment and in the home were deplored, the divisions themselves were starting to be seen as natural and even desirable (Molyneux 1990, 43).

To some extent, women themselves helped to perpetuate this way of thinking. They took certain pride in their ability to juggle numerous duties and in the control that they maintained over the domestic/private sphere, often infantilizing all members of their families, husbands included (Dunn 2004, 155-165). This stance led one sociologist famously to conclude that Polish women were “grateful slaves”⁴⁸ (Domański 1992), while another Polish scholar noted that Polish women were “accomplices in perpetuating

⁴⁶ Workers protests in 1970 sought several changes in the working-time regulations, among them the increase of the child-raising leave and the commitment to making the leave paid. Increasing the leave to 3 years without providing compensation was the settlement that was finally reached.

⁴⁷ That women's traditional roles as caregivers were taken for granted and further reinforced by the official policy is also evident in those working-time rules related to maternity and parental-leave provisions. After the initial period of maternity leave, women were encouraged to take an extended leave, of up to three years, and these leaves, albeit not connected with either the post-partum recovery or breastfeeding, were available to fathers only in some exceptional circumstances. Similarly, overtime restrictions during the early years of the child's life applied to mothers, not parents, and only women were entitled to the additional two days leave in the event of the child's sickness.

⁴⁸ The term “grateful slave” is used by sociologist Hendryk Domański in the title of his 1992 book, *Zadowolony Niewolnik? Studium o nierównościach między mężczyznami i kobietami w Polsce* (*The Grateful Slave? Study of inequalities between men and women in Poland*).

their own subordination through internalized stereotypes... compulsory patriotism, willingness to sacrifice our own good for the sake of family or nation, unquestioned acceptance of prescribed gender roles” (Karpiński 1995, 91).

Polish feminist researchers have argued that this very contradictory construction of womanhood and femininity in Poland is a result of historic circumstances, cultural norms, politics, and the influence of Catholicism (Ksieniewicz 2004). On the one hand, women occupied a very special, almost symbolic status in the Polish society. For a nation that had gained and lost its independence on so many occasions, the family was one of the few enduring institutions, and as the keepers of the familial hearth women were historically charged with the duty to cultivate Polish culture, language and the national identity (Titkow 1995). Inspired by the image of Maryja, the Mother of God,⁴⁹ the mythical construction of Matka Polka (the Polish Mother) prevalent in art, literature, and the public discourse, was both powerful and oppressive (Dunn 2004, 165-167, 158; Fidelis 2004; Ksieniewicz 2004). This contradictory construction of femininity glorified women at the same time as it tied them firmly to the private sphere and their role within it. In the process, it either denied women access to public life or served to diminish their actual public involvement.

During the People’s Republic era, when equality was the official policy and the levels of women’s labour market participation matched those of men, these enduring gender constructions continued to inform the universe of political discourse and served to double women’s workloads. The popular belief that women were irreplaceable in their

⁴⁹ According to an American anthropologist, Elizabeth Dunn (2004, 158), the role of Christian symbols such as Mary, the Virgin or the Mother of God was crucial, as it has been in other Catholic countries. Significantly, as in Poland, it was the maternity of Mary, not her virginity that was highlighted (as the case may have been in Italy for instance).

domestic and caring roles only compounded this reality. Matka Polka went out to work, but she was also the one to spend her “free time” queuing for foodstuffs, picking up the children after school, preparing the meals and cleaning up after everyone. Titkow calls the gender-role model that developed in the People’s Republic the “managerial matrimony” model; its key features were women’s lack of sleep and exhaustion, but also their sense of being the “indispensible family manager” (Titkow 1995, 318). Along with the growing dissatisfaction with “the system”, the private sphere – the home – became increasingly regarded as the refuge and the site of quiet personal resistance (Dunn 2004, 165-167) and women’s traditional, private roles as mothers and wives became even more revered and further entrenched.

The People’s Republic of Poland presents an interesting case of an attempt to accommodate the processes of social reproduction within a working-time regime based on standard hours for all adult workers. On the one hand, the state’s direct involvement in social reproduction clearly acknowledged the importance of this process to the broader social and economic sustainability, and translated into better access to standard employment for women who were supported in their dual roles as workers and mothers. However, this explicit recognition of *collective* responsibility for social reproduction coexisted with persistent traditional attitudes, and the underlying gender contract that assumed that it was the women’s role to provide residual work of care and maintenance. To some extent, women were complacent in maintaining this gender contract. Most of all, however, women’s heavy workloads were a result of having to combine long standard workweeks (initially 46-hours and later reduced to 42-hours) with domestic work in the context of scarce availability of goods and services. Few arrangements for the

reconciliation of work and family obligations made the balance between women's domestic and employment roles very tenuous, and this precarious balance was maintained at the cost of their leisure time and heavy double burdens. While the situation was far from ideal in the People's Republic, it became even harder for women to balance their dual roles during the years of transition. Although the long hours of work continued, the line between social reproduction and production was being redrawn. As the state and the enterprises' roles in organizing the former began to diminish post-1989 (Rittich 2002a), these inconsistencies and their gendered legacy became particularly apparent.

4.3 Polish Working-Time Regime in Transition – “Catching up” with the West

Following waves of strikes and social unrest during the 1980s, the 1989 Round Table talks officially brought together leaders of Solidarity – Poland's independent trade union and the oppositionist social movement – and the People's Republic's authorities to discuss the future of Poland's industrial, economic and social policy, as well as the need for political reform. Partially open Parliamentary elections held later that year lead to the formation of Poland's first non-Communist government in the post-war period under the leadership of Tadeusz Mazowiecki. Subsequent Presidential (1990) and Parliamentary (1991) elections brought further political victories for Lech Wałęsa, the Solidarity's spokesman and leader who was elected Poland's President, and the opposition parties affiliated with Solidarity. With democratization underway, economic restructuring was set in motion by the country's 1990 adoption of economic and fiscal reforms aimed to liberalize the planned-economy and establish the conditions for the operation of a viable and free market.

Labour law reform, including the reform of Poland's working-time regime, also constituted a significant component of the transition process. While no comprehensive *Labour Code* amendments were enacted until 1996, and, indeed, the real flurry of legislative activity did not occur until the new millennium (period between 2000 and 2004), the process of Poland's structural adjustment influenced Poland's universe of political discourse and the process of labour law reform from the start. In fact, the main reason for the 1996 *Labour Code* amendment, symbolically timed with Poland's Organization of Economic Cooperation and Development (OECD) membership in November of the same year, was to adapt Polish labour law to the realities of market economy and liberal democracy (Seweryński 1999). Moreover, while Poland's negotiations to join the EU did not begin until 1998, the *acquis communautaire* was also influential in the context of the 1996 amendment, since Polish legislators were inspired by the EU rules and, indeed, obligated to "approximate" Polish law with that of the EU as of 1994 (Matey 1995, 69; Sanetra 2004a, 9). Specifically, legal scholar Walerian Sanetra (2004, 9) identifies three stages of Poland's legal adjustment to the *acquis*: 1) the period from 1989 to 1994, after the signing of the Pact between the Republic of Poland and the European Community (EC), as it was then known, on 16 December 1991 (which came into force on 1 February 1994); 2) from 1994 to 1998, when Poland officially began its accession negotiations; and 3) from 1998 to 2004, covering the period of negotiations up until Poland's official accession on the 1 May 2004. While Poland had no formal obligations to comply with EC laws during the first period, Sanetra posits that Polish legislators were nonetheless already "inspired" by the *acquis communautaire*. The second period obligated Polish legislators to "approximate" Polish laws to those of the

Community by minimizing and gradually eradicating differences between them (Sanetra 2004a, 9; 2004b, 15-19).

Accordingly, the 1996 *Labour Code* Amendment, which I will discuss below, and preparatory projects that preceded it were guided by the principle of approximation, although major emphasis was also placed on the modernization of the norms to suit the needs of the developing market economy. Indeed, the latter contributed to providing an important rationale for the progressive liberalization of employment relations and the flexibilization of the Polish working-time regime in the subsequent years. While this shift to more flexibility had the potential to challenge the previous inefficiencies in work organization, the practices of “extensive managing,” and the long-hours of work that contributed to women’s double burdens, this transformative potential was largely unfulfilled. Instead, as I will elaborate below, the shift’s embeddedness in the universe of political discourse dominated by the ideology of neoliberalism and the notion that Poland’s economy was “on the make” (“na dorobku”) and in need of catching up, meant that long hours of work continued as a matter of policy and as a matter of practice.

4.3.1 “Making” the Market Economy in Poland

Much like the Plans of the People’s Republic-era, the economic reform plan that began the Polish transition to liberal market economy also required significant sacrifices and carried enormous human costs. Penned by the US development economist Jeffrey Sachs and the Polish economist Leszek Balcerowicz, the controversial reform plan (the Sachs-Balcerowicz Plan) adopted by Poland on 1 January 1990, was, in fact, the most drastic of the three options presented to the Polish administration by the World Bank (Kowalik 2007a; Majmurek and Szumlewicz 2009, 8). Based on Chicago-school

neoliberal economic principles and the “shock therapy” approach, the plan sought to liberalize and stabilize the Polish economy, and to facilitate the country’s prompt “return to Europe” (Sachs 1994, 269; 288). Despite critical warnings and advice that came both from within and outside Poland, the plan was approved and accepted by the Tadeusz Mazowiecki-led government with the justification that there was no “alternative” (Kowalik 2007a; Kołodko 2009b, 326).⁵⁰

While no one expected the reforms to be easy, as Polish economists Tadeusz Kowalik (2007a, 200b) and Grzegorz Kołodko (2009a, 2009b) observe, the economic and social costs of transition were grossly underestimated by the plan’s authors and supporters. In economic terms, instead of the projected three percent drop in GDP and five percent decrease in industrial production, Poland’s GDP fell by nearly one-fifth⁵¹ and industrial production declined by 25 percent causing serious deindustrialization and generating unemployment rates that exceeded expectations (Kowalik 2007a, 3; see also Kołodko 2009b). While it was originally estimated that unemployment would increase by a modest 2.5 percent (approximately 400-thousand unemployed) (Kołodko 2009b, 326),

⁵⁰ In fact, alternative programs were suggested but were completely disregarded at the time. Polish economist Tadeusz Kowalik (2007a; 2009) recounts that prior to the Round Table talks, a representation of Polish economists was sent to Sweden to explore the possibility of adopting the social-market economy; something that was also in line with the early Solidarity demands. Any attempts at finding a “middle” approach, however, were abandoned, with Tadeusz Mazowiecki, the Prime Minister, accepting expert advice that set Poland on a neoliberal course of transition. Kowalik, as well as Grzegorz Kołodko, another Polish economist, and the Minister of Finance during the Left Democratic Alliance administration, have been outspoken critics of the neoliberal “shock therapy” approach. Nonetheless, the programs adopted by the Left Democratic Alliance that Kołodko helped to draft – the 1994 *Strategy for Poland* and *Strategy 2000* – were also neoliberal in tenor, emphasizing economic growth, and the creation of institutional environment for investment and enterprise growth above other considerations. According to Stewart Shields (2011), these programs were also closely aligned with the conditionalities of the OECD and EU even before Poland’s accession negotiations began. Shields has referred to the Polish Left’s approach as “second wave” if neoliberal of reforms (Shields 2011, 89-90).

⁵¹ According to IMF World Economic Outlook 2011, Poland’s GDP fell sharply during the first two years of transition, 1990-1991 (-7.171 and -7.005). In 1992, however, it began to recover (2.033) and continued growing, reaching the highest levels (5.24, 6.7 and 6.23, 7.09) during 1994-1997 (years of the *Strategy for Poland*). As of 1998, it began to decline again, hitting the lows of 1.205 and 1.44 by 2001 and 2002, only to increase to 3.9 in 2003 and continue growing. See Appendix C, Table 2.

the actual rate of unemployment reached 6.3 percent by 1990 and more than doubled within five years (14.4 percent) (GUS 2005; see Appendix C, Table 2). In addition, within two years of the plan's implementation, real wages fell by 36 percent and incomes in the agricultural sector fell by half (Kowalik 2007a, 3).⁵² The economic insecurity caused by loss of employment and/or income was compounded by major cuts to social spending and the dismantling of the infrastructure that once, at least partially, supported the standards of living. As a result, living standards dropped (Balcerzak-Paradowska 2004; Tarkowska 2011), and social stratification, regional disparities, and inequality became much more pronounced (Konat 2009).⁵³

In light of declining social and economic conditions, references to the Polish economy being “on the make” or “catching up with the West” became a common element of the public and political discourse,⁵⁴ providing leaders and experts the narrative with

⁵² Similarly, although the plan eventually succeeded in bringing down the extremely high inflation rate, this reduction too did not happen within the first year, as projected, but not for another nine years (Kowalik 2007a).

⁵³ Although the GINI coefficient for Poland does not show a significant increase in income disparities and the IMF claims that Poland experienced the most moderate increase in inequality (and the largest increase in GDP) of all transition economies (Keane and Prasad 2001), the increasing social stratification in post-transition has been documented and noted by some researchers. Grzegorz Konat (2009, 40), for instance, cites alarming statistical data according to which the percentage of population living below the social minimum increased from about 20% of the population at the end of 1980s to nearly 60% by 2004. Moreover, the rate of people living below what Konat calls, the “existential minimum” – the level at which people cannot meet their basic needs as represented by food and housing costs – rose up to 12% of the population by 2005, from 4.3% in 1996, meaning that one out of every nine Poles experienced difficulties with meeting these most basic needs. Also, according to recent statistics more than one in four Polish children experience poverty (Konat 2009, 40-41). According to Tarkowska (2011), most poverty researchers in Poland acknowledged the rapid increase in child poverty as a characteristic phenomenon of transition. Tarkowska reports Central Statistical Office (GUS) figures for 2004, which indicated that children and young adults under 19 constituted 40% of Poles living below the existential minimum (Tarkowska 2011, 57). In 2008, the 22% of Polish children and young adults lived below the poverty line, which was above the EU average of 20% (Tarkowska 2011, 57-58). While Tarkowska notes that the post-transition growth tendency has reversed, and that the levels of child poverty are gradually decreasing, she calls child poverty one of the most significant problems in Poland.

⁵⁴ Based on my observations, press reviews, and conversations with people in Poland, the notion that Poland is “on the make” has been widespread in the public and political discourse. Essentially, being on the make is the key characteristic of a transitioning economy. Leszek Balcerowicz, for instance, frequently evoked the notion that Poland was “on the make”. When he was the Vice-President of the Council of Ministers and the Finance Minister (October 31, 1997 – June 8, 2000), Balcerowicz used this phrase in introducing and

which to convey the necessity and the rationality of reforms, but also the inevitability of the resulting hardship. Likewise, the notion that people ought to “take matters into their own hands” became popular with Poland’s leaders and served to justify and normalize Poland’s new neoliberal social contract, the key characteristic of which was a sudden reprivatisation of responsibility for citizens’ and familial wellbeing (Michalik 2003). As I discuss in more detail in section 4.3.3, these shifts had particular consequences for women’s ability to meet their labour market and family responsibilities, not only contributing to double burden but also casting women as undesirable employees.

The early explosion of new business ventures – evidenced mainly by the rapidly growing number of petty traders filling squares and sidewalks of most Polish cities and the establishment of small family firms – signalled that some people were indeed taking matters into their own hands (Sachs 1994). Jeffrey Sachs, in his 1994 Tanner Lecture taking stock of the five years of transition in Central Eastern Europe, praised this phenomenon declaring that “Poland took to a market economy like the proverbial fish to water,” pointing out that many of these petty traders were now becoming successful business owners (Sachs 1994, 276). This growth of small enterprises, although itself remarkable, could not, however, contain the rapid job loss resulting from restructuring of the public and nationalized sectors, which were the main source of employment in the

debating the budget (1999) and new taxation statutes (1998). In one instance, Balcerowicz noted: “As a country on the make, Poland needs development like it needs air” (Parliamentary Proceeding No. 34, 09 November 1998). Specifically, he invoked the notion of Poland “on the make” to call for “de-bureaucratization” of Polish law in order to create conditions for employment, enterprise growth, and competitiveness (Parliamentary Proceedings No. 53, 02 July 1999; see also No. 32, 13 October 1998). Various Ministers of Labour and Social Policy also evoked this notion. For instance, Andrzej Bączkowski, in introducing the 1996 unemployment prevention statute (Parliamentary Proceedings, No. 91 24 October 1996) and Longin Komolowski, to impress upon the Parliament that the government is unable to shield most of the public sector from the consequences of restructuring and privatization (Parliamentary Proceedings No. 94, 15 December 2000). Interestingly, even progressive public figures and feminist scholars, like Magdalena Środa, have used this phrase in reference to Poland’s post-transition environment and to excuse various social phenomena (Paciewicz 2011; and personal communication).

People's Republic.⁵⁵ With their progressive privatization (one of the key reform plan strategies) and the lay-offs, bankruptcies, and closures that soon followed, unemployment soared to previously unprecedented levels⁵⁶ (see Appendix C, Table 2).

In addition to producing unemployment, the process of restructuring had a significant impact on trade union membership rates, which began rapidly shrinking. In principle, all workers in the People's Republic belonged to unions, although these unions were centrally controlled. Moreover, at the height of its popularity in the early 1980s, the independent and self-governing Solidarity trade union boasted having a membership of ten million workers (Kowalik 2009a, 6). By 1991, however, only 18 to 19 percent of adults declared themselves trade union members; a number which continued to decline over the years reaching the low of 11 percent by 1999 (CBOS 2002, 1-2; Stelina 2006, 200) and merely six percent in 2002 (CBOS 2002, 1).

According to Polish economic sociologist Juliusz Gardawski (2002), this decline in membership was partially the result of privatization and the emergence of home-grown private sector, where anti-union sentiments were highest and, thus, new trade unions least likely to be established. Another reason, however, was a more generalized public antipathy towards organized labour.⁵⁷ Given the contradictory role that the trade unions, particularly Solidarity, played in the transition process, Polish workers simply lost trust that unions were invested in representing their interests (Gardawski 2002; Stelina 2006).

⁵⁵ While nationalized enterprises employed majority of Polish population, some private ownership was sustained in the People's Republic-period, though primarily in the agricultural sector.

⁵⁶ There was no official unemployment in the People's Republic. However, it is commonly observed that despite the full employment policy, unemployment was simply "hidden" in the People's Republic, with many jobs being unproductive and redundant.

⁵⁷ According to the Public Opinion Research Center (Centrum Badań Opinii Społecznej, CBOS) (2002), 69% of the polled expressed that trade unions are ineffective, while only 15% continued to perceive trade unions as effective.

After all, Solidarity's leaders played a key role in the transition and, although initially proponents of a more gradual and participatory systemic change, by the early 1990s they officially endorsed the technocratic and neoliberal course of political-economic transition chosen by Poland's advisors (Ost 2000, 2005; Gardawski 2002). According to Sachs,

[Polish] politicians and the general public understood intuitively that a 'shock therapy' approach was not simply another utopian scheme of economic reform, but rather was a quick route to a relatively quick target. In 1989, the quick target was Western Europe (1994, 269).

Not only did Wałęsa and other Solidarity leaders fully support the Sachs-Balcerowicz plan of "shock therapy," the union actually provided the protective umbrella for the reforms as they became instituted in the early 1990s (Gardawski 2002). Indeed, according to the Solidarity's biographer, US scholar David Ost (2000; 2005, 149-158), seeing organized labour as a potential obstacle to a swift and successful economic transformation, Solidarity's top-tier leaders had the local, enterprise-level stewards work to suppress the labour's militancy when the undesired effects of the reforms became apparent. Most famously, Lech Wałęsa declared: "We will not catch up to Europe if we build a strong union" (Ost 2000, 519; 2005, 37).

Solidarity's failure to buffer workers against the harsh realities of economic reform and its failure to halt the erosion of its membership base had significant and enduring costs. First, it weakened organized labour *vis-à-vis* Poland's new, yet increasingly powerful, business lobby and employer organizations. Indeed, Solidarity's principled unwillingness to cooperate with the All-Poland Alliance of Trade Unions (Ogólnopolskie Porozumienie Związków Zawodowych, OPZZ), Poland's other major trade union confederation, only exacerbated this problem (Ost 2000, 515; 2005). Active in the public

and the newly privatized sector, the OPZZ operated since 1984, when, as was widely believed, it was established by the People's Republic authorities as counterweight to Solidarity⁵⁸ (EIRR 1999; Ost 2005). This historical legacy continued to be reflected in the two confederations' political activism and alliances after 1989, with the OPZZ being a more natural ally of the Left and Solidarity of the Right-wing and "solidaristic" populist parties; it was also an ongoing source of tensions between them. In effect, it also fragmented the Polish labour movement and compromised its ability to withstand the pressures exerted by the Polish employers.

In purely political terms, the 1994 electoral victory of the social-democratic (and ex-Communist) Left Democratic Alliance was a clear indication that the political wing of Solidarity had also lost public confidence. Although the incoming Left's 1994 *Strategy for Poland*, penned by another Polish economist, Grzegorz Kołodko, eschewed the non-interventionism of the Balcerowicz's "doctrinal" ideology of neoliberalism in favour of a more active state involvement, particularly in regulation of labour markets and social policy (Kołodko 2009), its approach still fit within the fiscal parameters advocated by the transnational economic organizations and was explicitly designed to gain membership in the OECD, and eventually, to meet EU conditionalities of accession (Kołodko and Nuti 1997). Indeed, the Left chose to tackle Poland's unemployment by introducing what a political economist Stuart Shields refers to as "second wave" of neoliberal policies already promoted at the transnational level (Shields 2011, 89). Specifically, the Left's policies emphasized labour market and employment flexibility, as necessary for lowering labour costs and providing a more business-friendly regulatory environment for foreign

⁵⁸ The OPZZ was created in 1984 by the Meeting of Branch Union Representatives as a counterweight to Solidarity; it replaced the previous Central Trade Union Council, which was largely controlled by the Communist authorities.

investment and the flourishing of domestic enterprise (*Strategy for Poland* and 2002 *Economic Strategy*).⁵⁹ Despite the fact that the Left also introduced many pro-labour policies during its tenure, its acquiescence to neoliberalism made it an easy target for Right-wing, liberal, and populist parties who drew their support from Solidarity's membership and activists who were vehemently anticommunist (Ost 2005, 82-87). Ironically, the liberals whom Solidarity supported endorsed the same, or even more radical policies.

It was in this political and labour market context that the 1996 amendments to the 1974 *Labour Code* took place. In terms of working time, their combined result was moderate, but the introduction of extensions to the length of reference periods, reductions to overtime compensation, and the general liberalization of provisions regulating employment contracts laid the foundations for working-time increases and introduced considerably more flexibility into the *Labour Code*. Given the realities of the Polish labour market post-1989, however, this flexibility would mainly encompass the employer-driven forms of flexibility that were unlikely to lead to a more sustainable working-time regime. The powerful discourses of “catching up” and the “country (economy) on the make”, and the goals of adjusting Polish labour law to the competitive pressures of market economy meant that long hours of work would continue to be the reality. In the next section, I review in more details the working-time provisions of the 1996 *Labour Code* and their impact on the working-time patterns and women's position in the labour market.

⁵⁹ The third document in the economic “trilogy” developed by Kołodko was “Euro 2006”, the strategic plan for Poland's Economic and Monetary Union (EMU) membership.

4.3.2 Working-Time Regime in Poland, 1989-1996

Working-time Regulations Under the 1996 Labour Code Amendment

Although other important labour law changes were enacted in preparation for the 1996 *Labour Code* re-codification, no major changes to working-time rules were made between 1989 and 1996, and the working-time norms from the 1974 *Labour Code* remained binding. As already noted, the main goals of the 1996 Amendment were not only to reflect the systemic change and to adjust the Polish labour and employment law to the needs and conditions of a market economy, but also to bring it in compliance with international labour and human rights standards.⁶⁰ To that effect, the *Labour Code* made efforts to harmonize Polish law with the International Labour Organization (ILO) conventions, mainly in the field of health and safety and began the process of “approximating” Polish labour and employment law to the *acquis communautaire*.⁶¹

In terms of working time, the 1996 *Labour Code* retained the 42-hour working-time norm (art. 129), but introduced many changes that began to infuse more flexibility into the organization of working time. For example, it provided for increased daily working-time limits to nine hours (art. 129.6), establishing working time by reference to the scope of employee’s tasks (art. 129.8), and replacing the overtime allowance, calculated in accordance with hours worked, with a lump sum payment (art. 134(3)). The 1996

⁶⁰ To that effect, the 1996 *Labour Code* Amendment removed all references to nationalized enterprises, delegations to the Council of Ministers, and other provisions reflecting the Socialist foundations of the 1974 *Labour Code*.⁶⁰ It also modified the “right to work” principle and the previous obligation on the State to pursue a “full employment policy”, by replacing it with the right to freely choose one’s employment, the freedom to practice a profession (art. 10) and a duty on the state to pursue a policy aimed at full productive employment and regulation of the minimum remuneration for work (art. 65.1). To reflect the systemic change, the new *Labour Code* highlighted the freedom to contract and negotiate the conditions of employment (with some exceptions and limitations), introduced rules for mass layoffs and redundancies (which were already taking place as a result of privatization of national enterprises).

⁶¹ See Sanetra (2004), who describes the three phases of Poland’s legal adjustment and preparation for EU accession. The first phase, according to the author, began before Poland’s official negotiations and was that of “approximating” Polish law to the European *acquis*.

Amendment also raised the annual overtime limit from 120 to 150 hours (art.133(2)) and increased many of the reference periods for the calculation of average working-time norms. For example, the basic reference period for calculations of the 42-week average was extended to three months. Also, while the one-month reference period applicable to essential services, retail, and road transport sectors was retained, a provision was made for possible extensions to three months by collective agreement. Moreover, the reference period for calculating the 40-hour week in case of work determined by seasonal and atmospheric conditions was increased to six months. As a form of protection against overtime abuse, the four-hour daily overtime limit was imposed.

With respect to provisions regulating aspects of women's working time, no changes to the maternity leave provisions were made either prior to or in the 1996 amendment. However, a significant amendment was made to the child-raising leave. In 1996, the right to this leave was extended to men and the right to compensation was set at 80 percent of the employee's usual income. This change was important and evidenced a new commitment to encouraging men to take on more responsibility for the care of their children. Indeed, the Leftist government's *Family Policy Program*⁶² drafted a year later, in 1997, was also calling for more equal sharing of responsibilities for paid work and care. However, as pointed out by Raław-Markowska (2008), the choice of policy instruments for support of equal work-family reconciliation that the 1997 program highlighted suggests that the government was more interested in promotion of "interchangeable breadwinning" in the context of high unemployment, than in genuine promotion of gender equality.

⁶² The *Family Policy Program* was drafted by the Inter-departmental Group for the Development of the Government Family Policy, and was headed by the Plenipotentiary for the Affairs of Women and the Family.

That the commitment to equality was only half-baked in the context of the changes to the child-raising leave was also noted by the Centrum Praw Kobiet (Women's Rights Centre) assessment. The Centre pointed out that the way the legislation constructed the 1996 child-raising leave provisions clearly suggested the assumption that the leave would be taken up by women (Women's Rights Centre 2000, 53-54). The main article speaking to the leave, art. 186, provided that female workers who are mothers (*not* parents) are entitled to the leave. It was only in art. 189 that the leave was *also* extended to male workers who are fathers. Thus, while this amendment was most certainly a positive effort on the part of the Polish legislature, the manner in which the statute was drafted tended to reinforce the notion that the primary target and recipients of the leave would be women.

Patterns of Working Time

The changes to working-time rules made in the 1996 *Labour Code* not only retained the 42-hour norm, they also introduced longer reference periods and provided for additional permissible overtime. Although several protective provisions were introduced (such as the four-hour cap on daily overtime) and the child-raising leaves were extended to fathers, the main goal of the amendment was to provide for more flexibility in the deployment and organization of work, working time included. This thrust was consistent with the goals of adjusting the *Labour Code* to the needs and conditions of market economy as well as aiding the “economy on the make” and cutting the costs of labour in order to stimulate employment and economic growth – all important conditions for the 1996 membership in the OECD and the future membership of the EU.

The massive job loss (see Appendix C, Table 2) – one of the most dramatic consequences of the radical reform plan adopted by Poland in 1990 – had an enormous

effect on the Polish labour market. Not quite able to address the problem, in the early years of transition some politicians and union leaders issued calls for “returning” women to the domestic sphere, in part to create work for unemployed men⁶³ or to provide full-time childcare to mitigate the rapid decrease in public child-care facilities (Graff 2008; Desperak 2009; Kubisa 2009). Some Polish feminists described this process (along with the severe restrictions on abortion enacted by way of a 1993 bill) as the backlash against People’s Republic-era socialist egalitarianism and the backlash against women themselves (Graff 2008; Ksieniewicz Interview, 26 January 2010, Warsaw).⁶⁴ Although the process of pushing women out of the labour market was not entirely successful, many women nonetheless found themselves in a much more difficult position under the new conditions.⁶⁵ Urszula Sztanderska (2006, 4) estimated that after 1992 women’s activation and employment rates were consistently lower than men’s, with the difference in the former ranging between 14.5 and 16 percent, while the difference in the latter oscillating between 12.6 and 15.9 percent.⁶⁶ While the cycle of the rise and fall of the activity and employment rates varied from the early 1990s, the overall rates fell for both women and men by about seven to 9.8 percentage points (Sztanderska 2006, 5; see also Sztanderska

⁶³ In January 2010, I had the opportunity to meet with Magdalena Środa, one of Poland’s leading feminist politicians (formerly of Left Democratic Alliance) and scholars. Środa spoke of the same process of “pushing” women out of the labour market in order to “unblock” jobs for men (personal communication).

⁶⁴ Representatives of the Solidarity movement were famously said to make such calls. Ewa Tomaszewska, an Member of European Parliament (MEP) and a long-time Solidarity activist (and a former Member of the Polish Parliament on behalf of the League of Polish Families), for instance, has expressed such views on many occasions and has come under severe criticism from leading Polish feminists, such as Magdalena Środa. Interestingly, Tomaszewska and Solidarity have been very active in pushing for better working-time standards in Poland, as well as the EU. Most notably, Tomaszewska was one of the key figures among the Polish European Parliament representation in Brussels, to secure votes of support for the Cercas Report from other Polish MEPs.

⁶⁵ The impact of transition and restructuring on women’s labour market situation in Poland has been well documented by Polish and non-Polish researchers. For some examples, see: Balcerzak-Paradowska et.al. (2001); Rittich (2002b); Sztanderska (2006); Matysiak (2009).

⁶⁶ See also Sztanderska and Grotowska (2009, 59).

and Grotkowska 2009). Similarly, unemployment rates among women were consistently higher than those of men. Most significantly, more women than men experienced long-term unemployment (54.3 versus 52.1 percent of the unemployed women and men respectively) and although the gender difference in long-term unemployment rate varied considerably over the years, by 1998 it reached nearly 11.2 percent (Sztanderska 2006, 5). Finally, despite women's higher educational attainment, their average earnings during the 1990s were about 24 percent lower to those of men (Balcerzak-Paradowska 2001, 223). Discrimination, which was the perception that women were expensive workers on the account of their maternity entitlements, combined with the view that women's stronger attachment to the private sphere would make them more capable of dealing with the situation of unemployment, contributed to their deteriorating labour market situation in the early years of transition (Burdowska 2004; Fodor 2005; Desperak 2009).

Despite the new labour-market conditions, the key features of the People's Republic working-time regime remained remarkably persistent for those men and women who remained employed (see Appendix D). Long hours and overtime, for instance, continued to be widespread post-transition. It has been estimated that the percentage of employees working between 40 and 42 hours had actually decreased after 1992, while the proportion of employees working in excess of 48 hours per week had increased (Portet 2005, 293). Commenting on the restructuring of working-time norms in Poland, Stéphane Portet (2005, 293) noted that "it [was] at the heart of full-time employment that the most significant developments [were] taking place" in Poland. The increase in long hours was a consequence of the rise of self-employment (often disguised employment) on one hand, and the excessive use of overtime, on the other (Portet 2005; Strzemińska 2002).

Although some moderate increases in part-time work were reported, they too were insignificant. Between 1992 and 1996, the rates of part-time work oscillated between 10.1 and 10.7 percent, with women's rates varying between 12.8 and 13.3 percent and the men's between 7.8 and 8.9 percent (Poliwczak 2003, 18; see Appendix C, Table 4). The increase in part-time rates for women and men was an insignificant increase from the 12 and 7.8 percent rates for women and men reported at the end of 1980s. Some of the reasons for the low incidence and lack of popularity of part-time work amongst Polish workers compared to their Western European counterparts during this period were also remarkably similar to those in the People's Republic, and included the perception of lower social status associated with part-time work, lower earnings, and the habits of full-time work (Poliwczak 2003, 19).

Thus, although the overall labour market situation was generally altered due to the scarcity of jobs and the new rules of labour market engagement, the key characteristics of the working-time regime that existed between 1945 and 1989 were not significantly different after transition (see Appendix D). However, aside from the new insecurity and compromised ability of workers to refuse inferior conditions, these hard to reconcile patterns of employment (long hours and overtime) were now also being offered in an entirely transformed institutional context. Their consequences for women and the processes of social reproduction will be considered next.

4.3.3 Shifting the Balance, Keeping the Double Burden: Working-time, Women and Social Reproduction in Post-Transition Poland

Another institutional and ideological shift brought about by the transition process, particularly in its earliest stages (1989-1994), was the near complete re-privatization of the responsibility for individual and family welfare (Rittich 2002b; Konat 2009).

Previously centralized at the national level, the responsibility to organize and finance social services, including crèches, kindergartens, grade schools, community centres, and recreational facilities, was shifted to municipalities where a lack of sufficient resources and organizational capacities led to fee increases and/or subsequent closures of public facilities (Balcerzak-Paradowska et al. 2003; Balcerzak-Paradowska 2004; World Bank 2004, 41-43). In the context of rising unemployment and poverty, even moderately higher costs of childcare and after-school programs placed them out of reach for many parents, which quickly led to a significant drop in child enrolment rates (Balcerzak-Paradowska et al. 2003, 216). Paradoxically, as Balcerzak-Paradowska (2004) notes, although the drop in enrolment was not a result of decreased demand but rather the inability to pay for the services, it culminated in even further reductions and closures of child-care facilities. As a consequence, between 1989 and 2001, the number of daycares dropped from 1553 to 396, while the number of kindergartens dropped from 12767 to 8175 (World Bank 2004, 42; see also Balcerzak-Paradowska et al. 2003, 204), with the result that in 555 municipalities (95 percent of which are rural) there were no care facilities for children under the age of six (Herbst 2004, cited in Sztanderska 2006, 6).

Against this backdrop of shrinking public care infrastructure, the notion that the family constitutes the most appropriate institution for the raising and early education of young children became very deeply embedded in the Polish society. The dominant discourse of the family as sovereign – free of state interference and responsible for itself – espoused by the post-transition governments (Balcerzak-Paradowska 2004), gave further credence to significant state retrenchment and resulting re-privatization of responsibility for personal and family welfare. Bolstered by the revisionist glorification

of pre-World War II Polish traditions, Catholic values, and the firm rejection of the state paternalism of the People's Republic era, this discourse was pervasive and served to symbolically re-establish the division between the public and the private, a process which was accompanied by the active restructuring of Poland's gender order in accordance with socially conservative values (Graff 2008).

For working mothers, the shrinking access to affordable, good quality child-care ushered in increased difficulties with reconciling their paid work and family obligations. Given the persistence of very traditional attitudes towards gender roles and the appropriate division of responsibilities for unpaid work post transition, the working-time regime characterized by excessive hours and the culture of overtime had a particularly negative impact on female workers. Unlike working mothers in the People's Republic, however, Polish women after the transition could no longer count on the public infrastructure to support their efforts. Consequently, the experience of double burden, already common before 1989, was further exacerbated for many Polish women.⁶⁷ In the face of these difficulties, growing economic insecurity, and the bleak realities of the transition period, many women seemed to have declared a "womb strike." The rapid drop in the Polish fertility rate in the years following the beginning of transition, from 2.09 in 1989 to 1.22 in 2003 (Matysiak 2009, 201), was one indication that the tenuous balance between the needs of the economy and the processes of social reproduction that was maintained in the People's Republic, already at the cost of the double burden, has been profoundly upset.

⁶⁷ Fodor (2005) notes that women, post-transition, continued to be responsible for a "lion's share" of the domestic work, being primarily responsible for cooking, cleaning, and food shopping. In 2002, 78% of Polish women claimed to be doing all the cooking in the household, 83% did all the washing and 66 per cent all the cleaning (Fodor 2005, 16).

4.4 Into the New Millennium: Political Discourses of the Late 1990s and Beyond.

The double bind of economic neoliberalism and social conservatism that accompanied the early phase of Polish transition continued to shape the country's universe of political discourse at the end of the 1990s, as Poland prepared for EU accession. Although social conservative discourse proved an ongoing source of public controversy – polarizing the political arena and the society more broadly – economic neoliberalism was ultimately a more significant force in shaping Polish policy (Grzymalala-Busse and Innes 2003; Majmurek and Szumlewicz 2009), including labour law and working-time reform. Regardless of official party lines, most Polish parties accepted the primacy of the market (Ost 2005; Majmurek and Szumlewicz 2009) and Poland's ambition to join the OECD and the EU, made it difficult, if not impossible, to shift away from the neoliberal course (Grzymalala-Busse and Innes 2003; Shields 2011). Consequently, the emphasis on market building, growth and competitiveness – all conditions of successful EU accession – became the key objectives for the subsequent Polish governments, with social and employment policies being crafted in ways that would enhance these overarching goals, but also providing the arena in which competing parties could differentiate themselves and contest each other (Grzymalala-Busse and Innes 2003⁶⁸; Majmurek and Szumlewicz 2009; Stenning et al. 2010; Shields 2011).

The acquiescence to neoliberal reforms was particularly costly, in political terms, for the Left. Although the Left Democratic Alliance attempted to forge closer ties with

⁶⁸ See Grzymalala-Busse and Innes (2003), who make a somewhat different argument by stating that the only distinctive feature of various political parties was how they said they would manage the reforms; with the content of the promised reforms being in fact the same. By contrast, my argument is that in the context of labour law reform it was not just the delivery that was different, but also the content of reforms differed. I agree with Grzymalala-Busse and Innes, however, as far as a general convergence around neoliberalism in relation to economic reforms.

the social partners – particularly to bridge the lack of cooperation between the trade union confederations, Solidarity and OPZZ, these efforts proved largely futile (Ost 2005).

Solidarity remained vehemently opposed to the Left, and, indeed, in the subsequent years, each of the Left Democratic Alliance's losses (in 1997 and 2004) was to parties derived from the Solidarity's political wing. The Electoral Action Solidarity (*Akcja Wyborcza Solidarność*, AWS) in 1997, and Law and Justice (*Prawo i Sprawiedliwość*, PiS) in 2005, were two such parties that managed to challenge the Left by running on labour-friendly and "social-solidaristic" platform, but also one that was explicitly anti-communist and socially conservative (Szczurbiak 2005, 204). Both used social and labour policy to distinguish themselves from the neoliberal others, including the Left's ex-communists, by publically opposing further flexibilization and deregulation. Electoral Action Solidarity, for instance, included unfulfilled Solidarity demands from the August 1980 strikes – reduction of the workweek and extension of maternity leaves and benefits – as key elements of their 1997 electoral campaign platform, winning a 33 percent Parliamentary representation (Ost 2005; Tomaszewska Interview, 25 February 2010, Warsaw). Several years later, in 2005, Law and Justice⁶⁹ posed the contest between themselves and the other parties in the running – particularly the economic liberal-social conservative Civic Platform (*Platforma Obywatelska*, PO),⁷⁰ as the Left Democratic Alliance was an unlikely contender due to its very low popularity – as the choice between the "liberal" and the more egalitarian "social-solidaristic" visions of Poland (Szczurbiak 2005, 204;

⁶⁹ Law and Justice ran along with its allies League of Polish Families and the Self-Defense of the Polish Republic, which also partially derived from the by then defunct Electoral Action Solidarity. All of these parties presented a similar conservative worldview and opposition to both the ex-Communists and economic neo-liberals. After Law and Justice's electoral victory, these parties formed coalition government, which remained in power until Law and Justice's loss in the 2007 election.

⁷⁰ Many Civic Platform members came from Electoral Action Solidarity, the split within the latter occurring clearly along the official commitment to economic neo-liberalism.

211). Characterizing its key opponent, the Civic Platform, as the party that would benefit only the “winners” of transition, they appealed to those Poles who felt that they “lost” and who desired a more interventionist, socially redistributive state (Szczerbiak 2005, 211).

Although both the Electoral Action Solidarity and Law and Justice were socially conservative and represented decisively and unapologetically traditional worldviews, as I show in Chapter 5, their appeal to workers rights and women’s need for work-family reconciliation measures and support for social reproduction translated into some legislative proposals aimed at the reduction in working-time. This social conservative approach was further reinforced by Law and Justice, which was allied with the clerical-populist League of Polish Families (Liga Polskich Rodzin, LPR): an openly Catholic party, associated with the Radio Maryja⁷¹ radio station (Szczerbiak 2005, 218) ran by one of Poland’s most public clerics, Father Rydzyk. Explicitly reifying but also valuing women’s “natural” roles, and drawing on the evocative nationalist construct of the Polish Mother, these parties managed to attract significant following among women, with many joining their political ranks. Their conservative message, opposition to abortion, and reification of maternalism fundamentally clashed with the views and interests of more socially liberal Polish women and the feminists, highlighting the ideological split that

⁷¹ Radio Maryja is Polish for “Radio Mary” (as in Mary, the Mother of God). The station is run by Father Rydzyk whose general message is ultra Christian-Conservative. Albeit the radio is ridiculed by many Poles as the station of the “mohair berets” – a derogatory term for older, religious women – it, in fact, has had a very strong following among the supporters, young and old, of the Electoral Action Solidarity, and the populist parties Law and Justice and the League of Polish Families. Indeed, the radio has a significant influence on the political discourse; it actively partakes in shaping the conservative, traditionalist, “family values”, and anti-feminist discourse in Poland. The station’s activities and success are one example of the way in which the populist Right-wing in Poland has employed the power of public discourse and the media to build what Jakub Majmurek terms, following Gramsci, “cultural hegemony”: “The Polish Right was able to create a hegemonic block, educate its own engaged ‘organic’ intellectuals and build a thick network of institutions engaged in the production of discourse.” (Majmurek 2009, 141).

already existed and further driving a wedge between different women's groups (Solik Interview, February 2010, Warsaw).⁷² Paradoxically, because social reproduction and work-family reconciliation were on the conservative Right's agenda, the more socially progressive politicians within these parties, aided by Brussels and EU policy discourse, were able to develop the blueprints for more egalitarian work-family policies in the future. At the same time, as the next chapter will show, the labour-friendly and "social-solidaristic" rhetoric that Electoral Solidarity Action and Law and Justice utilized so effectively largely failed to translate into very significant policy change.

4.5 Conclusion

As this chapter outlined, the construction of a liberal market economy in Poland began with a rapid structural adjustment and significant ideological reorientation along the lines of economic neoliberalism and social conservatism. The hard-line reforms of the Sachs-Balcerowicz Plan, with their policy-mix of fiscal austerity, rapid privatization, and deregulation, accompanied by the hegemonic discourse of "country on the make" and "catching up" left an indelible mark on Poland. As the country's institutional architecture became dismantled and rearranged in accordance with the new political-economic dictates, the notion that people ought to "take matters in their own hands" legitimized the retrenchment of the state and the re-privatization of responsibility for personal and family welfare. Together, these shifts served to re-establish symbolically and materially the division between the public and the private, thus breaking away from the socialist legacy of state involvement in all aspects of economic and social life. Paradoxically, these post-

⁷² Chapter 5 explains this fragmentation within the labour and women's movements was to some extent overcome in the campaign for supermarket workers, which brought the plight of workers, particularly women workers, into the broad political discourse and Parliamentary debates, resulting in successful legal actions and demonstrating the true power of solidarity (Solik Interview, February 2010, Warsaw).

transition changes were also complemented by the attempt to restructure the People's Republic-inherited gender order in accordance with socially conservative values. This intervention was justified on the basis that it meant to “restore” the more traditional, culturally appropriate, and “authentic” Polish gender order and thus displace that which was externally-imposed (Soviet) and “unnatural”. While this traditional gender order had been in reality largely untransformed by the socialist egalitarian philosophy of the People's Republic and continued to dominate in the private sphere, and, to an extent, in the public sphere, these post-transition interventions had significant consequences for women. Among others, women's labour market position deteriorated rapidly, with some women being pushed out and others struggling to remain competitive.

The difficult labour market position of women was exacerbated by the fact that the People's Republic culture of long hours and the women's double burden would endure well into the period of transition. Remarkably, despite the magnitude of the ideological and institutional change, the discourse of economic growth surrounding work and employment regulation suggests that the reasons for the persistently long hours in Poland were much the same. Indeed, a striking path-dependence emerges when the persistence of long hours and their justifications are considered. The People's Republic-era “duty” to assist with rebuilding the country and building strong Socialist economy was, after 1989, replaced with rationales of “economy on the make” and notion that Poland had to “catch up” to the rest of Europe. The methods of “extensive managing” gave way to managing styles based on notorious overtime abuse and other forms of sidestepping labour regulations (see also Chapter 5). The latter, justified by rationales of labour-cost cutting, business efficiency, and competitiveness, as well as enabled by high rates of

unemployment, increased economic insecurity, and a very competitive labour market, put an increasing strain on the working people. As the institutional supports that assisted women with the tenuous balancing act between standard employment based on long hours and the unpaid work of social reproduction became dismantled, work-family reconciliation became increasingly difficult and the double burden became even heavier than before. Along with the resurgence of socially conservative values, the assumption of women's more limited availability and commitment to paid employment placed them at a much greater risk of labour market discrimination. The rapid drop in fertility rate was partially related to these phenomena, as women postponed procreative decisions in face of new forms of economic and social insecurity.

As Poland prepared for EU accession, social conservatism and economic neoliberalism continued to dominate the country's discursive universe. While the country's social problems, including the dire situation of women and the difficulties with work-family reconciliation, received increased policy attention as of the mid 1990s, the overarching emphasis on elevating the country's economic position, supporting its new enterprises, and curbing unemployment – all required for successful EU accession – tended to circumscribe the universe of political action. Given the union rate attrition and the fragmentation within the labour movement, Poland's new employers organizations grew in strength and became an increasingly prominent voice (alone and through their political allies) within the political discourse. As the next chapter will show, these economic rationales and new alliances also had a significant influence on the ongoing re-regulation of the Polish working-time regime.

Chapter 5

Consolidating Flexibility – Polish Working-Time Regime, Gender, and Social Reproduction in the Run-up to and since the European Union Accession

5.1 Introduction

As Poland entered the new millennium, over ten years had elapsed since its transition to market economy. By then, it was a member of the Organization of Economic Cooperation and Development (OECD), and, having begun the European Union (EU) membership negotiations in 1998, it was on the way to joining the Union.¹ However, as Chapter 5 showed, Poland's "return" to capitalism and to Europe, had been accompanied by serious costs, including the collapse and instability of its labour markets, a rising unemployment rate, and a resulting increase in social and economic inequalities. A related problem was the fact that the Polish fertility rate had dropped so rapidly in the aftermath of transition that it was now below the level required to replace the population, otherwise known as the replacement rate (see Chapter 4). Boosting the Polish economy and addressing the ailing labour market became the key issues shaping the universe of political discourse, particularly as Poland prepared for EU accession. While the fiscal austerity and state retrenchment that characterized the first phase of transition (Sachs-Balcerowicz Plan) gave way to more active state involvement in social policy (1994 *Strategy for Poland*²), neoliberal proscriptions of deregulation and removal of rigidities continued to guide policy, reinforced by the powerful discourse of "economy on the

¹ Poland applied for EU membership on 5 April 1994 and began negotiations on 31 March 1998.

² *Strategy for Poland*. Mid-term Socio-economic Policy Program adopted by the Parliament of Poland on 20 October 1994. Law Monitor, No. 57, item 486 (16 November 1994).

make,” Poland’s ongoing unemployment problem, and the necessity to comply with EU economic conditionalities.

As this chapter will show, the modernization and flexibilization of the Polish *Labour Code*, and the Polish working-time regime, were important elements in the country’s economic and unemployment strategies, pre- and post- the 2004 EU accession. Although the obligation to comply with the Community *acquis* required the adoption of a wide variety of EU instruments, including many socially progressive Directives, the focus on Poland’s economic performance and the necessity to foster the “right” economic environment for the flourishing of enterprise tended to overshadow other considerations. Following broader European trends, and as a result of home-grown lobbying and pressures, Polish working-time norms became initially reduced and then progressively flexibilized and diversified. Although domestic political contests and the presence of competing discourses, such as the rise of “social solidaristic” populism, made the process of flexibilization uneven, the necessity to comply with the *acquis communautaire* in the run-up to the 2004 EU accession served as an important rationale, adding a sense of inevitability and providing Polish policy-makers with an important source of legitimacy, for those changes that were unpopular with political opponents and the labour movement.

Although gender equality concerns and the issue of work-family reconciliation were to some extent incorporated into the discussion of working-time reform, they were largely subordinated, typically raised in the context of maternity and parental leaves, and often invoked in response to Brussels-imposed requirements. The ideological orientation of different political parties, particularly the contest between the more “liberal” or egalitarian (the Left and some Right-wing parties) and the socially conservative or “social

solidaristic” (Right-wing populist) factions played an important role in how the issue was phrased and what measures were promoted. Paradoxically, at least in the context of labour policy and working time, the socially conservative Right appeared more active in championing women’s cause than the more egalitarian Left.³ Despite these differences, however, any focus on flexible working-time solutions as crucial for balancing of work and family obligations, was, along with EU policy trends, largely driven by the objectives of unemployment reduction and women’s activation (or their rights as mothers), and the need to address Poland’s demographic crisis. The promotion of gender equality *for its own sake* did not feature prominently in the working-time political discourse.

Following on the discussion of the universe of political discourse in Chapter 4, this chapter describes the process of labour law reform, with the emphasis on the changes in the working-time rules that took place between 1997 and 2004 (see Table 3; Appendices D and E). The examination of the successive *Labour Code* amendments illustrates how the dominant discourses, and the internal and external pressures evoked to justify them, including the “hard” and “soft” conditionalities of EU accession, led to the reduction of the weekly hours along with the progressive flexibilization of the working-time rules (see Appendix D). The chapter then considers the more recent shift towards the promotion of work-family reconciliation and “family-friendly” policies, and the extent to which both have been able to mitigate the overarching trend towards employer-friendly flexibilization. Finally, the chapter assesses the contemporary Polish working-time

³ In reality, both addressed women’s cause in a very different manner, reflecting their social policy orientations. The Left advocated shorter maternity leaves to shield women from labour market discrimination (emphasizing women’s rights as workers), while the Right promoted long leaves and special accommodations for women (emphasizing women’s right to care). While the Left’s approach was more egalitarian as it sought to promote redistribution of care giving between men and women, the Right was a lot more vocal and more forcefully utilized the discourse of “protecting” women, particularly mothers, in the public and political debates.

regime and offers some thoughts as to why this regime continues to be posing serious problems for workers' ability to balance work and family obligations, the promotion of gender equality, and the broader processes of social reproduction.

5.2 Modernizing the Polish *Labour Code*

While the 1996 *Labour Code* amendment already introduced important changes into the Polish labour-law regime, there was a general consensus among Polish labour law experts, politicians, and the social partners that additional adjustments were needed. To support the reform, on 27 July 1999, the Minister of Labour and Social Policy convened a special Commission on Labour Law Reform composed of several prominent labour law scholars and Ministerial representatives.⁴ The role of this Commission was to provide expert opinions on reform proposals prepared by the government or by the members of Parliament, but also to work on its own proposal for an entirely new Code. While the latter was completed in 2005, as of 2010, it continued to remain a proposal.⁵

⁴ *Decree of the Minister of Labour and Social Policy of 27 July 1999 concerning the Establishment of the Labour Law Reform Commission*, (1999) Law Monitor, No. 26, item 404 (in force 30 July 1999, repealed on 1 July 2002). Similar Commissions had existed under the auspices of the Ministry of Labour and Social Policy since before the 1976 labour law codification. The Commission constituted in 1999 was composed of prominent labour law scholars and long-term public servants from the Ministry of Labour and Social Policy. In 2002, the Special Commission was reconstituted as the Labour Law Reform Commission, with mostly the same members. In 2005, the Commission finally presented the government with its proposals for two *Labour Codes*, one governing individual employment relationships and one addressing collective rights. Both proposals were published on the Ministry of Labour website in 2007. Neither has yet been accepted as the draft of new *Labour Code*.

⁵ The Reform Commission's proposal was published on the Ministry of Labour and Social Policy website in 2007 (<http://www.mpips.gov.pl/prawo-pracy/projekty-kodeksow-pracy/>), however the Ministry has not indicated whether or not it would be moving towards adopting it. The content of the proposal reveals an interesting mix of provisions. On the one hand, many forms of contracts that had been used to sidestep *Labour Code* regulations have been included in the ambit of the act in order to provide basic protection to workers in these types of contracts. Similarly, provisions on temporary agencies, regulated by a separate statute, have been included in the proposed recodification. At the same time, the Code's rules have been very streamlined. In terms of working time, for instance, the Code provides minimum standards, much as those in the *Working Time Directive*, and dispenses with many of the specific provisions made in the current *Labour Code*. Apart from the most basic norms, the proposal leaves significant freedom for parties to the employment relationship to bargain and negotiate their own working conditions.

Nonetheless, the Commission's view was frequently consulted and generally represented the view of many Polish labour law experts.

According to the Commission's president, Professor Tadeusz Zieliński, further reform was necessary to address three key developments: 1) Poland's 1997 Constitution;⁶ 2) the realities of market economy; and 3) Poland's impending EU accession (M.P. 2000; Florek 2004a; Gienieczko Interview, 22 January 2010, Warsaw). In practice, although formal compliance with Poland's 1997 Constitution was a consideration,⁷ the pressures associated with Poland's economic performance and the need to comply with EU accession conditionality proved to be more decisive in the subsequent reforms, including those of working-time norms. Indeed, as I will explain next, regulating working-time *for* the market and to comply with Europe were interrelated objectives, which also had specific consequences for the shape of the developing working-time regime.

5.2.1 Regulating for the Market and to Comply with Europe

As Chapter 4 had shown, one of the goals of the 1996 *Labour Code* amendment was – in line with the then prevailing economic strategy (the Left's 1994-1997 *Strategy*

⁶ *Constitution of the Polish Republic of 2 April 1997*, Journal of Laws No. 78, item 483.

⁷ The enactment of Poland's new Constitution in 1997, *supra* note 6, changed the legal rank of Ministerial executive acts, requiring that all rights and responsibilities previously regulated therein now be regulated by statute. Since many labour and employment law matters, including some aspects of working-time, had been previously regulated by executive acts, this change gave a more prominent role to the *Labour Code*. While most of these changes were already carried out prior to the 1996 amendment, further consolidation was required (Gienieczko Interview, 22 January 2010, Warsaw). This change was particularly significant in the context of working-time regulation. As Eugenia Gienieczko, a member of the Reform Commission and the Director of the Labour Law Department of the Ministry of Labour and Social Policy, recounted, during the People's Republic period working-time was largely perceived as an organizational issue and its regulation was not dealt with by the Department of Labour Law but instead by the economic departments of the Ministry (Gienieczko Interview, 22 January 2010, Warsaw). As a result, different types of working-time regulations (e.g. concerning different sectors or different systems of working-time) were "dispersed" over multiple executive acts. It was only in 1989 that the decision was made to move working-time regulation under the auspices of the Labour Law Department, beginning the consolidation of working-time regulations into the *Labour Code* (Gienieczko Interview, 22 January 2010, Warsaw). While many of these changes were already made by 1996, enactment of the 1997 Constitution meant that a more comprehensive consolidation needed to be carried out.

for Poland) – to support the creation of the institutional environment for attracting foreign investment and supporting domestic entrepreneurship. Many of the *Labour Code*'s provisions, including those on working time, were made more flexible to better match the needs of new enterprise; at the same time, however, many obligations previously carried out by state-enterprises were downloaded onto private employers. Since the vast majority of Poland's new enterprises were small, and indeed, "micro," (nearly 99.8 percent SMEs, employing nearly 70 percent of the population) (Eurostat 2008, 3), the most common critique of this approach was that it created prohibitive burdens for small firms and thus, had a negative impact on their ability to thrive and create new jobs. This critique became particularly salient as the dynamic growth that Poland experienced between 1994 and 1997 came to a halt in 1998 and was followed by gradual economic downturn and rising unemployment, particularly after 1999. By 2002, unemployment reached the unprecedented 20 percent (GUS 2005; see Appendix C, Table 2) and the GDP had declined to 1.4 from the 4.3 two years prior (Appendix C, Table 1).

Concerns about high labour costs and excessive administrative requirements as impediments to enterprise competitiveness and job growth, gave rise to renewed pressure to modernize and streamline employment regulation. While the source of this pressure was predominantly the enterprise and business lobby, many legal experts, including members of the Commission on Labour Law Reform, agreed that the rigidity of Polish labour law framework was indeed a problem (M.P. 1999; R.M. 2001⁸; Męcina 2003). Further relaxation of the hiring and firing regulations, diversification of employment

⁸ Tadeusz Zieliński, the Labour Law Reform Commission's President, expressed these views in several articles in the Polish daily newspapers, including *Rzeczpospolita*.

contracts, and flexibilization of working-time rules were some of the key proposals for a more adaptable and flexible legal framework (M.P. 1999; R.M. 2001).

Labour law's potential role in stimulating the economy and supporting enterprise became particularly important with EU accession on the horizon. Having entered into official membership negotiations in March 1998, Poland was now required to take further steps towards fulfilling the Copenhagen criteria, which were substantial and significantly biased towards economic conditionality. Set by the European Council in 1993, these criteria required applicant states to demonstrate: 1) the stability of institutions guaranteeing democracy, the rule of law, human rights, and respect for and protection of minorities; 2) the existence of a functioning market economy as well as the capacity to cope with competitive pressure and market forces within the Union; and 3) the ability to take on the obligations of membership including adherence to the aims of political, economic and monetary union. This last requirement involved the adoption of the EU *acquis communautaire*, a vast majority of which was also economic in nature and related to the functioning of the internal market. As was later specified by the Madrid European Council in 1995, mere transposition of relevant European law was not sufficient; instead, the prospective Member States had to demonstrate *effective* implementation of the EU *acquis* through parallel development of appropriate administrative and judicial structures.⁹

According to *Agenda 2000*, the European Commission's opinion on Poland's application for membership in the EU, prior to the official launch of EU enlargement process on 20 March 1998, Poland was already in relatively good standing with respect to

⁹ European Commission, Enlargement. http://ec.europa.eu/enlargement/enlargement_process/accession_process/criteria/index_en.htm/.

the first two criteria.¹⁰ The 1989 democratic reforms, the institution of market economy through the Sachs-Balcerowicz “shock therapy,” and the subsequent, more moderate, yet still market-friendly and pro-European policies of the Left’s *Strategy for Poland*¹¹ managed to build sufficient institutional capacities for the accession process to begin.¹² Nonetheless, as of 1998, the country was not only obligated to maintain its course, but to ratchet-up its efforts. While the Polish market economy was “well functioning”, the Commission’s 1998 report on *Poland’s Progress Towards Accession* noted that its future ability to cope with the competitive pressures of the internal market would require the country to “strengthen the pace of economic restructuring” (1998, 21). Moreover, Poland had only begun the process of achieving compliance with the remaining criteria of membership, the implementation of the *acquis communautaire*. With respect to labour law, some “approximation” had already taken place in 1996 (Sanetra 2004). However, many changes were still needed (*Poland’s Progress* 1998; Florek 2004b).¹³ In the context of working-time regulation, for instance, compliance with the *Directive concerning*

¹⁰ *Agenda 2000*. Commission Opinion on Poland’s Application for Membership in the European Union, DOC/97/16 (15 July 1997) (hereinafter *Agenda 2000*).

¹¹ The latter was explicitly designed to align Poland’s long-term goals with those of the EU. One of the strategy’s key objectives was the creation of a regulatory and institutional environment for investment and flourishing of enterprise, with the view to making Poland competitive and able to compete within the internal market (Kołodko 2000). Indeed, “Euro 2006” was another document that accompanied Strategy for Poland, and which was Kołodko’s plan for Poland’s membership in the Economic and Monetary Union.

¹² According to the EU’s 1997 opinion on Poland’s application and its 1998 follow up report *Poland’s Progress towards Accession* (1998 Regular Report from the Commission of 4 November 1998, http://ec.europa.eu/enlargement/archives/key_documents/reports_1998_en.htm/, hereinafter *Poland’s Progress* 1998), Poland had “stable democratic institutions and a well functioning market economy that should be well able to cope with competitive pressures and market forces within the Union... provided that it strengthens the pace of economic restructuring...” (*Poland’s Progress* 1998, 21).

¹³ The Commission’s 1998 *Poland’s Progress* report noted that Poland needed further harmonization with EU equal opportunities, labour, health and safety regulations, strengthening of the administrative competencies, and social dialogue.

*certain aspects of the organization of working time (Working Time Directive)*¹⁴ required the adjustment of the weekly working-time norm, incorporation of the mandatory rest periods, and extension of the annual leave to four weeks. Also, provisions on equal treatment of part-time and fixed-term work had to be introduced to comply with the framework agreements and Directives 97/81 and 99/70.¹⁵ The provisions on parental leave introduced in 1996 *Labour Code* amendment were also deemed to be out of line with EU law (*Poland's Progress* 1998).

Slow or uneven implementation of labour law Directives and other social *acquis* was partially related to the perception that they would be costly for the employers or the state budget, and hence, would stall Poland's economic development *vis-à-vis* the already more prosperous Member States (Sanetra 2004b, 21; Leiber 2005). Consequently, some protective regulations were purposely delayed; they were either "suspended" until the date of accession or phased-in over extended timeframes to accommodate fiscal restraints and address the criticism levied by the business lobby and Polish employers. As I will discuss in more detail below, the reduction of weekly working-time to 40-hours was one example of this strategy. Although it was legislated in 1999, it was not until 2003 that the 40-hour norm was in force. Similarly, the limit on the number of consecutive fixed-term contracts (art. 25 of the *Labour Code*) was legislated, but suspended until Poland's actual EU accession in 2004. At the same time, significant flexibility measures were

¹⁴ *Council Directive 93/104 EC concerning certain aspects of the organization of working time*, [1993] O.J. L 307/18 (23 November 1993), amended by *Council Directive 2000/34/EC of the European Parliament and of the Council of 22 June 2000 amending Council Directive 93/104/EC concerning certain aspects of the organization of working time to cover sectors and activities excluded from that Directive*, [2000] O.J. L 195/41 (01 August 2000).

¹⁵ *Council Directive 97/81/EC concerning the Framework Agreement on Part-time Working concluded by UNICE, CEEP and the ETUC*, [1989] O.J. L14/9 (20 January 1998); *Council Directive 99/70/EC of 28 June 1999 Concerning the Framework Agreement on Fixed-term Work concluded by UNICE, CEEP and the ETUC*, [1999] O.J. L 175/43 (10.07.1999).

implemented and justified as temporarily necessary to address local problems (such as unemployment and slow growth) and maintain Poland's competitiveness (and thus satisfy other conditionalities) in the run-up to accession.¹⁶ The 2002 *Labour Code* amendment, for instance, was explicitly aimed at responding to domestic pressures for more employer-friendly flexibility, including in the regulation of working time. This amendment was introduced on a temporary basis, with the proviso that its authors were aware of some discrepancies with the *acquis* and that the measure would be replaced by another one, the specific purpose of which would be to achieve compliance. The 2003 amendment of the *Labour Code* did just that, however, many flexibility measures introduced in 2002, which were previously not available under the *Labour Code*, were retained by the follow-up 2003 legislation since they were either permitted by EU law or not explicitly prohibited by any specific Directive (Florek 2004b, 38-39).

Indeed, Polish pursuit of more flexibility found significant support in EU policy discourse and law, which, not only enabled working-time flexibility measures but also (increasingly) emphasized the need for more flexible reorganization of working time. To begin, the 1993 *Working Time Directive* did not necessarily prescribe the adoption of flexible working-time organization since its key objective was to set minimum standards and protect workers' health and safety. Nonetheless, the Directive's many derogations and exceptions *from* its protective provisions enabled significant employer-friendly flexibility by identifying various possibilities for working-time extensions through, for instance, introduction of longer reference periods for the calculation of rest periods and overtime, or the individual "opt-out" provision. Apart from the art. 13 principle of

¹⁶As I will show in the next section, this tension between security and flexibility on the one hand, and compliance with social and economic conditionalities of EU accession, on the other, characterized all of the *Labour Code* amendments enacted before 2004.

“adapting work to worker,” which obliged Member States to adopt measures to “humanize” the workplace by, for instance, introducing breaks, there were no explicit provisions to encourage *reductions* of working hours below the minimum standards set by the Directive.

As Chapters 2 and 3 elaborated, by 1997, however, there was a shift in how working-time flexibility was portrayed in the EU policy discourse. Specifically, the EU began to officially promote and mainstream the flexibilization and diversification of work hours and patterns as beneficial for enterprises and for meeting the needs of different groups of actual and potential employees. The Commission’s 1997 Green Paper on the *Partnership for a New Organization of Work*,¹⁷ for instance, urged that more flexible and improved organization of work could contribute to job growth, make a “valuable contribution” to the “competitiveness of European firms” and “to the improvement of the quality of working life and employability of the workforce” (1997, 7). Framework agreements on part-time and fixed-term work negotiated by social partners in 1996 and 1998 respectively, and subsequently adopted as EU Directives,¹⁸ were indicative of this broader approach to flexibility. Both agreements sought to promote and make more secure these non-standard (and more flexible) forms of employment and working-time organization, with the particular view to accommodating and protecting workers unable to fit the standard patterns of employment *and* responding to employers’ needs for flexibility. Moreover, flexibility was incorporated explicitly into the “adaptability” pillar of the 1997 European Employment Strategy and the 1998 and 1999 Employment policy guidelines, making it a common objective for all Member States to consider in drafting

¹⁷ COM (97) 128 final (16 April 1997).

¹⁸ Supra note 15.

their national employment policies, and inviting the social partners to negotiate agreements on modernization of the organization of work, through, for instance, flexible working time arrangements,¹⁹ annualisation of working hours, reduction of hours and overtime, development of part-time work, and different forms of career breaks.²⁰

While the objectives set by the European Employment Strategy and Employment policy guidelines were not directly binding on the Member States in the traditional sense that they had to be transposed in a manner akin to the Directives, this “soft” coordination measure was nonetheless designed to “influence” Member State employment policy and practice. As Ashiagbor (2004) has shown in relation to the “old” Member States, the Netherlands and the UK, even in areas where relative regulatory diversity remained, soft methods of coordination have led to policy convergence in the field of employment (and others) on the overarching objectives of competitiveness, flexibility, and growth. The applicant countries, Poland included, were also required to engage with the Strategy’s guidelines in drafting their own employment policies even before official accession took place (Keune 2008, 12), thereby bringing them into the sphere of EU socialization and creating opportunities for learning from other EU Member States. Moreover, as Maarten Keune (2008, 12) has noted, the close alignment between the Strategy’s priorities and the funding criteria for the European Social Fund provided concrete incentives to participate, thereby ensuring EU’s influence on future Member States and the local debates in terms of agenda setting, transfer of discourse, and the imposition of framework for national employment policy.

¹⁹ *Council Resolution of 15 December 1997 on the 1998 Employment Guidelines*, [1998] O.J. C 30/01.

²⁰ *Council Resolution of 22 December 1999 on the 1999 Employment Guidelines*, [1999] O.J. C 96/02.

The influence of the European Employment Strategy was clear in the Polish context as early as 1999. While the governing Electoral Action Solidarity (AWS) (1997-2000) that replaced the Left Democratic Alliance (SLD) after its 1997 electoral victory came into office on a “solidaristic” and explicitly labour-friendly platform, it formed a government with the liberal Freedom Union (UW) which was headed by Balcerowicz, the author of Poland’s 1990 economic reform plan. Consequently, there were some inconsistencies in the governing party’s approach. Its *National Strategy for Employment Growth and Human Resource Development 2000-2006 (National Strategy)*,²¹ adopted by the Polish Council of Ministers on 4 January 2000, was closely aligned with European dictates for a more active and flexible labour market policy. Specifically, the *National Strategy* mirrored the 1997 European Employment Strategy by directly adopting the four-pillar approach and listing labour market and workplace flexibility under the adaptability pillar (2000, 26; 39). Although the European approach called for the adoption of “win-win” solutions, the *National Strategy* mainly emphasized reorganization of work to promote enterprise-friendly flexibility because its overarching goal was the creation of jobs and reduction of unemployment, and not necessarily the improvement of working conditions. In fact, the *National Strategy* suggested that an overly protective legal framework could be deleterious to workers’ interests, as the security it provided was merely illusory in the face of Poland’s economic and labour market conditions (2000, 40). At the same time, however, the *National Strategy* did point to women’s labour market disadvantage and identified promotion of part-time work as a potential solution (*National Strategy* 2000, 44). Likewise, the Electoral Action Solidarity’s (AWS) 1999

²¹ *National Strategy for Employment Growth and Human Resource Development for the years 2000-2006*. Warsaw: Ministry of Labour and Social Policy, 1999 (hereinafter *National Strategy* 2000).

*National Pro-Family Policy*²² program also cited part-time work and extended maternity leaves as ways of supporting *women's* work and family reconciliation.

Both, the 1999 *National Strategy* and *National Pro-Family Policy* echoed the contemporary EU policy consensus that more flexible organization of work was required for enterprise prosperity and job growth and to make work more adaptable to workers (in this case, women). Importantly, while part-time work was rarely utilized in practice (see Appendix C, Table 4), the view that the working-time regime needed to be reorganized and flexibilized for enterprise needs was by no means a novel development in the Polish context. This view was already popular with the Polish employer and business lobby, many politicians, and legal experts. Nonetheless, the fact that the *National Strategy* was drafted by an administration that professed to be labour-friendly and committed to the preservation of security and the *status quo* in working conditions, was a strong testament to the pressures from the domestic business²³ on the one hand, and the power of EU influence on the other. In the run-up to Poland's May 2004 accession, the disciplinary power of conditionalities and the "softer" forms of EU policy influence set new frames of reference for the reform of labour law. Coupled with the discourses of "economy on the make" and "catching up," the necessity to comply with "Europe" provided Polish policymakers with ample opportunities to make and justify changes that would be likely unpopular with their constituencies. The effect of these changes was to reorganize the working-time norms in a way that was more suitable for business needs than for workers

²² *National Pro-Family Policy*, Document adopted by the Council of Ministers on 3 November 1999, Government Review November-December 1999, 11-12: 101 (hereinafter *National Pro-Family Policy*).

²³ See for instance the positions on the labour law reform taken by PKPP "Lewiatan", one of Poland's key private employers umbrella organization, wherein Lewiatan critiqued the rigidity of the Polish *Labour Code* and called for more flexibility (Lewiatan 2001a; 2001b).

ability to strike a better balance between the demands of the workplace and the demands of the home.

5.2.2 Labour Code Amendments between 2000 and 2004

As I suggested, achieving compliance with the European *acquis* was one of the important drivers of labour law reform, and the change in Polish working-time norms in particular. Nonetheless, the process was relatively uneven due to changes in political administration and Poland's overall economic outlook. The period between the 21 March 1998 launch of negotiations and the 1 May 2004 official EU accession saw two different coalition governments – the first headed by the socially conservative Electoral Action Solidarity (AWS), the second by the Left Democratic Alliance (SLD) – and several *Labour Code* amendments that addressed working-time regulation. The general trajectory of these amendments was to first reduce working-time norms (in 2001), and subsequently flexibilize them (2002 and 2003). Not all of these amendments were explicitly aimed at compliance with the EU. The 2002 amendment, for instance, was a temporary measure intended to address domestic pressures and answer the employers' long-term calls for more flexibility.²⁴ As I suggested above, however, apart from home-grown pressures, the overall conditionality of membership, particularly the requirement of a competitive market economy, necessitated temporary actions that would ensure Poland's "good standing" in the long term, and its ability to meet the set deadline for accession. For similar reasons, those changes that were required by EU *acquis*, yet deemed to impose additional costs, were "suspended" or "phased in" over extended periods of *vacatio legis*.

²⁴ Unsurprisingly, this amendment was received very well and assessed positively by employers. See: Lewiatan (2002a). At the same time, it was highly criticized by the trade union Solidarity (NSZZ Solidarność 2002a, 2002b).

On balance, by 2004 the Polish working-time regime was significantly more flexible than its 1996 predecessor. However, the choice of flexibility measures tended to exacerbate the long-hours and overtime culture that was already prominent in Poland, thereby causing significant problems for the balancing of work-family obligations. Indeed, the issue of work-family reconciliation was only marginally considered in the debate on working-time; instead, the main locus for its consideration remained the context of maternity and parental protections.

Phase 1: Working Time Reductions

The first set of changes in working-time regulation was a reduction of the weekly working-time norm, which remained at 42 hours since 1986. The institution of a 40-hour workweek was one of the more popular campaign promises made by the Electoral Action Solidarity (AWS) during the 1997 election. It was symbolically important in that it recalled Solidarity's still unfulfilled August 1980 demands.²⁵ However, in September 1998, the Parliament considered not one, but three proposals for the reduction and reorganization of working-time. The first two sought the institution of the 40-hour and 5-day workweek by designating all Saturdays as official days off. One came from the Electoral Action Solidarity-dominated Senate with support of the Solidarity trade unionists,²⁶ while the other was a Left Democratic Alliance (SLD) member's bill, officially endorsed by the OPZZ trade union confederation.²⁷ The two proposals were

²⁵ See chapter 4 for more on Solidarity's 1980 campaign.

²⁶ Senate Proposal concerning the amendment of the Labour Code (Senacki projekt ustawy o zmianie ustawy - Kodeks pracy), Doc. No. 490 (7 July 1998). All Parliamentary Documents available online: <http://www.sejm.gov.pl>.

²⁷ Members' Proposal concerning the amendment of the Labour Code (Poselski projekt ustawy o zmianie ustawy - Kodeks Pracy), Doc. No. 500 (3 July 1998).

essentially the same in terms of the proposed reduction of the weekly working-time norm. The key distinction was that the member's bill also suggested increasing the permissible annual overtime limit from 150 hours to 200 hours as a trade-off for employers who were pressing for more flexibility. Both, however, were justified on predominately social basis: they referred to the Polish labour movement demands, the 1935 ILO convention on the 40-hour workweek,²⁸ and the legislative or negotiated norms already existing in many European countries (Parliamentary Proceedings, No. 28, 16 September 1998, Stanisław Janas).

The third proposal also sought to introduce some reduction in hours; however, as part of a comprehensive reorganization of the employment and working-time norms. Submitted by the Parliamentary Committee of Small and Medium Enterprises (SME Committee),²⁹ this proposal had the endorsement of all major Polish employers organizations and its intention was to “unburden” Polish enterprises, particularly small and medium employers (Parliamentary Proceedings, No. 28, 16 September 1999, Roman Jagieliński). In terms of the proposed reorganization of working-time, the changes envisaged included the introduction of additional 39 holidays during the year, the planning of which would be subject to collective agreement, workplace regulation, or agreement between employer and employee (provided that no less than nine were scheduled during a three month period). In practice, this would have given employees additional days off; however, the SME Committee proposed this amendment as a trade off to significant flexibility. The proposal sought to increase the permissible limit of

²⁸ *Convention concerning the Reduction of Hours of Work to Forty a Week*, Geneva, 19th ILC session (22 June 1935), C0 47, 1935 (in force 26 June 1957).

²⁹ Committee for Small and Medium Enterprises Proposal concerning the amendment of the Labour Code (Komisyjny projekt ustawy o zmianie ustawy - Kodeks pracy), Doc. No. 560 (27 July 1998).

overtime by setting the maximum number of weekly hours, inclusive of overtime, at 48, which in practice would have yielded 416 possible overtime hours per year.

Simultaneously, compensation for overtime hours was to be reduced to 25 percent for the first two hours and to 50 percent for all additional hours (from the 50 and 100 percent premiums prescribed by art. 134 of the *Labour Code*). Furthermore, the SME Committee sought the introduction of unpaid breaks of up to 90 minutes and a broader application of “interrupted” working-time system, which permitted the introduction of breaks of up to six hours per day in circumstances necessitated by the type of work or work organization. According to the Committee’s explanatory memo, broad application of interrupted working-time system was justified on the basis of recent Polish High Court jurisprudence permitting this type of work organization³⁰ and the fact that its introduction would not conflict with the provisions of the EU *Working Time Directive*. Indeed, the Committee proposed to implement several provisions of the Directive in order to achieve a more flexible working time regime. These provisions included the 48-hour weekly norm (inclusive of overtime) already mentioned, and the 11 hours mandatory rest rule.³¹

The measures proposed by the SME Committee radically departed from the existing *Labour Code* provisions and, thus, failed to attract broad political support. With only the Freedom Union liberals willing to back them up (Parliamentary Proceedings, No. 28, 16 September 1999, Adam Szejnfeld), the proposal was voted down in the first reading. As for the other two, they remained subject to review by a special Parliamentary

³⁰ The proposal referred to the 9 October 1997 Polish High Court decision that held that breaks in work (not counted towards working time) introduced by way of a collective agreement, workplace regulation, or employment contract were permissible provided they respected labour law norms (Judgment of 9 October 1997, III ZP 20/99, OSNAPiUS 1998 nr 5, poz. 143).

³¹ In addition to these major changes in working-time, the proposal suggested a number of other employer-friendly measures, including changes to health and safety regulations, record keeping, hiring and firing, and recognition of collective agreements.

Commission and assessments by the Ministries of Labour and Social Policy and the Ministry of Finance (Parliamentary Proceedings, No. 28, 16 September 1998). Ultimately, resistance within the Ministry of Finance, which projected that the budgetary and economic costs of the shorter workweek would be prohibitive, and the continued opposition of the business lobby, forced the government to introduce a new proposal on 9 December 1999.³²

Compromise was eventually reached, and in March 2001 the Parliament introduced the new working-time norm of eight daily and 40 weekly hours, to be averaged over a five-day week and a reference period not exceeding three months.³³ However, Poles would not get their 40-hour workweek for another two years, as a phase-in period was built into the bill to reflect the Ministry of Finance warnings and to give employers time to adjust. Thus, the 40-hour workweek was not operational until 2003. The only change actually to take place in 2001 was the introduction of the five-day workweek (art. 1(2), amending art. 129). Weekly working time was to be reduced to 41 hours in 2002 (art. 2(1)), and further reduced to 40 on January 1, 2003 (art. 2(2)), without a consequent reduction in employee compensation (art. 5).

Although the bill provided that the eight-hour norm was absolute and, thus, any work in excess of eight hours a day would normally warrant overtime compensation, there were exceptions. First, the previously existing “equivalent” working-time system was to be maintained. This particular system allowed working-time increases to up to 12

³² Proposal of the Government concerning the amendment of the Labour Code (Rządowy projekt ustawy o zmianie ustawy – Kodeks Pracy), Doc. No. 1565 (9 December 1999). While in practice the proposal also created a five-day workweek, it did so by way of retaining the 42-hour workweek and introducing additional holidays (52 days per annum), thereby necessitating work of up to 10 hours on some days.

³³ *Act of 1 March 2001 concerning the Amendment of the Labour Code*, (1999) Journal of Laws 2001, No. 28, item 301 (Ustawa z dnia 1 marca 2001 r. o zmianie ustawy - Kodeks pracy, Dz.U. Nr. 28, poz 301.), in force 1 May 2001, art. 1 point 2 (amending art. 129 para 1).

hours per day balanced with equivalent time off in situations where the type of work or work organization necessitated daily working-time extensions. Some examples included work dependent on seasonal or atmospheric conditions. Second, to accommodate the five-day workweek, the bill allowed temporary extensions of daily working-time to up to 10 hours, without such extension counting as overtime or attracting overtime pay (art. 2(3) of the amending statute). This last extension, however, was not permitted for some categories of workers, including workers exposed to particularly harmful conditions or environments, pregnant workers, and workers charged with care of a child under four-years of age (art. 2(4)). While the exclusion was absolute for the first two categories, workers charged with care of a child under four could work in excess of eight hours if the employer obtained their express permission (art. 129⁵ of the *Labour Code*).

Legislating the 40-hour workweek was symbolically important, and was a nod to labour law's protective functions, even if the measure was phased in gradually. Although the 1998 SME Committee's proposal was ultimately not successful, the business lobby continued to press for more flexibility and liberalization of the working-time regime, and indeed, would eventually manage to secure many of the far-reaching changes included in the 1998 proposal. Significantly, the SME's references to the minimum norms prescribed by the *Working Time Directive* were a clear indication that these norms would play a significant role in the progressive reform of the Polish working-time regime.

In addition to reducing the overall working time through the 1999 amendment, the Electoral Action Solidarity (AWS) also envisaged other changes to the working-time regime. As was set out in its 1999 *National Strategy*, the party also wanted to promote part-time work as a way of making work more adaptable for women. Part-time work was

also identified as an instrument of work-family reconciliation, and highlighted in the party's 1999 *National Pro-Family Policy*. In addition to part-time work, the latter policy also proposed the extension of maternity leaves and benefits and, to a lesser extent, the development of child-care infrastructure (mainly in rural areas). The choice of these instruments and the overall tenor of the strategy, with the emphasis on demographic changes, particularly low birth and marriage rates (Balcerzak-Paradowska 2004, 219-220), suggested that the overarching objective was not so much the facilitation of women's work through accommodation of caregiving roles, but rather the promotion of fertility. The policy preference was for women's temporary de-activation after the birth of a child, followed by more limited labour market participation through part-time work (Racław-Markowska 2008, 76).

Reflecting this model of work-family reconciliation, in 1999 the Electoral Action Solidarity-Freedom Union coalition government adopted measures to increase maternity leave.³⁴ The change was phased in, with the duration of the paid leave initially being raised from 16 to 20 weeks for first and subsequent births (on 1 January 2000), and from 26 to 30 weeks for multiple births. As of 1 January 2001, the leave was further extended to 26 and 36 weeks respectively, with the 16-week portion being obligatory and the remaining portion elective. To comply with EU equality law, the right to take up the non-obligatory portion of the maternity leave was subsequently extended to fathers.³⁵

In August 2001, a EU-influenced change was also made to the child-raising leave provisions. The right to take up the child-raising leave – the additional leave of up to

³⁴ *Act concerning the amendment of the Labour Code*, (1999) Journal of Laws, No. 99, item 1152 (Uchwała o zmianie ustawy – Kodeks Pracy, Dz.U. z 1999 r. Nr 99 poz. 1152).

³⁵ *Act concerning the amendment of the Labour Code*, (2001) Journal of Laws, No. 52, item 538 (Ustawa o zmianie ustawy – Kodeks Pracy, Dz.U. z 2001 r. Nr 52, poz. 538).

three years to be taken up before the child's fourth birthday – had been already available to fathers as of 1996; however, the leave could be taken only by one parent at the time. Since parents had to choose which one would use the unpaid leave, its take-up was generally low and particularly unpopular among men (Kotowska, Sztanderska and Wóycicka 2007; Balcerzak-Paradowska 2008, 20).³⁶ Hence, to encourage fathers, a provision was passed which enabled parents to share up to three months of the leave, which they could take up simultaneously (art. 189¹ para. 1(2)).³⁷ This change was also intended to bring Polish law in compliance with the Council Directive 96/34 EC (*Parental Leave Directive*).³⁸ However, the transposition was not entirely accurate, as the EU directive made the entitlement to an “individual” three-month leave for men and women, meaning that it was non-transferable between parents and each was entitled to it (Leiber 2005, 19-20). Thus, the amendment was completely useless in practice, since the leave was unpaid and the likelihood of both parents staying home to share it was very low. In addition, it tended to reinforce the idea that, in principle, it would be the mother that would take the leave.

Although both, the 1999 *National Pro-Family Policy* and the *National Strategy* referred to the promotion of part-time work, the Electoral Action Solidarity government did not take any specific actions with regard to its regulation. Part-time work remained a

³⁶ Balcerzak-Paradowska (2008, 20) cites figures that show a further drop in the already low number of people taking up the leave: from 336.1 thousand in 1993 to 138.8 thousand in 2000. By 2005, 33 percent of women entitled to the leave took it up compared to 2 percent of men (Balcerzak-Paradowska 2008, 20, based on GUS 2006).

³⁷ *Act concerning the amendment of the Labour Code and certain other Acts*, (2001) Journal of Laws, No. 128, item 1405 (Ustawa o zmianie ustawy – Kodeks Pracy oraz o zmianie niektórych innych ustaw, Dz.U. Nr. 128 poz 1405).

³⁸ Council Directive 96/34/EC of 3 June 1996 *on the Framework Agreement on Parental Leave concluded by UNICE, CEEP and the ETUC*, [1996] O.J. L 145/4 (19 June 1996), amended by *Council Directive 97/75/EC* of 15 December 1997, [1998] O.J. L 10/24 (16 January 1998).

rarely utilized (Eurostat 2007; Głogosz 2007, 96; Gładzicka-Janowska 2009, see Appendix C, Table 4) and unpopular strategy for reconciling of work and family demands, being used instead by retirement-age workers or workers unable to find any other employment (Poliwczak 2003, 18; Głogosz 2007, 100). Similarly, no efforts were made to support working parents through the provision of institutional care, with the numbers of kindergartens and crèches continuing to decline (Balcerzak-Paradowska et al. 2003, 204; Heinen and Wator 2006, 200-203).

Phase 2: Regulating Flexibility

The political conflicts within the Electoral Action Solidarity-Freedom Union (AWS-UW) coalition lead to its breakdown in 2000. In 2001, Electoral Action Solidarity lost the election to the Left Democratic Alliance, which formed a government in coalition with the Peasant Party (Polskie Stronnictwo Ludowe, PSL) and Union of Labour (Unia Pracy, UP). The recession, rapidly escalating unemployment (see Appendix C, Table 2), and high government deficit provided a difficult challenge. One of the first orders of business for the new coalition was to cut back on the maternity leave provisions that the Electoral Action Solidarity introduced a few months earlier. In December 2001,³⁹ the incoming government reduced the leave back to 16 weeks for the first, 18 for subsequent and 26 for multiple births. Effectively, this reduction also cut down on the father's entitlements, since the first 14 weeks were maintained as obligatory for the mother. At the same time, art. 180 was amended to extend the protection against dismissal, previously only available to pregnant women and women entitled to maternity leave, to

³⁹ *Act of 21 December 2001 concerning the amendment of the Labour Code*, (2001) Journal of Laws No. 154, item 1805 (Dz.U. Nr 154 poz 1805).

fathers taking up the portion of maternity leave to which they were entitled. Although the change was predominantly motivated by budgetary savings, in justifying the change, some on the Left also argued that long leaves had deleterious effect on women's opportunities in the already difficult labour market (Parliamentary Debate, 13 December 2001, Izabela Jaruga-Nowacka)⁴⁰, which was generally congruent with the party's more egalitarian stance and its promotion of "interchangeable breadwinning" (Raclaw-Markowska 2008, 76). Ultimately, however, the reduction was made due to budgetary pressures and the necessity to cut social spending (Kotowska et al. 2008, 192).

Since the Electoral Action Solidarity was unable to deliver on a comprehensive labour law reform beyond the reduced workweek, the second order of business for the Left was to prepare a proposal for *Labour Code* amendment. With Poland's EU accession on the horizon, and the European Commission's unsatisfactory pre-accession progress reports in 2000 and 2001,⁴¹ there was pressure to modernize the legal framework. Both of the reports noted Poland's high unemployment and pointed to the rigid *Labour Code* as a likely culprit. In Poland itself, a more flexible *Labour Code* was eagerly awaited by employer organizations and supported by the legal experts in the Reform Commission. The Left Democratic Alliance was prepared for labour law reform as well, already beginning the process in 1996. With the current economic situation even worse than before, and the EU accession looming, the party's commitment to deregulation and

⁴⁰ This change was also assessed positively and supported by the employers.

⁴¹ *Poland's Progress towards Accession*. 2000 Regular Report from the Commission (8 November 2000): http://ec.europa.eu/enlargement/archives/key_documents/reports_2000_en.htm/; *Poland's Progress towards Accession*. 2001 Regular Report from the Commission of the European Communities. SEC (2001) 1752 (13 November 2001): http://ec.europa.eu/enlargement/archives/key_documents/reports_2001_en.htm/ (hereinafter *Poland's Progress* 2000; *Poland's Progress* 2001).

flexibilization of labour law was clear and both formed an integral part of its overall strategic *Enterprise-Growth-Work*⁴² plan.

Unwilling to act unilaterally, however, the Left Democratic Alliance government encouraged social partners to negotiate on the most pressing issues concerning them – mainly, the flexibilization of the *Labour Code* and the removal of various administrative burdens and labour costs for the small and medium enterprises. While, according to David Ost, social dialogue had been largely ineffective from the moment of its institutionalization in 1994, primarily because Solidarity often boycotted talks and refused to cooperate with the ex-Communist government or with the public sector representative National Alliance of Trade Unions (OPZZ), things deteriorated under the Electoral Action Solidarity administration (Ost 2005, 162). Indeed, Ost recounts that social dialogue was almost entirely stalled during this period (Ost 2000, 515; 2005, 162). Presumably, the Solidarity's political wing was confident that it could alone speak for labour and that consultation was not necessary. The incoming Left Democratic Alliance government was determined to restore social dialogue, and to give the Tripartite Commission composed of representatives of unions, employer organizations, and the Ministry of Labour a more meaningful role in shaping labour regulations once again.⁴³ Possibly, however, the Left wanted to simply share some of the responsibility for

⁴² Economic Strategy of the SLD-UP-PSL Government adopted by the Council of Ministers, January 2002. http://www.poprzedniastrona.premier.gov.pl/archiwum/3585_3889.htm/ (*Przedsiębiorczość-Rozwój-Praca. Strategia Gospodarcza Rządu SLD-UP-PSL*) (hereinafter *Enterprise-Growth-Work*).

⁴³ Indeed, the Tripartite Commission was a Left Democratic Alliance innovation, which was originally proposed by Jacek Kuroń as part of the Pact on State Enterprises, which was negotiated with the trade unions in 1993. Leszek Miller, the Left's Labour Minister (1993-1996), and later Prime Minister (2001-2004), established the commission as a forum for regular exchange between unions and employers and many labour deals were negotiated therein during the Left's Parliamentary tenure in the 1990s (Ost 2005).

potentially unpopular changes that were forthcoming, as it had learned from the past that assuming this burden alone was costly in political terms.

Independent social partner talks on the issue of labour law changes had been going on since February 2001, although they involved only the OPZZ and the Confederation of Polish Private Employers (Stelina 2004, 201) with the Polish Craftsmen Union (Związek Rzemiosła Polskiego) joining the negotiations at the end of 2001 (Błaszczuk 2002, 39; Ost 2005). Solidarity did not participate in these negotiations, in part because it was busy pouring resources into its governing political wing (Ost 2005). Finally, when in February 2002 the talks collapsed because members of OPZZ refused to give their negotiating committee the green light to sign the deal, the government presented social partners with its own amendment proposal (Sadłowska 2002). The proposal was then debated in the labour law group of the Tripartite Commission; however, the social partners could not come to an agreement and present a joint position. This failure to achieve consensus, according to the Labour Minister Jerzy Hausner, left the government in a position of having to act on its own (Sadłowska 2002).

2002 Labour Code Amendment

By 2002, Poland's growth rate fell to 1.4 from 4.3 in 2000 (see Appendix C, Table 1), its employment rate plunged to 44.5 percent, and unemployment reached nearly 20 percent, its highest level since the start of transition (GUS 2005; see Appendix C, Table 2). With the accession deadline looming and the European Commission's 2001 report pressing for "job creation" measures to "tackle unemployment," and "improve the functioning of the labour markets" (*Poland's Progress* 2001, 33), complete deregulation of the employment relationship was being advocated in some expert circles aligned with

the business lobby. Convinced that restrictive regulations and high labour costs were overburdening Polish enterprises and preventing job growth, many politicians were prepared to go that far. Indeed, in February 2002, a group of MPs from the business-friendly Civic Platform introduced a proposal for *Labour Code* amendment that was very much in line with the 1998 proposal introduced by the Small and Medium Enterprise Parliamentary Committee (SME Committee).⁴⁴ One month later, the Left Democratic Alliance coalition government presented its own, somewhat more moderate position,⁴⁵ which formed a part of the *Enterprise-Growth-Work* economic strategy.

While both proposals ultimately sought to introduce additional flexibility into the *Labour Code*, streamline some of its mechanisms to reduce administrative burdens, particularly for small and medium enterprises, and to lower labour costs, there were significant differences in how much flexibility each considered acceptable. With respect to working-time reform, the key elements of the Civic Platform's proposal were the introduction of several of the minimum standards prescribed by the *Working Time Directive*, including the 48 hours weekly maximum and the minimum 11 hours rest break. On the basis of the Directive's norms, it was proposed to amend art. 129 of the *Labour Code*, as amended in 1996, to increase the permissible daily norms for working hours from eight to up to 12 hours, and to increase the reference period for calculation of the 40-hour workweek from three to up to 12 months.⁴⁶ There was no requirement to

⁴⁴ *Members' proposal concerning the amendment of the Labour Code* (Poselski projekt ustawy o zmianie ustawy Kodeks pracy oraz o zmianie niektórych innych ustaw), Doc. No. 334 (12 February 2002) (hereinafter Members' Amendment Proposal 2002).

⁴⁵ *Proposal of the Government concerning the amendment of the Labour Code* (Rządowy projekt ustawy o zmianie ustawy Kodeks pracy oraz o zmianie niektórych innych ustaw), Doc. No. 335 (20 March 2002) (hereinafter Government Amendment Proposal 2002).

⁴⁶ The only exceptions were made for systems of working-time organization demanding continuous, uninterrupted effort where similar extensions were already available but reference periods were set at one to

negotiate or consult the reference period for calculation of the weekly averages with representatives of workers. In terms of additional overtime, which the *Labour Code* permitted in emergency and rescue operations or if required by special needs of the employer (art. 133 para 1), the proposal suggested to increase the annual limit previously set at 150 hours, to 240 hours. Overtime was to be compensated at the flat rate of 50 percent; dispensing with the two-tier compensation scheme of 50 percent and 100 percent depending on the number of hours worked in excess of the daily limits and the days on which these extra hours were worked. Furthermore, employees would not be entitled to any premium if they permitted the employer to retroactively adjust the schedule to reflect any excessive work carried out, provided that this was done within the month in which overtime work occurred (proposed amendment no. 37c). Finally, like the 1998 SME Committee proposal, the Civic Platform's also sought the introduction of up to 90 minute uncompensated lunch breaks (regulated by collective agreement or agreement between workers and employers), and the introduction of a system of "interrupted" working-time wherein a single break of up to five hours (not six, as was the case in 1998) could be scheduled. In addition to these fundamental changes in working-time rules, the proposal suggested major changes in the administration of various benefits (certain types of disability insurance or coverage for work-related health assessments) and administrative requirements involved in setting up workplace health and safety boards, among others. Primarily, its aim was to shield small and medium enterprises, employing below 20 or in some cases 50 workers (previously this was set at five), from the costs involved in their administration.

four months. Similarly, an exception was to be made for workers in road transport, for whom the permissible daily working time was 10 hours (arts. 129(4), 132 para 2 and 4 of the 1996 *Labour Code*).

Compared to the Civic Platform's proposal, the government's was much more "conservative" – the government was unwilling to go as far, even in face of difficult labour market and economic situation. Nonetheless, it also proposed significant changes to the regulation of working time. In terms of adjustments to the art. 129 working-time norms, the government proposed to retain the 8/40 norms, but increase the basic reference period from three to four months. In addition, reference periods of up to six months were proposed in certain sectors (including agriculture, livestock, guarding of persons or property, public works, and essential services), and 12 months in cases where "organization of work" or "technological reasons" would justify it. The extended reference periods could be introduced through collective agreement or an agreement with workers' representatives. Where no collective agreement or a representative body existed, the employer could introduce longer reference periods after notifying the health and safety inspector. In terms of overtime compensation, the proposal maintained the 150 annual hours already available, but, just as the Civic Platform, it proposed to lower compensation to 50 percent for the first four hours. Also, similar to the Civic Platform, the Left's proposal supported the introduction of the "interrupted" working-time system, with a single break of up to five hours, with the important proviso that such breaks be compensated at the rate of one-half of regular pay. In terms of introducing longer, uncompensated breaks for lunch or personal needs, the government suggested breaks of up to 60 minutes regulated by collective agreement.

Ultimately, both the Civic Platform and the Left Democratic Alliance wanted the *Labour Code* to be more business-friendly and flexible, although the emphasis of their justification was somewhat different. The government's explanatory memo invoked the

need to reduce labour costs and flexibilize employment relations as key for the realization of its long-term strategy and its *Entrepreneurship First*⁴⁷ program, however its key objective was to address unemployment: “The current *Labour Code* is not sufficiently flexible and restricts the contractual freedoms of the parties to the employment relationship, which is particularly detrimental from the standpoint of addressing unemployment” (Government Amendment Proposal 2002, 17). The Civic Platform, also focused on the labour market: “Modern and flexible labour market cannot be regulated through rigid provisions” (Members’ Amendment Proposal 2002, 12) and urged that the current *Labour Code* “discouraged” employers from creating jobs. However, its key emphasis was on the creation of business-friendly environment. Specifically, the Civic Platform’s explanatory memo suggested that in the course of its various amendments, the *Labour Code* had profoundly upset the balance between employee and employer rights; while it privileged the former, it had become a “hostile” Act for employers. According to its authors, the proposal was to “re-balance” the expectations of employees *vis-à-vis* employers to make the *Labour Code* “safer” for the latter (Members’ Amendment Proposal 2002, 13).

These differences aside, since there was some overlap between the proposals, the social partners and broader expert community were consulted over both. A special Commission of the Parliament was established to oversee the reform. In May 2002, for instance the Social Policy and Health Committee, jointly with the Polish Senate, held a conference entitled “Changes in the *Labour Code* as an Element of Reform and

⁴⁷ Program adopted by the Council of Ministers on 29 January 2002 as part of the Economic Strategy of the SLD-UP-PSL Government “Enterprise-Growth-Work” (*Przed wszystkim przedsiębiorczość*). http://www.poprzedniastrona.premier.gov.pl/archiwum/3585_3923.htm/ (hereinafter *Entrepreneurship First*).

Adjustment of Polish Labour Law to the Law of the European Union” (Senate of the Polish Republic 2002). Prominent labour law experts, representatives of all social partner organizations, as well as members of the Parliamentary Work Safety Council were invited to attend and speak to the proposed changes. Review of the conference proceedings reveals the extent of divergence in the social partner views on the proposed changes. It also confirmed that some Polish labour law experts supported further liberalization of the *Labour Code* (Senate of the Polish Republic 2002, see Lewandowski, 13-17), although others disputed whether the measures proposed would actually address unemployment since they tended to make overtime less expensive and thus unlikely to encourage creation of new jobs (Senate of the Polish Republic 2002, see Kabaj, 23-28).

By July 2002, the special Parliamentary Committee drafted the consolidated proposal, which was introduced on 25 July 2002. In introducing the proposal, the Committee Rapporteur, Marek Dyduch, alluded to the tough debate and the significant differences of opinion, but was confident that a fair compromise had been reached and that the proposed changes would have a positive impact on the situation of Polish enterprises and, hence, prevent further job shedding (Parliamentary proceedings, No. 27, 25 July 2002). During the Parliamentary debate, members of Leftist coalition government speaking in support of the bill put the value of employment protection on the record, but cited the “desperate” labour market situation, particularly high unemployment rates, in support of more flexible legal framework. Given Poland’s recession, tough concessions and sacrifices were necessary to turn the economy. In the words of Janusz Lisak of the Union of Labour, his “workers’ party” was willing to accept some of the far-reaching limitations of workers rights that the bill contained out of solidarity with the “3.5 million

people who remain jobless, and who are awaiting some sort of an opportunity”

(Parliamentary proceedings, No. 27, 25 July 2002).

In the end, most MPs were able to converge on the issue of unemployment and the joint proposal was passed. Significantly, the proposed change was to be temporary only, given that some of the proposed provisions were in conflict with EU regulations. A follow-up amendment was to be introduced within a year. Not in agreement were the members of Law and Justice, Self Defense, and the League of Polish Families, the right-wing conservatives and populist parties that replaced Electoral Action Solidarity after its recent dissolution. While they too agreed that a *Labour Code* amendment was necessary, most of them either opposed the far-reaching deregulation that the bill was proposing (Parliamentary Proceedings, No. 27, 25 July 2002, see Anna Sobecka and Lech Kaczyński), or considered the changes as not going far enough (Parliamentary Proceedings, No. 27, 25 July 2002, see Stanisław Dulias and Tomasz Szczypiński). Although the objections of the former mainly centered on the necessity to protect workers, their opposition was also very much a strategic and political one.

The changes introduced by the 2002 bill were indeed business friendly⁴⁸, although they were largely in line with what the government’s earlier proposal, not that of the Civic Platform. Moreover, the consolidated-proposal made some effort to balance the business-friendly measures with several new protective provisions. In terms of working time, the 2002 bill increased the basic reference period of four months (as proposed), and

⁴⁸ The changes were assessed very positively by at least one organization of Polish employers (Lewiatan 2002). The National Committee of the trade union confederation Solidarity, protested the amendment as particularly unfriendly to workers and accused the government of ignoring and sidestepping the process of consultation, which was not entirely true. See: Ost (2005) and Stelina (2006). The National Committee’s statement listed working-time extensions and increased overtime limits among the problematic measures adopted by the bill (NSZZ Solidarność 2002a, 2002b).

enabled longer periods of six and 12 months in some select cases (such as in case of seasonal work and where it was deemed required by employers' special needs or technological reasons) (art. 129). In a nod towards Polish employers, permissible annual overtime hours were set at 416 (previously 150), while costs associated with overtime were diminished through a simultaneous reduction in overtime compensation to 50 percent for all overtime hours (art. 134). Nonetheless, the amendment maintained the 100 percent compensation in case of overtime work on the weekend or during statutory-holidays. In addition to this reduction in premium, the amendment gave the employers a unilateral right to decide whether overtime compensation would be paid out or awarded by time off in lieu of compensation (art. 143 para. 2).

As initially proposed, "interrupted" working time was introduced, enabling the scheduling of breaks of up to five hours within a 24-hour period during. Employees were to retain a right to one-third of their compensation, not one-half as previously proposed. The new law also allowed scheduling 60-minute breaks not counted as working time and thus require no compensation. Finally, the bill changed holiday entitlements, mainly shifting the responsibility (or right) to draw up holiday schedules from the unions or organizations of employees to the employers (art. 163 para. 1), although technically dispensing with the responsibility to draw up such schedules at all.

In addition to the series of these and other employer-friendly flexibility measures,⁴⁹ the 2002 bill introduced several measures intended to benefit employees. Among others,

⁴⁹ Significant other changes aimed at lowering the costs of operating a business, involved dispensing with several of the administrative requirements for SMEs. For instance, the requirement that all firms with no fewer than 10 employees form a health and safety board was waived for all companies with fewer than 100 workers. While the health and safety requirements were not completely waived for these smaller companies, they were given more leeway in how to organize and implement health and safety rules within the workplace.

the requirements and definitions of the employment contract were tightened to limit the employer practice of sidestepping the *Labour Code* through civil-contracts.⁵⁰ In terms of working time, the bill included a provision that allowed employees eligible for child-raising leave to request reduced working-time for the duration of the leave, with a corresponding employer duty to accommodate such requests (art.186 para. 3). The bill also enabled employees to request four days of their annual leave “on demand” (art. 167²⁻³).

Thus, while the amendment did not go as far as to strip existing working-time norms to the minimums set by EU law, its overall effect was to permit employers a great deal more flexibility in planning work through longer reference periods, more and cheaper overtime and longer breaks. The new freedom to “interrupt” the workday, previously available only in road transport, had the same intention and in addition was aimed at minimization of passive times during which employees were not “productively” engaged.

All of these forms of flexibility, however, had the potential to conflict with the interests of employees in more predictable working schedules and hours. This potential conflict was a problem, since actual work hours were already fairly long in Poland. According to Eurostat and studies carried out by the Warsaw Institute of Labour and Social Matters, in 2000 and 2001, Poles worked some of the longest hours in Europe, with Polish men (43 hours) working only less than men in the UK and Greece, while Polish women (38.9 hours) working only shorter average times than Greek women

⁵⁰ Moreover, the bill introduced a special substitute-worker provision, whereby the employee on leave could be replaced by a substitute contractor whose employment contract would only be signed/valid for the duration of the main employees leave. This provision was intended to make it easier for employers to temporarily replace workers on leave, without the necessity of dismissing them or replacing them permanently.

(Strzemińska et al. 2002, 123). Moreover, a significant proportion of Poles were reporting hours in excess of the statutory limits (Strzemińska et al. 2002). Over 16 percent of all workers (17.3 percent of women) reported hours between 44 and 49, while 13.4 (11.2 of women) percent worked in excess of 50. In feminized sectors such as retail, the average working time was 43.6 hours (Strzemińska et al. 2002, 116-124).

Given this statistical picture, additional working-time extensions, or the introduction of scheduled “interruptions” of up to five hours, would be particularly burdensome for workers with caring obligations. Similarly, interrupted work organization would make it very difficult to plan personal schedules around the more rigidly set times of kindergartens and schools, and could significantly disrupt family time. The new option to request reduced working-time while on child-raising leave was a positive development. The change was intended to accommodate smoother transition between child-care and labour market participation, and to minimize career breaks, which was in line with the Left Democratic Alliances’ reduction of maternity leave entitlements earlier that year to shield women from the perception that they were expensive and undesirable employees. However, this provision did not adequately respond to needs of all other working parents, whose children were older than four. Similarly, the right to take-up a portion of annual leave “on demand” could be used in emergency situations and went some way towards making flexibility also work for employees, but on balance the changes introduced by the 2002 amendment were not very “woman“ or “family friendly”. Moreover, given the traditional gender roles and the difficult labour market situation, the take-up of these new forms of “employee-friendly” flexibility by fathers was unlikely. The key justification for the 2002 bill was the fact that it was intended to be “temporary” and reflected Poland’s

dire labour market conditions. With EU accession only two years away, reducing unemployment, promoting entrepreneurship by lowering labour costs and the overarching goal of demonstrating that Poland was a stable, well-functioning and competitive economy topped the policy agenda. As for the needs of workers, and women, while it was acknowledged that women fared particularly badly in the Polish labour market, the general message was that jobs were “a blessing” and the only secure guarantee that basic subsistence needs would be met; the fact that these jobs may have significantly interfered with private life or people’s ability to balance competing demands, was not the most significant consideration.

2003 Labour Code Amendment

Several months after the passing of the 2002 statute, the Parliament began working on a further, more comprehensive bill designed to bring the *Labour Code* in full compliance with the *acquis communautaire*. Proceeded by several months of parliamentary debate and work in the Special Parliamentary Committee, the statute amending the *Labour Code*⁵¹ was passed on 14 November 2003, just a few months short of the May 2004 date of accession. Many of the proposed changes were already subject to an earlier bill that had been proposed in 2001 by the Electoral Action Solidarity bill (Florek 2004a). At the time, the bill was opposed by the Left Democratic Alliance and vetoed by President Kwaśniewski, formerly of the Left Democratic Alliance, because it contained Sunday-rest provisions⁵² that the President deemed unjustified and too

⁵¹ *Act of 14 November 2003 concerning the amendment of the Labour Code*, (2003) Journal of Laws No. 213, item 2081 (Dz.U. Nr. 213, poz 2081).

⁵² By this point, and since, Sunday rest has been a highly charged issue dividing the Left and the “liberal” Right-wing parties from the “social solidaristic” Right (Electoral Action Solidarity, League of Polish Families, and Law and Justice). While the former opposed a broad ban on Sunday work for business or

ideologically charged. Although the Electoral Solidarity Action's political successors – now dispersed mainly throughout Law and Justice, League of Polish Families, and Self-Defence – were set on political retaliation by way of putting some roadblocks in the Left's way, the fact that the EU accession deadline was close made concessions necessary. Similarly, the Civic Platform, again pushing for additional forms of flexibility that they were not able to achieve in 2002, had only a short timeframe to work with. Thus, despite the discontent among the opposition parties, the necessity to harmonize Polish law with that of the EU meant that the bill, with several minor changes, passed in both chambers of the Parliament in the fall and received the Presidential signature by the end of November 2003.⁵³

The changes introduced by the 2003 amending bill were wide in scope as there were many areas in which harmonization with the EU Directives was outstanding.⁵⁴ Smaller measures enacted in prior years already addressed select aspects of equality, health and safety, and working time (for instance the 2002 amendment). However, the purpose of the 2003 amending statute was to bring the *Labour Code* in full compliance with all equality and non-discrimination Directives (2000/78, 2000/43, 76/207),⁵⁵ health

“freedom to shop” reasons, the latter fought to incorporate provisions prohibiting Sunday work in the retail sector, where it has been traditionally permitted. The reasons ranged from the right to worship to the need to keep families together and mothers closer to their children. Attempts to institute Sunday rest and additional religious holidays took up a great deal of Parliamentary debate time during the Electoral Action Solidarity and Law and Justice tenures and this was another issue on which both parties had been able to rally significant public support and media frenzy. Nonetheless, while several religious holidays have been introduced over the years, Sunday work continues to be permitted in the retail sector.

⁵³ That Poland's transposition of the EC Directives was timely, but enacted at the last possible minute was noted by Simone Leiber (2007).

⁵⁴ The amendment was very wide in scope and in addition to the changes discussed in this chapter it addressed new provisions on employment contracts, workers rights to information and consultation and the protection of young people at work.

⁵⁵ *Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin*, [2000] O.J. L 180/22; *Council Directive 2000/78/EC of 27 November 2000, establishing a general framework for equal treatment in employment and occupation*,

and safety Directives (89/391, 90/394, 78/610),⁵⁶ and, in relation to working time, the *Working Time Directive* (93/104) and the framework agreements and Directives on Part-time work (97/81) and fixed-term work (99/70).⁵⁷

As I will show in more detail below, the overall effect of the 2003 amendment on the working-time regime was to align it closely with the provisions of the *Working Time Directive*: both, the protective norms and some of the exclusions and derogations (see Table 3). Although some of this was already accomplished in 2002, the changes enacted then were specifically justified as of “emergency” and “temporary” nature. One effect of the 2003 amendment was to make these prior changes permanent, in so far as they did not conflict with the provisions of the *Working Time Directive*. At the same time, by aligning Polish working-time rules closer with the Directive’s provisions, new forms of flexibility to extend work hours became incorporated into the *Labour Code*. On balance, the 2002 and 2003 amendments led to a significant flexibilization of the working-time regime.⁵⁸ At the same time, reflecting the EU’s broader focus on diversification of working time and adaptability of work to both enterprises and workers, the 2003 amendment also provided for several new employee-friendly forms of flexibility. As I will elaborate in more detail

[2000] O.J. L 303/16; Council Directive 76/207/EEC of 9 February 1976 on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions, [1976] O.J. L 39/40.

⁵⁶ Council Directive 78/610/EEC of 29 June 1978 on the approximation of laws, regulations and administrative provisions of the Member States on the protection of health of workers exposed to vinyl chloride monomer, [1978] O.J. L 197/12; Council Directive 89/391/EEC of 12 June 1989 on the introduction of measures to encourage improvements in the safety and health of workers at work, [1989] O.J. L 183; Council Directive 90/394/EEC of 28 June 1990, on the protection of workers from risks related to exposure to carcinogens at work, insofar as it relates to carcinogens other than asbestos, [1990] O.J. L 196/1.

⁵⁷ Supra note 15.

⁵⁸ Note that Leiber (2007, 21) observes that the transposition of the *Working Time Directive* did not lead to the lowering of national standards. Indeed, as I note below the basic *Labour Code* standards remained largely intact and the main flexibility provisions enacted in 2003 (derogations and exceptions) had already been introduced a year earlier, in 2002, and were merely repeated here.

below, these new working-time solutions may have been beneficial to some workers, but were not necessarily suitable to better work-family reconciliation.

In terms of changes to working time, the 2003 statute was largely an exercise in “organizing” the working-time rules (Florek 2004a). Previously dealt with in Chapter Eleven of the *Labour Code*, working-time was shifted to Chapter Six, which restated and reorganized many of the previously enacted provisions (including those from 2002) and introduced further changes designed to adapt them to European norms, and indeed, went beyond these norms (Florek 2004a).⁵⁹ In terms of compliance with the *Working Time Directive*, the amended Chapter Six maintained the 40-hour weekly norm; however, as per the Directive, it explicitly restated that total weekly working-time, inclusive of overtime, was not to exceed 48-hours over a specified reference period no longer than 4 months. The potential extensions of the reference period to 6 (in specified sectors) or 12 months (if required by employer’s special needs or for technological reasons), already adopted in 2002, were retained. Moreover, the Directive’s mandatory daily and weekly rest periods of 11 and 35 hours respectively, were introduced (arts. 132 and 133). These minimum mandatory rest periods were novel in Polish labour law, since daily rest had previously been determined only by the number of permissible daily working time and overtime hours, and by the permissible daily extensions for specific categories of workers. One result of their implementation was to dispense with the previously set daily overtime limit of four hours (art. 151), effectively increasing permissible daily overtime from four to five hours because the application of the minimum 11-hour rest rule

⁵⁹ For instance, the amendment introduced definitions of working day and working week, which are absent in the Directive and which, according to many Polish labour lawyers substantially interfere with more flexible organization of working time: see for instance Rycak 2008a, 2008b; Florek 2004a. The *Labour Code* amendment also took advantage of only some of the derogations and exemptions enabled by Art. 17 of the *Working Time Directive* (see Table 3).

effectively enabled work for up to 13 hours daily, thus up to five hours *over* the basic eight hour norm.⁶⁰ Moreover, following the Directive, exceptions to the weekly working-time norms, and the daily and weekly rest norms were applied to managerial staff (art. 132 para. 2). Similarly, exceptions from the daily and weekly rest were applied to essential emergency response workers, shift workers and workers employed in the system of equivalent working time, with the proviso that at least 24-hours of uninterrupted weekly rest had to be provided to these workers (arts. 132-133). To compensate unused rest periods, workers excluded from the daily rest requirement (but not managerial workers) were entitled to an equivalent time off within the reference period set at one week (art. 132 para. 3). By contrast, the Directive provided that this reference period could be set at two weeks, making the *Labour Code* norm more favourable for workers.

Finally, annual overtime limits – permitted for rescue or lifesaving operations or when justified by special needs of the employer – were set at 150 hours (art. 151 para. 3); however, higher limits were permitted to be set by collective agreement, workplace regulation or employment contract, in practice enabling annual overtime of up to 416 hours (art. 151 para. 4). Once again, this change was already brought in by the 2002 “temporary” amendment, and was now reaffirmed.

Also following the Directive, special rules were applied to the working-time of night workers, including a newly specified definition of night worker (art. 151⁷ para. 2), limit on the working hours of night workers (art. 151⁷ para. 3) and requirement that *if an employee requests*, a workplace inspector should be notified that night work is carried out (arts. 151⁷ para. 6). In the latter case, the Directive’s specification on the necessity of

⁶⁰ 24 – 11 (daily rest) = 13 permissible hours of work (inclusive of overtime), 13 – 8 = 5 potential legal overtime limit.

notification differed in that its art. 11 provided that the request for information on the performance of night work was to come from the competent national authorities to the employer; the Directive, unlike the 2003 amendment, did not place the burden on the employee to request that such information be forwarded.

In terms of the annual leave, art. 154 of the 2003 amendment raised the basic vacation entitlement to 20 days (from 18) for workers with registered work experience of under 10 years, thereby bringing this entitlement in line with the minimum (four-weeks) required by art. 7(2) of the *Working Time Directive*. For workers with work record in excess of 10 years, the annual vacation entitlement was set at 26 days. Finally, in accordance with the Directive, art. 171 of the amended *Labour Code* limited the right to equivalent pay-in-lieu of annual leave to only those situations where the dissolution of the employment relationship conflicted with the employee's entitlement to leave. Effectively, it imposed a requirement that the annual leave be taken up in all other circumstances.

Table 3 *Working Time Directive* and Corresponding *Labour Code* Provisions

<i>Working Time Directive</i> Provisions	Polish <i>Labour Code</i> Provisions (2011 numbering)
Art. 3 Daily rest: 11hrs, within 24hr period	Art. 132 (2003 Amendment) Daily rest: 11hrs, within 24hr period
Art. 4 Mandatory break if working-time equals or exceeds 6hrs	Art. 134 (2003 Amendment) Mandatory break if work-time equals or exceeds 6hrs
Art. 5 Weekly rest: 35 hrs	Art. 133 (2003 Amendment) Weekly rest: 35 hrs
Art. 6 Weekly working time inclusive of overtime: 48/hrs over 7 day period	Art. 131 para.1 (2003 Amendment) Weekly working time inclusive of overtime: 48/hrs over 7 day period
Art. 7 4 week annual leave (Cannot be replaced by time in lieu)	Art. 154 (2003 Amendment) 20 days, 26 days (based on 5d average w.w.) Pay in lieu limited to the dissolution of employment
Art. 8 - 11 Working time of night workers and workers exposed to hazardous conditions: 8 hrs/24 (average)	Art. 151⁷ para. 2 (2003 Amendment) Definition of "night worker" Set 8hr limit on night work involving dangerous work or work

Free confidential health assessment Report to authorities Ensure health and safety needs met	requiring high levels of physical or mental exertion
Art. 13 Patterns of work “Adapting work to worker”	Art. 94 2(a) 2003 Amendment Employers required to organize work in a manner that minimizes the burden of monotonous work, or work at set rate, by introducing breaks
Art. 16 Basic Reference Periods Weekly rest – 14 days Weekly working-time – 4 months Night work – industry agreement	Art. 129 para. 1 (2002 Amendment) Weekly working time – 4 months Art. 333 (2003 Amendment) Weekly rest – 1 week
Derogations, Art. 17(1) Certain categories of workers: - Managing executives or other persons with autonomous decision-making powers - Family workers; - Workers officiating at religious ceremonies in churches and religious communities.	Arts 132, para. 2, 133 para. 2, 151⁷ para.5 (2003 Amendment) Derogation from daily rest rule, weekly rest, night work limits for managerial workers
Derogations, Art. 17 Derogations from overtime limits (reference periods), daily and weekly rest and night work, Art. 17(3) - Workers whose place of work and place of residence are distant from one another, including offshore work, or where their different places of work are distant from one another; - Workers engaged in security and surveillance activities; - Workers involved in activities which require continuity of service or production (e.g. hospitals, residential institutions, gas, water and electricity production, industries in which work cannot be interrupted on technical grounds, and research and development activities); - Workers engaged in areas where there is ‘a foreseeable surge of activity’; - In cases of accident or the imminent risk of an accident. Derogations from the 11-hour and 35-hour rest rules, Art. 17(4) - Shift work; shift change - Where work is split up during the day	2002 Amendment , retained in 2003 Article 129 para. 2 Derogation from the basic reference period in some sectors (i.e. seasonal work and workers engaged in security and surveillance activities) 6 months, and 12 months where required by employer’s special needs or technological reasons. “Interrupted working-time” system, breaks of up to 5 hours allowed Arts 132, para. 2, 133 para. 2, 151⁷ para.5 (2003 Amendment) Derogation from daily rest rule, weekly rest, night work limits for “emergency” workers (risk of accident, risk to life, health and environment) Art. 135-139 (2003 Amendment, Arts. 132-133) Derogations from the daily and weekly rest applied to essential emergency response workers, shift workers, workers employed in system of equivalent working time
Derogations, Art. 18 Legislated or negotiated (by collective agreement) derogations from daily, weekly rest, breaks, night work, weekly working time and reference periods	Art. 151 para. 4 (2003 Amendment) Derogations from annual overtime limits (150) by collective agreement, workplace regulation or employment contract (up to 419 annual hours)
Derogations Art. 19 (previously Art. 17(4)) Reference Periods - Legislated – up to 6 months - By collective agreement – 12 months (for objective or technical reasons)	Anti-Crisis Bill, 2009 (expired 31 Dec 2011) Art. 1 Up to 12 months where required by objective needs of the employer, technological reasons, or requirements stemming from the organization of work time
Derogations, Art. 22(1) (formerly Art. 18(1)(b)(i)) Individual opt-out from Art. 6 (weekly working time)	Act of 24 August 2007 concerning Health Care Centers Individual opt-out in health-care establishments, doctors and health care technicians with post-secondary education

In relation to other aspects of working time, the amendment broadened the provisions guaranteeing equal treatment of part-time and temporary workers, stemming from provisions of Directives 97/81 (part-time work) and 99/70 (fixed-term work), by introducing the non-discrimination principle.⁶¹ While no specific provisions for part-time work were made within the chapter dealing with working-time regulation, the amendment imposed specific obligations to inform employees of applicable working conditions (Directive 91/533)⁶². Specifically, art. 94² now required employers to inform workers on part-time or fixed-term contracts of possibilities to “upgrade” to full-time or permanent positions, or vice versa, to reduce their hours of work. Moreover, the amendment “restored” art. 25(1), which provided that a third “annexation” of a fixed-term contracts between the same parties resulted in a contract for permanent, open-ended employment. Intended to discourage employers from abusing fixed-term contracts for the sole purpose of limiting costs and sidestepping termination notice provisions, this provision was “suspended” in 2002 (Gładzicka-Janowska 2009, 166). While the 2003 amendment formally restored it, in practice, the article’s operation was “frozen” until Poland’s official membership on 1 May 2004. By then, the use of fixed-term work had increased from the negligible 4.8 percent in 1997 to 22.7 percent (Eurostat 2006, cited in Gładzicka-Janowska 2009, 169).

The above noted provisions on non-discrimination for part-time and fixed-term workers were part of the effort to diversify the working-time regime in ways that could

⁶¹ Supra notes 15; 55-56. A series of provisions were amended that adjusted the *Labour Code* to EU directives: 2000/78 (equal treatment) (arts. 9, 11.3, 18, 18.3.a-18.3.e, 94(2b), 94.1), 2000/43 (equal treatment – race and ethnicity) (art. 11.3, 94 (2b), 99/70 (temporary work)(art. 11.3, 25.1, 94.2), 97/81(part-time work)(art. 11.3, 29.2, 92.4).

⁶² Council Directive 91/533/EEC of 14 October 1991 on the employer’s obligation to inform employees of the conditions applicable to the contract or employment relationship, [1991] O.J. L 288/32.

also benefit workers. This was particularly the case with part-time work, which continued to be rarely utilized, having remained relatively stable at about 11 percent between 1997 and 2004 (GUS 2005; Maytsiak 2007), largely due to insufficient compensation and inferior conditions with which it was generally associated (Poliwczak 2003, 18; Głogosz 2007, 100). In reality, as Simone Lieber (2007, 20) notes, the introduction of the protection and information provisions with respect to part-time work was an instance of bare-minimum transposition of EU standards in order to achieve the required compliance in time for accession, and was not necessarily guided by the belief that part-time work would indeed be more broadly utilized.⁶³ In addition, the 2003 statute also introduced several new systems of working time, which too could serve more adaptable organization of work, particularly for those workers unable to fit the “standard” schedule. These systems included “weekend working” (which allowed extended working hours on Fridays, Saturdays and Sundays) (art. 144), a “reduced workweek” (arts. 143) and the option to set individual working-time schedule (art. 142). All of these new systems retained the basic standard weekly norm of 40 hours (48 including overtime), which in the first two cases meant significant intensification of work on some days, compensated with rest on others (not unlike in case of equivalent system of working time). While this type of system may have been indeed suitable to workers who were studying or training, or workers balancing two different jobs, the extent to which it actually facilitated better balancing of work and family obligations was highly questionable and unlikely. Indeed, the fact that pregnant workers or parents of children under four were explicitly prohibited

⁶³ Lieber (2007, 20) notes that legislators and politicians responsible for the revision expressed hesitation as to whether these revisions would in practice increase or facilitate the take-up of part-time work in Poland.

from these systems was a sufficient indication (art. 148) that these systems were unlikely to assist working parents.

To sum up, the 2003 *Labour Code* amendment introduced some new forms of flexibility that were permitted by the *Working Time Directive* and introduced several new systems of working-time with the purpose of reorganization of work. In reality, many forms of flexibility – particularly those enabling daily and weekly working time extensions and higher (and cheaper) annual overtime – had already been introduced in 2002, by way of a “temporary” measure. In 2003, many of these provisions were simply restated; with the effect of becoming legitimated as “in compliance” with the EU law. At the same time, neither the 2002, nor the 2003 amendment went so far as to include all of the exceptions and derogations permitted by the *Working Time Directive*. For example, while the Directive mandated that the weekly rest of 35 hours could be calculated on the basis of 14-day reference period, the amendment chose to maintain the reference period at one week. Also, art. 17 of the *Working Time Directive* provided derogations for a long list of sectors in which further extensions could be applied, many of which the Polish legislators chose not to use. Finally, the Directive’s art. 18 (later Article 22) “opt-out” provision applicable in individual employment contracts and the wider use of annual reference periods through collective bargaining or workplace negotiations were omitted in the 2003 amendment.

The fact that not all flexibility mechanisms permitted by the *Working Time Directive* were incorporated into the *Labour Code* was subject to later critique. The Polish business lobby, but also by many labour-law specialists, saw it as a missed opportunity to make labour law even more flexible (Florek 2004b; Rycak 2008b, 11); the

Code's working-time regulations were still generally regarded as rigid, despite the significant flexibility introduced over the years (Gładzicka-Janowska 2009, 169). At the same time, some groups and commentators regarded provisions like the "opt out" as a complete violation of the protective role of labour law, and signalled that it signified a return to nineteenth century capitalism (Rycak 2009). Ultimately, however, the government simply decided to act incrementally as additional flexibility was coming in the future.

5.2.3 Developments Since Accession: Work-Family Reconciliation

Shortly after Poland joined the EU the political landscape changed, as the pendulum swung to the Right once again in the 2004 fall election.⁶⁴ Law and Justice formed government in coalition with Self-Defense of the Polish Republic and the League of Polish Families and the Civic Platform assuming the role of official opposition (Szczurbiak 2005). With this change in administration, priorities had shifted somewhat away from the focus on the economy and competitiveness. The fact that the Polish growth rate began to recover in 2003 and by 2004 its GDP was back to its pre-recession rate of 5.3 (see Appendix C, Table 1), helped to keep economic rationales from the centre stage. In parallel, unemployment began to decline, however, at 17.8 percent in 2005, it was one of the highest in Europe (see Appendix C, Table 2). With significant deregulation and flexibilization of the *Labour Code* carried out prior to Poland's EU accession, the rigidity of the legal framework, albeit still identified as an issue by Polish

⁶⁴ Leszek Miller stepped down from his post as Prime Minister among allegations of corruption, and was for a brief time replaced by Marian Belka. Shortly thereafter, the Left was ousted from its governing status after losing in the September 2005 election that brought electoral success to the conservative Law and Justice and the economic liberals Civic Platform. The Left attempted to reform itself by moving further towards the centre and forming the Left and Democrats party (Lewica i Demokraci). Nonetheless, it was not successful in gaining a significant following.

experts, was no longer singled out as the major reason for the persistence of unemployment by the OECD and the EU (Narożny 2006). Indeed, employment protection in Poland was comparable to that in other OECD and EU countries, and even lower than of both EU-10 and EU-25 (OECD 2004; OECD 2006 cited in Narożny 2006, 4). What remained a problem however, were the costs resulting from high taxes and low labour mobility (Narożny 2006, 5-6). Similar conclusions were reached by a comprehensive report on Poland's unemployment causes, entitled *Unemployment in Poland* 2005, which was prepared by the outgoing Left Democratic Alliance administration in 2005.⁶⁵

While unemployment remained a problem, the new Law and Justice, League of Polish Families, and Self-Defense coalition government decided to tackle other major issues: Poland's demographic situation and work-family reconciliation. Both issues had been addressed by previous administrations; however, the process of EU accession and Poland's particularly bad economic situation in the early 2000s had the tendency to emphasize economic conditionalities and policy. The adoption of social *acquis* or the infrastructure for its delivery, while required and ultimately timely (even if at the lowest common denominator), was at times delayed or subordinated to keep Poland's "good standing". Moreover, the frequent political changes and the contest between more socially egalitarian Left and the social conservative Right meant that no coherent

⁶⁵ *Unemployment in Poland 2005* was prepared by the Ministry of Labour and Social Affairs and the Warsaw School of Economics (SGH). The report explored the causes of Polish unemployment and provided a number of recommendations. One of the main findings of the report was that unemployment was related to lower levels of vocational activity among the youth and older workers. In its recommendations, the report emphasized the importance of education, skills development and effective inclusion of underprivileged and older workers. In addition, the report emphasized high employment taxes and inflexible, centralized wages as additional problems. These recommendations were in line with the OECD and EU recommendations. However, as it was released in last days of the Left Democratic Alliance administration, it did not receive significant attention from the incoming Law and Justice coalition government.

approach had been developed. By now, however, Poland was in the EU, where the issue of work-family reconciliation had become a significant component of the policy discourse. As I had suggested in Chapters 2 and 3, however, the rise of work-family reconciliation in the context of EU working-time regulation had been uneven, with only some forms of working-time organization or accommodation – such as part-time work or parental leave – having been gendered and discussed in terms of their impact on and potential role in the balancing of work and family. In the context of the *Working Time Directive*, the core working-time instrument, the issue of work and family had only come up on the occasion of the Directive's 2003 review – also in the response to the broader work-family debate and the mainstreaming of gender in the EU policy.

This selective engagement with gender and work-family reconciliation in the context of working-time debate translated into the Polish context, with most of the debate on the core working time norms – and the flexibility to extend them – taking place without significant consideration of their gendered impacts. Apart from some limited efforts to diversify working-time norms – by for instance, promoting part-time work – most regulation of working time tended to either maintain the full hours or enable the flexibility to increase them further. In regulating flexibility, Polish policymakers and Parliamentarians were guided by economic rationales and adopted most flexibility available in the core EU working-time measure, the *Working Time Directive*. How these norms were to be reconciled with family obligations was never a subject of discussion. By contrast, the soft dictates of the 1997 European Employment Strategy and the Directive on part-time work, which also emphasized flexibility and diversification of working arrangements, found expression in some legislative amendments intended to

support work and family, but much less reflection in practice. On balance, despite several provisions introduced to reorganize and reduce working time and to make it more adaptable to people's needs for work-family reconciliation, the main thrust of the changes to the Polish working-time regime was to reinforce the long-hours, overtime culture. Given the traditional gender contracts within the home, this type of regime was not conducive to the redistribution of men and women's domestic responsibilities and thus their more equal assumption of care work within the home and risk in the labour market.

Thus, addressing the issue of work-family reconciliation was something that governing coalition of Law and Justice, League of Polish Families and Self-Defense of the Polish Republic set to achieve through its 2007 *Family Policy Project*.⁶⁶ Like the approach previously developed by Electoral Action Solidarity in 1999, this program was also concerned with demography and was explicitly pro-natalist; however, there were some marked differences between the two. Most significantly, the 2007 program was no longer aimed solely at women, but rather aimed to support parents in a variety of family forms. While the program contained measures to support more traditional family arrangements (i.e. the extension of maternity leave and removal of social insurance barriers to temporary or permanent labour market exit), it also emphasized measures for better work-family reconciliation, such as better access to quality care and flexible working-time arrangements for parents.

Despite the generally socially conservative tenor of the Law and Justice administration and the influence of the clerical-traditionalist League of Polish Families,

⁶⁶ Government in the Care for Polish Families. Family Policy Project of the Jarosław Kaczyński Government (*Rząd w Trosce o Polskie Rodziny. Projekt Polityki Rodzinnej Rządu Jarosława Kaczyńskiego*). 8 marca 2007 r. Warszawa (hereinafter *Family Policy Project*). <http://www.poprzedniastrona.premier.gov.pl/>.

according to Raław-Markowska, the 2007 *Family Policy Project* was a definite shift to a more complex model of work-family reconciliation that aimed to promote both, activation and fertility by accounting for diversity of family forms and women's preferences (Raław-Markowska 2008, 76-77).

There were a number of reasons for this shift in direction. First, the program was largely developed by Joanna Kluzik-Rostkowska, a Law and Justice politician who was generally regarded as the progressive voice within her conservative party and was well respected by Polish feminists (Ksieniewicz Interview, 26 January 2010, Warsaw).⁶⁷ Kluzik-Rostkowska was responsible for the Ministry of Labour and Social Affairs during Law and Justice government tenure and the development of a more family- and woman-friendly infrastructure was her key objective (Kluzik-Rostkowska Interview, 25 March 2010, Warsaw). She was well aware of the disadvantage that women faced in the workplace, but was a proponent of diversified policy, which would be inclusive of different family formations and women's diverse preferences. She also wanted to champion a more active focus on redistribution of care work and the promotion of more active fathering. Changes to the structure of maternity leave, and the introduction of the two week father's leave was one way of achieving these goals. In her opinion, however, Polish women themselves constituted an obstacle to more equal division of labour as they often clutched to their traditional roles (Kluzik-Rostkowska Interview, 25 March 2010, Warsaw). Moreover, she was well aware that financial disincentives (men's higher earnings) and traditional perception of gender roles constituted an obstacle for Polish

⁶⁷ In a personal communication, Magdalena Środa, one of Poland's leading feminist politicians (Left Democratic Alliance), journalists, and gender scholars praised the work of Kluzik-Rostkowska, despite the fact that the two women's political views differed significantly. See also Heinen and Portet (2009, 16), who also single out Kluzik-Rostkowska for her progressive views on social policy and family policy.

parents who wanted to take advantage of their entitlements (Kluzik-Rostkowska Interview, 25 March 2010, Warsaw).

The second reason was the direct and indirect influence of the EU. Labour market activation of women through measures aimed at better work-family reconciliation, including flexible working-time, more and better quality childcare, and the promotion of more equal sharing of paid and unpaid work between men and women had become key components of European policy discourse. Work-family reconciliation had been included in successive Employment guidelines (of the European Employment Strategy) and the Lisbon Strategy and the Barcelona Council conclusions had set concrete targets for women's employment rates at 60 percent and child-care coverage at 33 percent (under 3) and 90 percent (3 and up). Poland was lagging behind on all counts. Women's activation rates, at 50.6 in 2007, continued to be far below the set targets (Eurostat 2007). Similarly, the development of child-care facilities was slow and enrolment rates low, with only 2.3 percent of children under three and 44.6 percent of children under 5 (55 percent under 6) being in some form of institutional or private care (GUS 2007b, 109; Balcerzak-Paradowska 2008, 21; Raław-Markowska 2008, 79). Similarly, despite some "family-friendly" working-time measures having been enacted by the 2003 *Labour Code* amendment, these measure were few (European Foundation 2007) and, in practice, not always available for workers to take up because of barriers in the workplace (Balcerzak-Paradowska 2008, 25-26; Borkowska 2011b, 38-39⁶⁸) or lack of information about their

⁶⁸ According to Borkowska (2011b, 38-40) many firms audited as part of the Leader in Human Resource Management annual competition in Poland did not have an official "work-life balance" policy. In 2003, 54.9% of the audited firms had such a policy, and the numbers for the following years were as follows: 42.9% (2004), 71% (2005), 36.4% (2006), 60% (2007), 43.8% (2008), and 34.8% (2009). Borkowska concludes that most firms continue to perceive reconciliation of employment and non-employment activities as a private matter of the employees and not one in which the firm should take an active interest. Of the firms that expressed concern for work-life balance, most developed policies for those employees

availability (Głogosz 2008, 41-43). Indeed, family-friendly flexibility was found to be typically the “privilege” of own-account or self-employed workers, and significantly more difficult to attain for employees (Matysiak 2009, 357). Nonetheless, Poland’s participation in the Lisbon Strategy had some effect in re-casting the focus on work-family reconciliation (Płomień 2009, 147). In fact, as one Ministry of Labour and Social Policy staffer, Monika Ksieniewicz, a gender expert at the Family Policy Department, remarked, “the only impetus for action on gender issues stems from the requirements imposed by Brussels” (Ksieniewicz Interview, 26 January 2010, Warsaw). According to Ksieniewicz, so long as there is no EU pressure, nothing happens in Warsaw to meaningfully assist women workers.

Aside from any direct pressures or necessity to adopt EU prescriptions, influence over Polish policy was also exerted through the European Social Fund. Funding for projects and programs addressing gender equality, the use of flexible working-time, and work-family reconciliation or work-life balance prompted new scholarly research (see Raław-Markowska 2008; Sadowska-Snarska 2008; Sochańska-Kawiecka, Kołakowska-Seroczyńska, and Morysińska 2009; Borkowska 2011). In addition, European Social Fund has provided funding for NGO and government-run publications (*Flexible Employment, or How to Reconcile Professional Life with Motherhood* 2007, *Partnership within the Family – Women’s Employment Opportunities*), training programs and awareness-raising campaigns, such as *Reconciliation of Women and Men’s Family and Professional Roles 2008-2012*⁶⁹ (Ksieniewicz Interview, 26 January 2010, Warsaw). In

who were continuing education, were parents of young, school-age children (particularly those of key importance for the firm).

⁶⁹ Developed by the Center of Human Resource Development, and co-sponsored by the Human Capital National Cohesion Strategy, the European Social Fund, and the Ministry of Labour and Social Policy, the

recognition of the fact that considerable resistance to the accommodation of working parents and addressing the barriers to work-family reconciliation stem from business practices, not the existing legal framework, projects such as the “Gender Index” and the accompanying “Equal Opportunities Firm” survey and training manual are some examples of the initiatives that were spurred from the European Social Fund and which have promoted educational/training materials and spread existing and potential best practices (Gender Index 2007).

Nonetheless, some feminists within the Ministry of Labour and Social Policy have remained very sceptical of the sudden embrace of work-family reconciliation by the Polish governments. Monika Ksieniewicz, for instance, fundamentally questioned whether the focus on reconciliation was genuinely about concern for women’s wellbeing:

Here in Poland, we have this very traditional approach to working time and the issue of reconciliation [of work and family]. Reconciliation of work and family is not viewed [by public policy] in terms of assisting women. Here, [in Poland] politicians tend to speak only of increasing fertility (Ksieniewicz Interview, 26 January 2010, Warsaw).

Ksieniewicz was similarly sceptical about the push for working-time flexibility as an activation and reconciliation method. Suggesting that flexibility was a purely employer-friendly strategy in the Polish context, she referred to its promotion as “the biggest lie that women (and feminists!) bought into” (Ksieniewicz Interview, 26 January 2010, Warsaw). Others, however, did not necessarily share this scepticism. Another staffer within the Ministry’s Labour Law Department, Robert Lisicki, expressed the view

Reconciliation of Women and Men’s Family and Professional Roles 2008-2012 project included a qualitative and quantitative study (Sochańska-Kawiecka, Kołakowska-Seroczyńska, and Morysińska 2009), good practices, conferences, an awareness raising campaign, including television spots, and training sessions. More information is available on the campaign website: <http://www.rowniwpracy.gov.pl/>.

that Polish regulations in the realm of work-family reconciliation were not only fairly good, but that Poland was actually “ahead of Europe” on this issue (Lisicki Interview, 22 January 2010, Warsaw). This view was also shared by Lisicki’s superior, the Director of the Labour Law Department Eugenia Gienieczko (Gienieczko Interview, 22 January 2010, Warsaw) and by the staff lawyer in the public sector union confederation OPZZ (Anonymous, 2 February 2010, Warsaw).

The Law and Justice coalition administration never got to implement the program as it lost the fall 2007 election to the liberal Civic Platform, which formed a minority government in coalition with the Peasant Party (Polskie Stronnictwo Ludowe, PSL), (Szczurbiak 2007). With Donald Tusk as the Prime Minister, the Civic Platform was generally regarded as one of the most business-friendly parties and had the backing of the Polish enterprise in prior years. In 2002, Civic Platform authored the radical proposal for reform of the *Labour Code*, which was not introduced, but nonetheless managed to influence the 2002 “emergency” amendment. However, the Civic Platform was also a pro-EU party and one that too espoused the family-friendly, “solidaristic” message. Thus, its first political move was to continue the popular policy direction developed by Kluzik-Rostkowska during the Law and Justice tenure (2005-2007).⁷⁰ In 2008, the party introduced an extensive amendment of the *Labour Code* and several other statutes, which introduced a series of provisions, intended to assist working parents and promote better work-family reconciliation. Once again, they mainly focused on maternity leaves. The

⁷⁰ Kluzik-Rostkowska left Law and Justice after the party’s representative Jarosław Kaczyński (whose campaign Kluzik-Rostkowska led) lost the 2010 presidential election. Late in 2010 she formed a new party, named Poland Comes First (Polska Jest Najważniejsza), along with a number of other moderates and former Law and Justice members. Later that year, however, she resigned from the Poland Comes First leadership to join the Civic Platform. See: K.T. 2010. “An interview with Joanna Kluzik-Rostkowska.” *Economist*, 1 December 2010. http://www.economist.com/blogs/easternapproaches/2010/12/polands_new_political_group/.

changes included a new, phased-in extension of maternity leave (art. 180 para. 1), with an additional provision for further paid non-mandatory extensions (art. 181¹⁻²). The leave was also made available to fathers in case of mother's hospitalization (art. 182 para. 6¹⁻³). A two-week paid paternity leave was enacted for men, with the first week being available in 2010 and the full two weeks in 2012 (art. 182³). Job protection was also extended to workers taking advantage of the provisions enabling part-time work while on child-raising leave (art. 186⁸).

While positive, most of the changes were still aimed primarily at accommodating maternity and parenthood in the first years of a child's life, confirming Ksieniewicz's charge that ensuring fertility rates was the likely objective (Ksieniewicz Interview, 26 January 2010, Warsaw). There was no complementary effort to reorganize working-time or address how work and family demands were to be balanced in the long term, particularly given the continued shortage of child-care facilities.⁷¹ On the contrary, a year later, in July 2009, the Civic Platform introduced another bill amending the *Labour Code*. This bill contained new working-time flexibility measures; however, given the fact that the bill was intended to address the potential consequences of the global financial crisis, there was a significant employer-friendly bias in its approach to flexibility, which was likely to conflict with the "family friendly" objectives.

5.2.4 The 2009 *Anti-Crisis Bill* as the "Experimental Field" for Flexibility

⁷¹ Importantly, Płomień (2009, 140) reports that by the end of March 2008 nearly 800 new preschools had been set up benefitting more than 10,000 children (and funded mostly from European Social Fund). While important, Płomień points out, however, that only about 1 percent of children in the 3-5 age category benefited from this.

The *Statute on the Alleviation of the Effects of the Crisis*, commonly known as the “*Anti-Crisis Bill*”, was passed on July 1, 2009.⁷² The bill introduced a number of temporary amendments to various statutes, including the *Labour Code*. Prior to its Parliamentary discussion, the labour law related provisions of the bill were consulted with Labour Law Group of the Tripartite Commission and yielded tentative compromise between the social partners on the adoption of additional flexibility. As was the case in 2002, outbreak of a “crisis” provided the perfect opportunity for employers to demand more flexibility. However, as Eugenia Gienieczko, the Director of the Labour Law Department of the Ministry of Labour and Social Policy noted, the next step in the progressive flexibilization of the Polish *Labour Code* was also an indication of the weakening power of trade unions *vis-à-vis* Polish employers (Gienieczko Interview, 22 January 2010, Warsaw). At the very least, as is the case of most negotiations, some compromise was necessary in order to block even more far reaching management proposals.

Largely a pre-emptive measure – given Poland’s comparatively good economic performance during the early period of the crisis⁷³ – the *Anti-Crisis Bill* introduced several important changes into the *Labour Code*. The most crucial change for working-time was a further extension of the general reference periods for calculation of overtime

⁷² (2009) Journal of Laws No. 125, item 1035 (Ustawa z dnia 1 lipca 2009 r. o łagodzeniu skutków kryzysu ekonomicznego dla pracowników i przedsiębiorców, Dz.U. 2009 nr 125 poz. 1035).

⁷³ In fact, Poland was the only country to note economic growth during the 2009-2010 period. In a March 29, 2010 speech entitled *After the Global Financial Crisis: the Road Ahead for Europe*, the Managing Director of the IMF, Dominique Strauss-Kahn, tied the exceptional (under the circumstances) economic performance of Poland in 2009 to the sound macroeconomic policies that are the legacy of the Polish transition reform: “As the pioneer reformer in ex-communist Europe, Poland’s leaders showed great courage in adopting a bold macroeconomic stabilization plan and equally ambitious structural reforms. These actions laid the groundwork for the vibrant economy that Poland is today.” See: <http://www.imf.org/external/np/speeches/2010/032910.htm/>.

from the 4 months permitted by the Code, to up to twelve months⁷⁴ – a change long on the employer and business lobby “wish list” and already subject of the 2002 Civic Platform and the 1998 SME Committee proposals (see Table 3). Not in the package was another employer organization-backed proposal seeking the simultaneous introduction of a system of working-time accounts, which would enable the full and efficient use of the extended reference periods (Męcina Interview, February 2010, Warsaw; Ambrozik Interview, 26 January 2010, Warsaw). Working time accounts enable employees to “log” shorter or longer hours of work as debits or credits in an individual working time account, which are then compensated with additional time off work. The benefit for the employer is that hours worked in excess of statutory norms are not counted as overtime and thus do not have to be compensated as such (Schulten 1998).

By way of trade-off and to appease the unions weary of working-time extensions, the *Anti-Crisis Bill* also introduced some positive-flexibility provisions aimed at improving the reconciliation of work and family obligations. Specifically, the Bill included a new right to request reduced working-time by employees in standard, full-time positions, who are in the care of a child under 14 years of age or another dependent person. The right to request was paired with the employer obligation to accommodate such requests, except where there were compelling organizational reasons to refuse accommodation. While introduction of moderate reductions of working-time for the purpose of better balancing of work and family was a positive step towards development of win-win solutions under chapter six of the *Labour Code*, the Bill also introduced

⁷⁴ Possible in all sectors with the agreement of a representative trade union or representatives of employees. Supra note 72, art. 9.

significant negative flexibility to extend work hours which is likely to conflict with reconciliation.

The *Anti-Crisis Bill* was yet another response to the enduring and long-lasting calls for more flexibility in labour law. A significant extension of the reference period across all sectors was precisely the sort of change that the Left Democratic Alliance coalition government was not prepared to introduce a few years earlier, but that the enterprise friendly Civic Platform was eager to implement. Although the bill did not go as far as full deregulation, it introduced yet another *Working Time Directive* provision that the Polish employers were keen to have in the *Labour Code* (see Table 3). Granted, the bill was intended to be temporary only – the provisions being introduced for the duration of two years. However, according to Eugenia Gienieczko, the Tusk-led Civic Platform government saw the *Anti-Crisis Bill* as the “experimental field” for future *Labour Code* amendments, particularly those designed to further liberalize and flexibilize labour law (Gienieczko Interview, 22 January 2010, Warsaw).⁷⁵ Representatives of employer organizations were resolved that they would lobby to move it into the *Labour Code* on a permanent basis (Męcina Interview, February 2010, Warsaw; Ambrozik Interview, 26 January 2010, Warsaw). Indeed, a year before the bill’s expiry, the issue of a permanent *Labour Code* amendment to include the annual reference period was already subject to Tripartite Commission negotiations.

⁷⁵According to Eugenia Gienieczko, the ultimate *Labour Code* would be one that contained the most fundamental norms – those prescribed by the ILO and the EU – and leave the remaining details to the negotiations between social partners at the enterprise level, or the parties to the employment relationship. Of course, she did acknowledge that given the low unionization rates in Poland and the employer’s labour market ensuring that fair bargaining was taking place would be a challenge (Gienieczko Interview, 22 January 2010, Warsaw).

The controversial opt-out provision – the most flexible of the *Working Time Directive* mechanisms – remained available solely in the health care sector, where it was introduced as a response to the *SIMAP* and *Jaeger* rulings of the ECJ in 2007 by the previous Law and Justice government.⁷⁶ As was discussed in Chapter 3, these rulings interpreted working-time to include time spend on-call, causing significant disruptions in national practice in many Member States, including Poland, primarily by necessitating different scheduling of work, and hiring of new staff. Thus, many Member States, which did not previously apply the opt-out, decided to do so in their health care sectors. Poland was one of them.⁷⁷

When asked about their views on the opt-out, Jacek Męcina and Adam Ambrozik representatives of the two key employer associations in Poland – the private sector Lewiatan and Polish Employers Confederation (Konfederacja Pracodawcow Polskich (KPP)) – confirmed that the opt-out was on their wish list and that the Tripartite Commission debate on the *Anti-Crisis Bill* most certainly included discussion on this issue. According to Eugenia Gienieczko, the Ministry of Labour and Social Affairs had a policy of tackling only one controversial issue at the time, and although Poland officially

⁷⁶ *Act of 24 August 2007 concerning health care centers*, (2007) Journal of Laws No. 176 item 1240.

⁷⁷ The possibility of the opt-out in health care centers applied to doctors and other technical health care professionals with post-secondary education. Prior to the adoption of the opt-out, Poland was in breach of the *Working Time Directive* because like in some other EU Member States on-call time was not included in calculation of working time, which was not consistent with the ECJ's interpretation of working time and rest time. The conditions in the Polish health-care sector, particularly observance of working-time norms and wage rates (Gazeta 2008b; 2011), have been a source of significant social and labour conflicts. The most famous one was the Białe Miasteczko, or "White Village" strike/social solidarity protest/sit-in, which was staged by the Trade Union of Nurses and Midwives in front of the Premier Jarosław Kaczyński's office in Warsaw. The protest lasted for nearly one month in the summer of 2007 and drew in significant public support and media attention. The nurses demanded wage raises and health care reform, and to meet with Kaczyński, a former Solidarity activist. The "White Village" was finally dismantled on 15 July 2007 after a mediation meeting two days prior, during which the nurses obtained a guaranteed salary increase. Another dispute involved that between the Ministry of Health and All-Polish Trade Union of Doctors regarding rules for overtime compensation (Kozak 2006). Finally, Polish doctors in various Polish hospitals have been reportedly withdrawing their "opt-out" agreement, which they agreed to in exchange for wage increases that have not been honoured (Gazeta 2008a; Gazeta 2012).

supported the opt-out at the European Union-level negotiations on the amendment of the *Working Time Directive*, the Ministry was not yet prepared to tackle the opt-out issue at home (Gienieczko Interview, 22 January 2010, Warsaw; Lisicki Interview, 22 January 2010, Warsaw). Gienieczko knew that the employers were keen to introduce the opt-out, but acknowledged that this was not a politically possible amendment at this time: it was “too politically risky” and the unions were most certainly going to pull all stops to oppose it. Though she thought that the contemporary Polish trade unions were significantly weaker than in the past, she saw them as wielding significant symbolic power: “The trade unions could still organize a huge manifestation in Warsaw, in front of the Ministry of Labour, and the symbolic power of this act would be great. No government could afford to have this happen” (Gienieczko Interview, 22 January 2010, Warsaw). In coming to this conclusion, she drew on a relatively long experience as a civil servant, who had began work at the Labour Law Department of the Ministry of Labour and Social Policy in 1989, at the time of transition. Solidarity’s role in democratization and liberalization of Poland was a historical fact and this union was very skilled at employing the historical discourse. Moreover, a large nurses’ strike that took place in 2007 in relation to wages and work hours in the health care sector was a fairly fresh reminder that workers were quite capable of drawing-in significant public support. Likewise, doctors across Poland had a bitter and drawn-out dispute with the Ministry of Health over unpaid wages and overtime compensation. As a result, some were withdrawing in protest the opt-out agreements they signed with their employers (Gazeta 2008a). With the Labour Minister, Izabella Fedak, busy with other controversial reforms,⁷⁸ this one had to wait (Gienieczko Interview, 22

⁷⁸ The Ministry was tackling amendments to the retirement plan schemes during this time (Gienieczko Interview, 22 January 2010, Warsaw).

January 2010, Warsaw). At the same time, she did not deny that this issue would eventually come up. The representatives of employer organizations seemed of the similar mindset. According to them, the opt-out very much remained on their agenda (Ambrozik Interview, 26 January 2010, Warsaw) and it was only a matter of time before they would be able to secure it.

5.3 Polish Working Time Regime, Gender and Social Reproduction

Between Poland's first major post-transition *Labour Code* amendment in 1996 and the *Anti-Crisis Bill* introduced in 2009, the shape and content of the Polish working-time regime changed (see Appendix D). Although hours of work – already long prior to the 1989 transition – have not increased significantly, Poles continued to work some of the longest hours in Europe. Moreover, between 1996 and Poland's EU accession, the Polish working-time regime had become significantly more flexible than before. With reference periods for the calculation of average weekly norms of up to 12 months and lower premium rates, overtime has become even cheaper and more available. Various systems of working-time organization and possibilities to schedule breaks that “interrupt” the working day have given employers significant flexibility in deploying workers and managing the production process. While some forms of working-time flexibility have been introduced to accommodate workers needs, on the balance, flexibility contained in the Polish *Labour Code* is biased towards that which benefits employers, not employees, and that which enables longer hours of work. In practice, this has particular implications for women unable to balance long and unpredictable hours of work with the unpaid work of care and social reproduction. Likewise, it tends to hamper men's rights to care and reinforces the gender-based division of household work between men and women.

What tends to exacerbate this situation is the fact that observance of working-time norms is poor and the availability of “family-friendly” flexibility at the firm level is still limited. These problems were noted by my informants (Męcina Interview, February 2010, Warsaw; Solik Interview, February 2010, Warsaw), one of whom, a lawyer for the OPZZ trade union confederation, referred to them as the distinction between “rules” and “life” (Anonymous Interview, 2 February 2010, Warsaw). Indeed, despite the fact that the *de jure* working-time rules prescribed by the *Labour Code* are still “decent,” examination of the *de facto* workplace practices tends to reveal a more problematic reality.⁷⁹ Excessive overtime tends to be the most common violation observed by the National Workplace Inspection (PIP), although economic necessity, low wages, and increased consumer appetites mean that workers often willingly take on extra hours. Nonetheless several surveys and reports have clearly shown that long hours and uncompensated overtime are also driven by employers.

In a 2001 survey on working time distribution conducted by the Institute of Labour and Social Matters in Warsaw, 65 percent of respondents worked overtime, of which 22.4 percent worked in excess of the statutory maximum of 150 hours per year and 28.4 percent exceeded the daily limit of four overtime hours (Strzezińska et al. 2002, 114-122; Strzezińska 2008b, 59). When asked about their motivation to work overtime, 36.2 percent cited inability to refuse the request to work overtime and 17.9 percent attributed it to the inability to fulfill the assigned tasks within the normal hours. While 30.1 percent of these workers received time in lieu of compensation for their overtime hours, nearly a third claimed to have not received any compensation (Strzezińska 2008b, 60). Although

⁷⁹ As I will elaborate below, this is consistent with Leiber’s (2007) findings on the insufficient administrative capacities and insufficient enforcement of Europeanized laws.

the 2001 survey tended to report higher work hours among men, some of the longest work hours were reported in feminized sectors, such as retail and sales jobs (Strzemińska et al. 2002, 122).

Lack of compliance with working-time regulation in the retail sector, including pressure to work without breaks and put in uncompensated overtime, was the subject of a highly publicized controversy surrounding workers in a major supermarket chain, “Biedronka,” a subsidiary of the Portuguese-owned Jeronimo Martins S.A. The Coalition of Persons Harmed by Biedronka,⁸⁰ a network of lawyers, trade union organizers, and former and current employees of the “Biedronka” chain, was formed to support and address the labour grievances of the mostly unorganized Biedronka employees. In addition to raising public awareness, the network also initiated a series of legal suits in Polish courts, many of which were successful. The suits involved, among others, issues of working-time excesses, uncompensated overtime, and mobbing. The first and most significant of the cases was filed with the District Court in Elbląg by Bożena Łopacka, a former manager at a Biedronka store, who claimed that Biedronka owed her overtime compensation in the amount of 35,000 PLN (about \$10,000) for the years 2000-2002. In September 2004, Łopacka won at the first instance⁸¹; however, the defendant company, Jeronimo Martins, S.A. appealed the decision. On appeal, the Gdańsk Court of Appeal held that on the basis of evidence presented, some of which included evidence presented by the company, Łopacka had indeed worked the overtime hours and was entitled to

⁸⁰ “Biedronka” is Polish for “Ladybug”, which is also the chain’s logo. As I elaborate below, the innocent and friendly corporate image is not very consistent with the company’s workplace and human resource practices. <http://www.stowarzyszenie-biedronka.pl/>.

⁸¹ *Łopacka v. Jeronimo Martins, S.A.*, [2004] sygn. akt V P 13/03 (Dist. Ct., Elbląg).

compensation.⁸² The Helsinki Human Rights Foundation, acted as the intervener in the case. The case was sent back for a retrial and Łopacka was eventually awarded 26,000 PLN for 2,500 hours of overtime. Łopacka's case was followed by a number of other claims against the Biedronka chain.⁸³ In 2007, for instance, 27 separate claims were filed; the company was found in violation of the *Labour Code* in ten of those cases (Gazeta 2007). In addition, the case was followed by a Poland-wide criminal investigation, with 39 different Biedronka locations being investigated for, among others, violations of health and safety, forced, uncompensated overtime, falsifying of documentation and schedules, and harassment (Ministry of Justice 2009). In 2008, 11 individuals were charged for contravention of the *Labour Code* in the Lubuski and Wielopolski districts (Gazeta Lubuska 2008; Regional Prosecutions Office Zielona Góra 2008). By 2009, charges had been laid against 60 individuals, primarily managers of Biedronka stores across Poland (Gazeta 2009).

The early Biedronka cases and the network's activities precipitated a major socio-legal study carried out by a Polish NGO, the Karat Coalition, with the support of the Friedrich Egbert Foundation. Beyond Biedronka, the study also included other major foreign and domestic supermarket chains. The results of the study were published in a 2008 report entitled *Gender Equality Perspective on the Working Conditions and Respect for Worker's Rights in Supermarkets in Poland* (the Karat Report) (Chmielewska, Krzyśków, and Wojciechowska-Nowak 2008).⁸⁴ The Report cites employer practices

⁸² *Łopacka v. Jeronimo Martins, S.A.*, [2005] sygn. akt III Apa 125/04 (C.A. III, Dept. Labour and Social Insurance, Gdańsk).

⁸³ *Gazeta* reported that one hundred former Biedronka employees filed a class action lawsuit with the Labour Court in August 2005. The court rejected the application (Kowalski and Kopiński 2005; Rewiński 2005).

⁸⁴ The Report's Polish title is, *Warunki pracy i respektowanie praw pracowniczych w supermarketach w Polsce z perspektywy równouprawnienia płci* [Translated by author].

such as preventing workers from taking restroom breaks, forcing workers to work overtime without compensation, or keeping two separate work schedules – the “official” schedule for the workplace inspectors, and the actual schedule according to which employees were expected to report for work. According to the Report, the latter practice often clearly showed hours of work breaching the working time provisions of the *Labour Code* (Chmielewska, Krzyśków, and Wojciechowska-Nowak 2008, 23-27). Aleksandra Solik, one of the NGO’s officers involved in the study recounted extreme situations reported by workers, including being forced to wear diapers during their shifts so that they would not have to leave their registers for washroom breaks (Solik Interview, February 2010, Warsaw).

The National Workplace Inspectorate has noted overtime violations similar to those reported by the Karat Coalition for several years prior. Between years 2001 and 2004, violations included poor maintenance of working-time evidence (sometimes double schedules: one for the inspection, one for the employee), unpaid overtime, and failure to provide rest days, and were motivated primarily by cost-saving and insufficient staffing (GIP 2004, 48; Bednarek 2004). They were most common in retail, repair services, and the food processing industry; particularly in small firms employing fewer than 9 people. Similarly, according to the Workplace Inspectorate’s 2006 report, in 2005, 50 percent controlled workplaces in the retail sector (and 60 percent overall) were found to keep irregular schedules and insufficient evidence of working-time, 42 percent failed to provide employees with sufficient daily and weekly rest (while 54 percent failed to award annual leave), 44 percent were found in violation of overtime compensation, and 27 percent failed to observe the average five day workweek (GIP 2006 57, 122, Appendix

24). Both large and small, foreign and domestic workplaces were found in breach of the rules. As a result of these findings, in 2006 the Central Workplace Inspection initiated a media campaign and significantly stepped up inspections with the aim to eliminate pathological non-observance of basic employment norms. The campaign was partially successful, as there was a reduction in employment violations. Nonetheless, in the coming years, many employers were found to continue scheduling excessive, uncompensated overtime.

The Central Workplace Inspection campaign was partially a result of the outreach and consultative work done by Karat Coalition and the Coalition of Persons Harmed by Biedronka. Indeed, prompted by the efforts of these organizations, and on request of the Public Prosecutor's Office, in 2008, in addition to its regular inspections, the National Workplace Inspectorate carried out over 700 inspections of the Biedronka chains. The concerted efforts of Karat, the "Biedronka" Coalition, and the Workplace Inspectorate appeared to exert significant positive influence. In annual reports for the years 2007 and 2008, the Central Workplace Inspection noted significant reduction in violations of working-time regulations in large supermarkets (GIP 2008, 73; 82; GIP 2009, 84). At the same time, however, violations had increased so considerably in smaller workplaces, that the Inspection referred to them as "permanent." According to the report for the year 2008, for instance, violations of rest periods – both the 11 daily and 35 weekly hours – had quadrupled, violations of the average five-day week rule had tripled and instances of uncompensated overtime had more than doubled (GIP 2009, 84-85). While the report attributed some of the irregularities to lack of proper working-time records or insufficient knowledge of regulations, it also cited purposeful ignoring or sidestepping of regulations

by responsible personnel and the practice of prioritizing interests of the firm (such as competitiveness and cost cutting) above legal responsibilities *vis-à-vis* employees as other common reasons for violations (GIP 2009, 84-85).

Despite the success of the Biedronka campaign in raising awareness and the new attention of the National Workplace Inspectorate to problems in Polish workplaces, reports of employment violations, particularly in large supermarket chains, have continued to be quite common in the Polish press. Most recently, the popular national daily *Gazeta Wyborcza* reported on the poor labour practices at the Polish retail locales of the French chain of supermarkets, Carrefour, as well as Real, Makro, Kaufland and others (Lewińska 2010).

As the 2004 and 2009 Workplace Inspectorate Reports suggested, the need to cut costs as a way to remain competitive is a powerful determinant of employment violations. Indeed, the discourse of “economy on the make” and, more recently, the economic crisis, have continued to provide employers with reasons for driving down employment conditions by, for instance, increasing overtime without sufficient compensation. With the high levels of labour market insecurity and the tendency to view workers as replaceable, employee compliance with employer requests is often necessary for job retention. As the public sector union confederation, OPZZ, staff lawyer observed, such labour market conditions place workers at a significant disadvantage and compromise their ability to seek redress when their rights are violated (Anonymous Interview, 2 February 2010, Warsaw). The activity of the National Workplace Inspectorate has been an important step in the right direction; however, the scale of the problem is much larger according to the OPZZ staff lawyer. Limited funding, insufficient inspectorate staff, and

the strict requirements involved in the carrying out of inspections permit many employers get away with employment standard violations (Anonymous Interview, 2 February 2010, Warsaw).

Also, while press reports have been important in bringing attention to the most severe cases of violations, such as those reported at the Biedronka supermarket chain or the recent Carrefour incidents, the tendency to highlight problems in large, foreign-owned chains detracts attention from problems within home-grown small and medium enterprise sector (Chmielewska, Krzyśków, and Wojciechowska-Nowak 2008; Solik Interview, February 2010, Warsaw). As the 2004 and 2009 GIP reports indicated, this is where the problem is most prevalent. Yet despite the fact that working conditions and management-labour relations in small and medium enterprises have been likened to nineteenth century exploitation, the recognition that Polish small and medium enterprises are still “on the make” and thus, have a much harder time to remain competitive, tends to provide excuses for the violations that occur.

Poland’s chronic culture of overtime, lax observance of the law, and the very competitive labour market realities make survival in the labour market very difficult, particularly for lower skilled workers, and make attainment of better balance between work and family obligations particularly hard. With attitudes towards gender roles remaining traditional, and this traditionalism being further reinforced by the strong presence of socially conservative rhetoric in the political discourse, it is Polish women who are most vulnerable to pressures. Given the dearth of public or affordable care facilities on the one hand, and the persistently unequal sharing of responsibility for care and household activities (Kotowska, Sztanderska, and Wóycicka 2009, 254) women tend

to spend more time on caregiving. While this assumption that women are responsible for care and the residual social provisioning makes them appear to be less committed employees, in reality, women's hours of paid work are insignificantly shorter than men's. Forty percent of Polish mothers of children under three years of age and fifty percent of those whose children are between three and six combine child-raising with active employment (Kotowska, Sztanderska, and Wóycicka 2009, 254). Since part-time work is unpopular⁸⁵ and women's wages are required to sustain a family, much as in the People's Republic, contemporary Polish women's total time of work (including unpaid work) exceeds men's, leaving them with less time for leisure, rest, and education (Bobrowicz 2007). While some women who cannot afford or are unable to secure institutional child-care decide to withdrawal from the labour market, many rely on their mothers or other members of their family to look after their children. As Irena Wóycicka observes, a "family model" is the most prevalent model of care in Poland, whether it involves members of the household or members of the extended kin network⁸⁶ (Wóycicka 2009, 111). The existence of this model partially reflects cultural preferences and values. However, Wóycicka notes that structural factors, such as insufficient public care infrastructure, high costs of private facilities, as well as an "internalization" of the belief that public care is hard to access, are also significant (Wóycicka 2009, 113).

⁸⁵ Kotowska, Sztanderska, and Wóycicka (2009, 244) report that 77% of women and men employed full time express no interest in reducing their working hours to part-time. Primary reasons cited are low wages (90% of men and 83% of women). Interestingly, as noted by Kulpa-Ogdowska (2006, 50), the hours of work for women working part-time are not significantly lower than those working full-time.

⁸⁶ During my four-month research stay in Poland I had the opportunity to reconnect with many members of my extended family and old friends. The vast majority of those who had children used family networks to arrange care, as many took only maternity leave and opted to forgo the child-raising leave for economic and workplace-relations reasons. The creative ways in which people drew on family and friends was astonishing, though clearly an indication of the scarcity of care services or their high cost. Interestingly, men (primarily grandfathers) were often included in the provision of this care as well. This "evidence" is anecdotal only, but it appears to be corroborated by, or corroborates more formal research.

Given this context, despite women's reported desire to have children and their preference for having more than one, the double burden on the one hand, and the perception and the reality of workplace discrimination on the other, have caused women to postpone procreative decisions (Matysiak 2009). Indeed, Polish sociologists and demographers have observed that low fertility in Poland is a structural issue as well, and is only marginally related to change in cultural attitudes. According to Anna Matysiak, a Polish demographer specializing in women's employment and fertility, most Polish women adopt a "work first, child second" strategy when deciding on having a second or third child (Matysiak 2009, 218).

Gradual acknowledgment of the positive correlation between women's employment and parenthood by policymakers has caused a slight shift in the Polish state's approach to its role in social reproduction. Currently, even the more socially conservative parties that advocated the discourses of "family sovereignty" or the "family on its own," and emphasized women's temporary or permanent labour market withdrawal (de-activation) have moved away from this approach. The traditional rhetoric of "work-family conflict" has shifted to one of "work-family reconciliation," with more emphasis on supporting women's lifelong activation. The impact of EU policy, research contributions and policy recommendations of Polish gender scholars, and presence of progressive women like Kluzik-Rostkowska within conservative political parties has exerted some positive pressure on the Polish state.

The fact that several important "family friendly" and positive flexibility provisions have been enacted in the Polish *Labour Code* is a positive development, as is the finding that abuses akin to those reported in relation to long-hours working and overtime have

not been found in relation to the provisions meant to support working parents (GIP 2008). However, a number of research reports indicate that the legal availability of “family friendly” provisions has not yet translated into better workplace practices or more availability of positive working-time flexibility to assist working parents (Gender Index 2007; Balcerzak-Paradowska 2008; Głogosz 2008; Borkowska 2011). While the European Social Fund sponsored research and awareness raising campaigns will likely contribute to the spread of work-family reconciliation policies in Polish workplaces, the parallel development of negative forms of flexibility, the entrenched long-hours culture, and the practices of overtime work enabled by the Polish *Labour Code*’s working-time provisions are worrisome. Given that gender contracts continue to be fairly traditional in many Polish households, the current approach increases the likelihood that working time will become polarized along gender lines, making a more egalitarian redistribution of paid and unpaid work unlikely.

5.4 Conclusion

This chapter sought to examine in more detail the process of labour law reform and reform of the working-time rules prescribed by the *Labour Code*. Focusing on the period since the 1996 *Labour Code* amendment, it encompassed the process of Poland’s EU accession and its EU membership. As the chapter had shown, since the main impetus for this reform came from the related objectives of flexibilization, adjustment to the realities of the market economy, and harmonization of Polish labour law with the *acquis communautaire*, the political discourse surrounding regulation of working-time in the Polish context has also been dominated by the push for flexibility and deregulation. The rationales of protecting workers’ rights to leisure and a healthy and safe environment

have been largely subordinated, thought relevant to the extent that they furthered the project of harmonization or helped different political parties distinguish themselves.

While parties on the Left and the “liberal” Right prioritized employment and support for enterprise (and job growth), “social solidaristic” and populist parties of the far-Right invoked the need to protect workers and secure time for families or religious observance.

Overall, however, 1) the embeddedness of neoliberalism and the notions that Poland’s economy was “on the make” or “catching up”, 2) the pressures from local business and employers lobby with parallel fragmentation of the labour movement, 3) Poland’s economic troubles and particularly high unemployment at the start of the new millennium, as well as 4) the strict conditionalities of EU accession, combined to elevate the discourse of flexibility above all others. The need to harmonize Polish labour law with EU Directives and the “soft” requirements of the European Employment Strategy had a definite effect on the local debates, particularly by providing ongoing legitimacy to the already present discourses of flexibility, competitiveness, and growth, which were, at the time, being discredited and challenged (at least in relation to employment policy) by the “social solidaristic” and populist political actors. Thus, the need to comply with “Europe” provided Polish politicians of the Left with the rationale to pass amendments that were not necessarily popular with the electorate but which, they believed, would address local economic problems of high unemployment and slow growth. In the process, they also responded, albeit partially only, to the lobbying efforts of those actors whose involvement was essential to meeting these economic ends (i.e. employers organizations) and whose interests were represented by Right-wing liberals. The conflict and fragmentation within organized labour meant that trade unions, while vocal, were not as

effective in negotiating their best bargains. As a consequence of this interplay between local dynamics on the one hand, and external pressure of conditionality and softer forms of persuasion on the other, many of the derogations and exclusions prescribed by the *Working Time Directive* were implemented into the Polish *Labour Code* with the effect of making the Code's rules much more flexible than before. Particularly, the legislation of longer reference periods and overtime limits ushered in new ways of increasing working time without increasing compensation. As Chapter 4 elaborated, this was a “true-and-tried” way of dealing with time organization and management in Polish firms. Now, however, it was enacted in a more generalized manner and applicable to a broader range of workers.

With the focus on economic growth, unemployment, and the necessity to adapt Polish law to the realities of market economy, the relationship between working-time and gender was rarely considered in the mainstream debate on working time and its reform. When brought up, the accommodation of care and other family responsibilities was treated separately from “core” discussions on working time – not unlike at the European level, where concerns around gender equality and work-family reconciliation have only recently featured in discussions on the *Working Time Directive*. Ironically, the populist Right was one of the key actors invoking women's rights as mothers, but did so through the discourse of traditional “family-values,” thereby causing a cleavage within the Polish women's movement by alienating feminists. In fact, Polish feminists were so occupied with issues of reproductive rights and the relationship between the Polish state and the Church, that the issue of women's working conditions only recently emerged as an agenda point for the Polish women's NGOs and the Polish Women's Congress.

Overall, this marginalization of gender contributed to a working-time regime and forms of flexibility that are biased towards those reforms that benefit employers and enable long work hours. In the context of practices of excessive overtime and poor observance of standards, the implications of such a working-time regime are particularly severe for women because long and unpredictable hours make the balancing of work and family life difficult. At the same time, this type of regime also hampers men's ability to contribute to unpaid work of care, thus reproducing unequal division of labour within the home. As researchers highlighted the problem and women's groups like Karat Coalition began to draw attention to the terrible workplace conditions in feminized sectors, the Polish government began to show more interest in supporting working parents in their work-family reconciliation efforts. Progressive women within the state administration spearheaded this new attention, but it was also the case of what Ksieniewicz referred to as "Brussels imposed requirements" and the influence of EU policy discourses. The fact that Poland still lagged behind the Lisbon targets for women's activation and child-care coverage was likely a sore spot with the Civic Platform government, which projected itself as a truly modern "European" party. While the party's openness to adopting more family-friendly policy was a positive development and gender equality also featured more firmly on the policy agenda, the underlying rationales for reform continued to be those of women's employment activation and Poland's demographic crisis.

Chapter 6

Social Reproduction, Gender, Working-time Regulation – Change on the Bedrock of Continuity

6.1 Introduction

In an effort to assess the potential of the European Union's (EU) approach to working time to contribute to the development of a more gender equal and socially sustainable working-time regime in Poland, this dissertation has looked “beneath” the EU and Polish regulations to understand more precisely the rationales and assumptions on which they rest and the influences on their evolution. Through a feminist “unpacking” of the standard approach to the organization and regulation of working time undertaken in Chapter 1, and an analysis of the historic developments in the universes of political discourse that have given rise to EU and Polish working-time regimes (Chapters 2 and 4), I sought to identify the key discourses (and the actors promoting them) that have delineated the political opportunities and possibilities for legal action on working time at the Community and domestic levels, which, in turn, I considered in Chapters 3 and 5.

As suggested in the introduction, the key objectives motivating this study were scholarly as well as political. Joining efforts of other feminist scholars, I undertook to re-frame labour law analysis in a manner that places gender and the process of social reproduction at its centre, and to problematize the “neutrality” of working-time standards by uncovering the normative assumptions and biases underlying them. In relation to the empirical case data, I set out to determine whether, and how, the objectives of gender equality have figured in the ongoing transformation of standards at the EU level and in

Poland: both those that make explicit their intention to alleviate gender-based disadvantage by, for instance, providing more “positive” or worker-friendly flexibility and enabling better work-family reconciliation for *all* workers, as well as those that, on the face of it, remain gender neutral and are not specifically designed to promote those objectives. Building on the work of a select group of feminist labour lawyers and drawing on a range of concepts developed in other disciplines, particularly feminist political economy, women’s studies, comparative institutionalism, and policy studies, my critical and contextual analysis of working-time norms provides an important contribution to labour law scholarship. Likewise, my application of this gender analysis to the *Working Time Directive* is a particularly valuable addition to EU legal studies on working time, and may also be of interest to social policy scholars interested in the interface between policy and gender.

Moreover, by examining the evolving universe of political discourse, which, in the European context is characteristically multi-level, I sought to evaluate legal norms in their social, political, and economic milieu and consider them as products of discursive practices, structural arrangements, and power struggles between various actors vying for attention and influence. This contextual and multi-level analysis was designed to capture the embeddedness, complexity, and dynamism of law and policymaking, but also to show them as constitutive of the very structures, discourses, and relations from which they arise. In thinking about the EU’s impact on Polish policy discourses and working-time norms, I drew on the work of other legal scholars of the EU, as well as research in comparative policy and institutionalism, and select studies on Europeanization. My engagement with each of the debates in each of these fields was limited by the

interdisciplinary framework of my study. However, the resulting approach is relatively unique in that it is attentive to and illustrates the mutually reinforcing role of law and politics, and the importance of discourses, structural arrangements, and actor agency in the production, reproduction, and interaction between legal norms. As such, it contributes to the growing socio-legal literature on the making of and the interaction between EU law and domestic legal regimes in general, with the original value of examining these processes in the context of a relatively recent accession state, Poland.

Beyond its scholarly contribution and explanatory value, this study was also designed to explore the “closures” and limitations, as well as the “openings” and opportunities for legal reform. Particularly, my examination of the impact of “Europe” – its policies, laws, and discourses – was also driven by the overarching political question about the EU’s potential role in encouraging its Member States, including Poland, to adopt working-time policies that are congruent with a more egalitarian vision of working time distribution (between paid and unpaid work and among men and women).

In this concluding chapter, I wish to recall and elaborate on some of the most significant findings of this dissertation by reconnecting once again the key themes of social reproduction, gender, and working time; the relationship between the discursive and legislative practices; and the interaction between the EU and Poland. In doing so, I will also return to the key questions posed at the outset of this dissertation in order to suggest some answers, identify new avenues for research and thinking on this topic, and re-emphasize the political importance of lobbying for a more transformative approach to working time as an essential element of gender equality strategies.

6.2 Gender and Working Time: Continuity and Change

As I showed in Chapter 1, the traditional organization and regulation of working time has rested on a series of assumptions about: 1) the relationship between the productive and socially reproductive processes; 2) the distribution of responsibilities for these spheres among different institutions and between men and women; and 3) the ideal-typical subjects of regulation being largely unencumbered by other responsibilities. Together, these assumptions have had particular consequences for men and women's respective labour market opportunities.

Women's mass entry into the labour market shook some of these assumptions. Particularly, women's labour market engagement and the awareness of the actual or potential "conflicts" (particularly time conflicts) between paid work and the unpaid work carried out within the home, forced the recognition that not all workers are alike and, indeed, that the needs of most individuals differ over their lifetimes. As I showed in Chapters 2 and 3, the recognition of such diverse needs has become fairly prominent in the contemporary discourse on working time. It is particularly associated with the promotion of flexible and diversified working-time arrangements. These types of arrangements are often said to be more adaptable to individual workers' needs and preferences and, hence, enable more effective work-family reconciliation and make paid work more adaptable to people's lives. Although, both working-time flexibility and work-family reconciliation measures are also claimed to advance the objectives of gender equality, the extent to which they do depends on how they are institutionalized, and for whom they are promoted. In other words, these sorts of arrangements can be transformative only if they also challenge the other assumptions that lie beneath standard

working-time norms. Effecting or enabling a more equal distribution of work between different institutions and among men and women, and valuing unpaid work of social reproduction by acknowledging its essential contribution to the productive process is a good test of this transformative potential. Indeed, this is precisely what feminist social policy and comparative institutionalism scholars have pointed out by observing that working-time flexibility and work-family reconciliation can only fulfill their promise if they are promoted for *all* workers and create the opportunities for a more equal allocation of the time spent on employment and the unpaid work of care and maintenance of lives and households. Thus, the key questions raised at the outset of this study related to whether the approach to working time and working-time flexibility adopted at the Community level supports the development of such egalitarian working-time regimes. Another, concerned whether this approach facilitates the promotion of gender equality in EU Member States like Poland. Related to these questions was a question about the key rationales informing regulation of working time in both contexts. Indeed, answering the latter question was the first step to considering the other two.

As the analysis of the EU and Polish universes of discursive practice and legislative decision-making suggests, despite the ongoing legislative change in this field, a more egalitarian and socially sustainable approach to working time has not yet developed at either level because the universes of political discourse surrounding the “core” working-time instruments – the *Working Time Directive* and the working-time rules of the Polish *Labour Code* – have engaged insufficiently with the policy objectives of the meaningful accommodation, valorization, and redistribution of unpaid care-giving (and other work involved in social reproduction). Nevertheless, traditional approach to working-time

regulation has indeed been challenged in both contexts. In fact, in the last decades of the 20th century, the growing emphasis on the need for more flexibility has contributed to a proliferation of diversified and flexible working-time measures at the EU level and, as this dissertation has shown, to the ongoing re-regulation of the Polish working-time regime. Yet, as the cases of EU and Poland also illustrate, amid all of this change, not only have certain elements of the traditional approach remained largely intact, but the key underlying rationales for regulation of working time have also persisted despite changes in the means by which they are to be achieved (flexibility) and the choice of regulatory methods. In both cases, these rationales have emphasized the objectives of productivity, efficiency, and growth, checked only by the concern for the preservation of workers' basic rights to a healthy and secure working environment. Let me elaborate on this finding by referencing the two cases I examined.

Regulation of working time is one of the oldest and most established forms of labour regulation, having been instituted at the beginning of the Industrial Revolution. Although its social significance cannot be understated given the protective health and safety rationales that lay at its heart, the EU and Polish examples make it apparent that the key objective underlying regulation of working time has always been the focus on its role in facilitating the productive process. While the regular, predictable, and synchronized organization of time associated with the standard working-time norms likely benefited those workers able to submit to its demands (while excluding or overburdening others), this type of work organization was ultimately consistent with the requirements of the Fordist-style enterprises of the post-WWII era. Likewise, the more recent push for re-regulation of working time to enable more flexible deployment of

labour reflects the changes in the organization of the productive process prompted by technological innovations and forced by new competitive pressures and economic realities. Thus, in the context of flexibility, the underlying rationale for re-regulation is also embedded in the policy preference of facilitating production and economic performance, albeit in a transformed environment.

This continuity between the rationales for working-time regulation is demonstrated particularly well by the Polish example, in which the requirements of production, efficiency of firms (or state enterprises), and economic performance have been paramount in the context of two very different political-economic realities: a socialist command economy and liberal market democracy. Indeed, long hours of work, although somewhat differently achieved, have constituted a defining feature of the Polish working-time regime “then” and “now”, in *both cases* justified by economic objectives. As I showed in Chapter 4, the justifications for long hours, overtime, and other types of working-time extensions have shifted from the emphasis on building socialism and meeting demands of the Plan, to those of building capitalism, supporting growth, and creating the conditions for the most efficient running of firms. Interestingly, this discursive shift has been accompanied also by one in working-time management practices: from “extensive managing” of the People’s Republic era characterized by the belief that more hours lead to better productivity to the contemporary utilization of employer-driven, often uncompensated overtime, largely for the same reasons. The continuity and similarity of these rationales and practices is quite remarkable, particularly given the magnitude of Poland’s profound political-economic and ideological transition.

In the EU context, the continuity of the economic rationales underlying the debate on working time is also evident in the proposals, recommendations, and negotiations spanning nearly two decades (from the early 1970s) and culminating with the adoption of the Community's first working-time instrument, the 1993 *Working Time Directive*. As Chapter 2 showed, the rationales advanced in support of such a measure ranged from the need to facilitate reorganization of work for the purpose of unemployment reduction and in response to economic downturn (through the 1980s), to the need to establish the basic floor of rights for the protection of health and safety (in the 1990s). However, my analysis also suggests that the underlying objectives had much to do with productivity, efficiency, and the needs of firms (while the health and safety rationale provided a traditional social policy reference and justification, and a convenient legal base for action). This argument tends to be supported by the fact that the fundamental conflicts over the necessity of the 1993 Directive's and its legitimacy, particularly the UK's opposition to it, had less to do with whether the needs of production and economy were paramount (this was not disputed), and more with how these needs ought to be served (through a regulated flexibility approach or a non-interventionist deregulatory one). Indeed, to further that end and in an attempt to reconcile the different regulatory approaches, the Directive provided for significant flexibility to extend working hours beyond the limits set – a fairly traditional method of adapting to the needs of production (through overtime, which was now much less expensive for firms). These underlying rationales were clearly exposed in the subsequent and ongoing problems with the Directive's revision. Particularly, they were revealed in the vehement resistance on part of the European business representatives and an increasing number of the Member States

to removing the flexibility of the opt-out provision and to broadening the Directive's scope and the discourse around it to include, among others, the objective of work-family reconciliation.

Even if not surprising in light of the broader policy trends, particularly the tension between economic and social policy since the mid-1970s, the key problem with the heavy emphasis on the productive process and the needs of firms is that this dual focus largely subordinated other rationales for regulation of working time. As I demonstrated in Chapters 2 and 3, the universe of political discourse surrounding the *Working Time Directive* filtered out the concern with work-family reconciliation and the objective of equal opportunities because the emphasis on balancing economic rationales with the protection of health and safety precluded a more holistic conceptualization of working time, despite such efforts having been made in the earlier attempts at securing a Community-wide working-time instrument (such as the 1983 *Draft Recommendation*). Instead, the objectives of work-family reconciliation have been addressed by other instruments providing for the flexibility to reduce working hours – part-time or fixed-term work – or to accommodate parental leave, with the result of bifurcating the EU's approach to working time.

Since the *Working Time Directive*'s adoption, the increased recognition that work-family reconciliation objectives must be mainstreamed in order to promote more gender equal distribution of work has broadened the universe of political discourse surrounding the Directive. However, this discursive change has not yet translated into concrete policy/legal change embodied by the enactment of provisions within the Directive that recognize the need to consider the objectives of work-family reconciliation in the context

of *standard* working time. Although this assessment must be qualified by the fact that the Directive's revision was for a number of reasons ultimately unsuccessful, it was evident over the course of the consultation and review period (2004-2009) that the incorporation of such a provision would likely be questioned on legal grounds (the health and safety treaty base) and because some of the key actors (primarily the employers organizations) contested its inclusion. Moreover, the Council and the employers lobby's insistence on the retention of the controversial opt-out provision was another indication that even if a work-family reconciliation provision were incorporated, it would be largely undermined by simultaneous sanctioning of long hours of work.

Why is this situation problematic? There are two related reasons suggested by my study. The first has to do with the broader issue of working-time regimes and their egalitarian potential. The second is more specifically related to the Polish case, and addresses the consequences of a failure to accommodate social reproduction adequately.

6.2.1 The *Working Time Directive* as a Foundation for the EU Working-Time Regime

As the comparative scholars of institutions and working time have suggested, working-time regimes are important predictors of equality because they delimit the range of actual arrangements which are available for women and men to organize and allocate their time between labour market participation and unpaid work of care and maintenance (Figart and Mutari 1998, 2000, 2001). Those working-time regimes that enable more equal distribution of hours between men and women, and among different institutions, tend to be more egalitarian, because they are most likely to support models of universal citizen/caregiver (Fraser 1997) or equal worker/equal caregiver. The underlying assumption, of course, is that more equal redistribution of paid and unpaid work will

“free” men’s time to partake in unpaid work in the home, while also ensuring that women have opportunities to engage in paid employment in ways that preserve their chances of advancement, satisfy their career goals, and maximize their financial independence.

Although the precise bargains and arrangements that people strike with each other and within their families should ultimately be a matter of personal preference and choice, the role of policy and law, however, should be to ensure that all choices and preferences can indeed be exercised and satisfied without detriment to those who make them. This type of policy approach, of course, entails the recognition that all work is valuable, whether carried out within the context of standard employment, otherwise carried out within the market, or performed out of love and care or obligation, and likely without remuneration. An approach like this challenges all of the assumptions underlying standard norms and re-integrates social reproduction into the productive process by erasing the artificial boundaries that have been created between them and by treating both as necessary and interrelated processes. Such a visionary view of working-time regulation and the more general *total* social organization of work (or labour), is precisely the sort that Catélene Passchier, the ETUC’s Confederal Secretary, referred to (Chapter 3). Yet, as she acknowledged, this is not the vision that underlies the *Working Time Directive*, or the EU’s approach to working time in general.

Indeed, as it is currently conceived, the EU working-time approach provides for accommodation of care-giving responsibilities only in those regulations that address atypical forms of work, leaving untouched the standards prescribed by the *Working Time Directive*. Despite its supposed “neutrality”, the Directive continues the legacy of the standard employment relationship (SER) because, like the SER, the norms and the

derogations it prescribes have ultimately taken for granted workers' availability for full-time or extended work hours. As such, the Directive and the working-time regime that rests on its foundation conflict with the overall gender mainstreaming trend within the EU policy and are unlikely to provide incentives for a more egalitarian redistribution, or re-allocation of work.

6.2.2 The Polish Working-Time Regime

The second reason why the Directive's gender neutrality and its tendency to enable long hours are a problem is exemplified by the Polish case study. In fact, the findings of this study show that the EU has much to learn from Poland when it comes to working time. Let me elaborate.

Lessons from the Working-time Regime of the People's Republic of Poland

Although the Polish case shows that standard organization and regulation of working time *can* coexist with full employment of all adults where the institutional supports for care and social reproduction are in place, the historic snapshot of the work organization in the People's Republic of Poland (1945-1989) also provides an excellent example of the tensions that are inherent in a working-time regime based on long hours of work. As I illustrated in Chapter 4, even in the context of fairly extensive social provisions, long hours posed a serious problem when the residual work of care and maintenance had to be carried out within the household, and when, according to the traditional gender contract and Poland's cultural specificity, it fell to women. Ultimately, women paid the highest price for this working-time regime, which came at a cost to their rest and leisure, their health and well-being, and their career prospects.

If the double burden were not enough, just how unsustainable this regime was became evident with Poland's transition to a market economy. The conditions set by the state's retrenchment and re-privatization of most responsibility for personal and familial wellbeing, coupled with high insecurity, unemployment, and an employer's labour market in which working more, for less, was the daily reality, put this regime to a severe test. Combining full employment with responsibilities inherent in having a family became a source of particularly high tension. Women's inability to absorb this tension resulted, on the one hand, in a significant drop in the Polish fertility rate (a prudent way for individuals and households to deal with family pressure and economic insecurity). On the other hand, women's labour market exit, or the experience of being "pushed out", was related to the perception that women must be "unburdened" or that they were unreliable employees. I do not suggest that the persistence of long working hours was the sole reason for the strife of most Polish women during the process of transition, or that this case is generalizable to other contexts. However, the Polish case provides a striking example of how closely connected social reproduction and production really are and how working-time regimes that emphasize long hours are inherently unsustainable.

Importantly, this case also illustrates that the process by which social reproduction has been subordinated to the needs of production and accumulation in capitalist economies – as conceptualized by feminist political economists – had also taken place in command economies, albeit through different institutional arrangements. The particular results that this process yielded in the People's Republic – women's full employment and double burden – confirm both the importance of institutional arrangements and the power of

cultural values that provided a bedrock of continuity for the country's traditional gender order despite the official philosophy of egalitarianism espoused by the party-state.

“Europeanization” of the Polish Working-time Regime

In the context of long hours, insecurity, and pressure to compete against other labour market participants, including men, the potential impact of the *Working Time Directive* and the other instruments regulating working time could have been significant in Poland. Indeed, one of the early assumptions that I made was that the EU norms would have positive influence as far as promoting a more equal distribution of time and alleviating women's burden, given the emphasis on work-family reconciliation and gender equality in EU discourse. Nonetheless, as my Chapter 5 discussion illustrated, along with its basic “floor of rights” (which was, in fact, set lower than what the Polish *Labour Code* already prescribed), the *Working Time Directive* also furnished Polish policymakers with significant flexibility measures not previously available in the Polish *Labour Code*. Indeed, the ongoing revision of the Polish *Labour Code* demonstrates that the promulgation of the dominant economic discourses (of flexibility, productivity, efficiency, and growth) at the EU level has had significant effect in the domestic arena. While these discourses were already prominent in Poland since the onset of the country's political-economic reforms in the early 1990s, these reforms were, from the start, heavily influenced by neoliberalism and the deregulation ethos promoted by the international financial institutions and, in the European context, by the UK. As I showed in Chapters 2 and 3, this very ethos was formative also for the discursive universe within which the EU working-time approach was embedded. As Polish politicians identified the objective of joining the EU fairly early on (the process of legal approximation began as early as 1994,

with efforts to adapt Polish law to the *acquis communautaire* beginning in 1998), the discourses of flexibility operating at the EU level reinforced those already existing in Poland, particularly post 1989, and which were championed by a number of local actors.

As I outlined in Chapters 4 and 5, the reform of Polish labour law was at the heart of the political-economic transition and the process of EU accession; both proceeded largely along the same trajectory. The charges that Polish labour costs remained high and the working-time rules prescribed by the Polish *Labour Code* were rigid and out of step with Poland's post-transition realities made working-time reform, particularly in the direction of more flexibility, a top priority. This need to enact a more employer-friendly legal framework was exacerbated by Poland's difficult economic situation, particularly in the years immediately preceding EU accession. Although the process of change was uneven (measures to enable working-time extensions were enacted along with measures reducing weekly working time and introducing additional statutory holidays, reflecting the political differences between Poland's governing parties), over the course of Poland's accession preparations the working-time regime became progressively flexibilized and "Europeanized". By 2003, the rules of the Polish *Labour Code* governing hours of work had come to contain many of the provisions of the *Working Time Directive* (and some provisions of the directives governing part-time and fixed term work). Paradoxically, transposition of this "protective" instrument led to a more employer-friendly *Labour Code*, as Polish legislators elected to apply many of the Directive's exclusions and derogations enabling new forms of flexibility to extend work hours. And, as I showed in Chapter 5, this process has continued since accession.

While the EU discourses and norms have had an undeniable influence on those in Poland, in part because of the conditionality of EU accession, it is at the same clear that the EU agenda and policy discourses were not “blindly” adopted, but instead utilized by local actors to advance or add clout to their own policy objectives. While politicians of the liberal “Right” and the employers lobby (acting largely through the Civic Platform and Freedom Union) pushed for even more far reaching reforms, it was the governing Left Democratic Alliance – the country’s only major social-democratic party – that delivered the most significant labour law reform packages in 2002 and 2003. The Left referred to itself as a “workers’ party” and attempted to forge better alliances with trade unions (through social dialogue; albeit not with much success), nonetheless satisfying Polish employers and entrepreneurs who were central to the party’s economic plan was an important element of its strategy. Necessity to comply with “Europe” by transposition of the Directives and the softer forms of EU regulation (i.e. the European Employment Strategy) was a way in which to justify changes in labour law that were sufficiently unpopular to have cost the party its 2004 election. Ironically, the gradual implementation of the Directive’s flexibility provisions was continued by the populist Law and Justice, a party with Solidarity pedigree and “social-solidaristic” orientation that replaced the Left. More expectedly perhaps, the same reform trajectory has been continued by the business-friendly Civic Platform, which assumed office in 2007. While Law and Justice implemented the Directive’s opt-out provision in the health care sector (2007), Civic Platform introduced annual reference periods through the 2009 *Anti-Crisis Bill*.

All this suggests that the process of adopting EU norms, beyond actual need to comply with the *acquis*, has been used by political actors to “solve” local policy

problems. Indeed, actor agency and power struggles are assumed by the conceptual approach of the universe of political discourse. The interplay between external pressures of conditionality and internal opportunism of motivated actors (political parties, as well as motivated employer and business communities), as also conceptualized by rationalist scholars of Europeanization, were certainly at operation here. This dynamic is also visible in the context of recent work-family reconciliation turn in working-time regulation, which also is a result of pressure, albeit mostly of the “soft” kind. Particularly, EU targets, like those set in Lisbon, and the mechanisms of praise or shaming that are involved in the review of local progress and publication of statistical data, can be very effective, particularly with parties like the Civic Platform, which wish to project themselves as “modern” and “European.” More importantly, these forms of pressure have also proven effective with very conservative and Euro-phobic parties, like Civic Platform’s predecessor Law and Justice, although it often requires the work of feminist activists, progressive woman-friendly politicians, and directed funding (i.e. European Social Fund) to ensure this.

Indeed, since Poland’s participation in the Lisbon strategy, positive developments, both discursive and legal, have taken place with regard to work-family reconciliation policies. Beyond the pressures and opportunities for action, one could also detect that some EU-socialization may have taken place in this policy context and that the importance of assisting families and fostering opportunities for women and men to engage in employment and caregiving has finally begun to resonate with Polish politicians. At the same time, it is hard not to be sceptical about the real motivations that underlie this more recent shift. Indeed, given the feminist critique of EU gender

mainstreaming policy, and given my own observations about the shape and the egalitarian potential of the EU's own working-time regime, as well as the enduring traditionalism of the Polish gender order (and the country's low fertility rate), such scepticism is probably well placed. This is particularly so given that implementation of EU norms enabled the introduction of measures that keep Poles working long hours, something that ultimately conflicts with the objectives of work-family reconciliation.

Overall, the case of working time shows that the relationship between Poland and the EU is a complex one, with both the EU and local actors being crucial in shaping the Polish universe of political discourse and legislative practice. There has been a definite policy convergence in so far as flexibility has been maintained and reinforced as the key discourse and employment policy objective in Poland. While some positive forms of flexibility currently promoted by the EU have also been enacted into the Polish *Labour Code*, the practical deployment of flexibility in Polish workplaces has been skewed towards the flexibility to extend work hours. While part-time work is not popular in Poland, the polarized, bifurcated approach to working-time developed at the EU level threatens to replicate such polarization in Poland should part-time work become more common. For time being, the Polish working-time regime has taken its key cue from the *Working Time Directive* and the long-hours end of the working-time spectrum.

While it may not be entirely appropriate to characterize the EU-Polish relationship as a reflexive or a symbiotic one given that the adoption of EU policies was a legal requirement for Poland's 2004 accession, this relationship will likely change as the position of Poland within the EU stabilizes, its political-economic standing improves, and its ability to influence EU working-time policy increases. Indeed, Poland's alliance with

the UK over the course of the *Working Time Directive*'s revision is already an indication that the country's influence is growing and that its policy preferences will with time be more clearly reflected in the EU policy and regulation.

6.3 Towards a More Holistic Vision of Working Time? Future Revision of the *Working Time Directive* as the Litmus Test for European Union's Commitment to Gender Equality

Working time is clearly a gender issue. This realization is evident in the Community's discursive approach to working time, even if it is not well supported by the working-time regulatory regime that has emerged at the EU level. The identification of the need to diversify working time in a manner that is suitable to all types of workers confirms the recognition that standard norms of working time, such as those set by the *Working Time Directive*, are not easily reconcilable with the responsibilities involved in the process of social reproduction – the care of dependents being one key part of this process.

As the Directive is bound for another round of revisions and negotiations, there is a promise that the progressive broadening of the EU universe of political discourse will have a positive impact, and that the recent recognition of the need for more equal redistribution of work and care will influence the Directive. This dissertation traced the developments surrounding the Directive up to the failed revision negotiations in 2009. Although I conducted a series of interviews with key actors – representatives of trade unions, business, European Parliament, and the European Commission – involved in the process of revision in early 2010, it was outside the scope of this dissertation to consider the newest consultation and revision process, which began shortly thereafter, and which, at this moment, is in its second phase. Preliminary examination of the consultation

documents¹ and the social and economic impact assessment² produced so far, indicate that the issues of work-family reconciliation and gender equality are more pronounced discourses than before. The modernization of labour law, to account for new labour market realities, is also an increasingly important aspect. The European Commission's March 2010 communication indicated two potential approaches to revision, with the second one being broader and suggesting a more holistic approach to working-time regulation. Given that the universe of political discourse surrounding the Directive had already expanded during the 2003-2009 round of consultation and negotiations, and the fact that previously uninvolved groups like the European Women's Lobby have now expressed a more active interest in the issue of working-time, there is a promise that the Directive will be indeed re-conceived in a way that more explicitly engages with the impact of standard work-hours, and particularly the flexibility to extend them, on gender equality. The fact that the new *Charter of Fundamental Rights of the European Union* guarantees workers both the right to reconciliation of work and family (art. 33(2)) and the right to the limitation of the maximum work-time (art. 21(2)) are also significant legal developments.

However, there are certain economic, political, and legal limitations, which may thwart these efforts. First, the post-global financial crisis climate may impede positive

¹ *Review of 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 European Economic and Social Committee and the Committee of Regions. COM (2010) 92 final (24 March 2010). <http://ec.europa.eu/social/BlobServlet?docId=4781&langId=en/> (hereinafter Commission Communication 2010).

² *Study to support an Impact Assessment on Further action at European level regarding Directive 2003/88/EC and the evolution of working time organization* (21 December 2010) (hereinafter Deloitte Study): <http://ec.europa.eu/social/BlobServlet?docId=6421&langId=en/>; *Flexible Working Time Arrangements and Gender Equality: A Comparative Study of 30 European Countries*. EU Expert Group on Gender and Employment Report, edited by Janneke Plantenga and Chantal Remery. European Commission: Directorate General for Employment, Social Affairs and Equal Opportunities, 2009. <http://ec.europa.eu/social/BlobServlet?docId=6473&langId=en/>.

developments and creative rethinking of Directive because focus on economic competitiveness and efficiency goals may once again polarize the social and political actors. The new emphasis on the modernization of working-time, mainstreaming of work-family reconciliation, and equality may once again give way to the rationales of the productive processes and the need to ensure competitiveness of European enterprises. Moreover, there are political and legal limitations that are inherent in the institutional architecture of the EU, and in the reach of its competencies and the influence of its various actors. These structural limitations, however, are also in flux, with each Treaty revision serving to expand competences and broaden the Community. The adoption and the coming into force of the *Charter of Fundamental Rights* in 2009 is one significant development. As for the legal restrictions, the European Trade Union Congress (ETUC) suggested that what may be required to amend the Directive and to broaden the universe of political discourse around it is to re-characterize work-family reconciliation itself as a health and safety issue. Indeed, a broad definition of health would/could encompass people's ability/right to partake in the lives of their families and their communities, as personal wellbeing is ultimately connected with one's ability to maintain familial bonds and social relations. Thus, recognizing that work-family reconciliation is an issue for all workers – those at the “core” and those at the “margins” of the labour market – would be a concrete and important step towards creating regulations and a policy environment that provides opportunities for *all* workers to engage in family work. This kind of development would also be consistent with the recognition that the work of care is a right (Busby 2011), just as much as it is a responsibility. In this way, the next revision of the

Working Time Directive will test the EU's promise of gender equality and promotion of work-family reconciliation for *all* workers, including those in Poland.

Thus, in this new, post-crisis environment, the developments surrounding this Directive demand ongoing critical scrutiny. The extent to which this instrument will embrace a more holistic approach to working-time will serve as a litmus test for EU's broader commitments to gender mainstreaming and building a more socially sustainable and inclusive economic order in the long term. Indeed, the crisis context may be precisely the period of opening. In the early 2012, the London School of Economics held a conference sponsored by the New Economics Foundation on the 21-hour workweek.³ If working-time reductions have been deemed by some to be a relic of a bygone era, the scholars at this conference foresaw the exact opposite. Juliet Schor, an American economist and sociologist of working time, claimed that periods of financial downturn are precisely the moments when we should work less, not more. She rejected the conventional wisdom that periods such as these necessitate that people should “buckle down” and work harder as a great fallacy. In proposing a 21-workweek for all workers, she cited economic, social and environmental reasons. Whether or not a 21-hour workweek is a feasible proposal is not important, at this point. It makes perfect sense, however, that a working-time regime that is based on shorter hours of work for all workers would help to redistribute paid work. It would “free” up the time for all sorts of “other” work that is required for the maintenance of lives. Shorter working hours for each worker may be one step towards fostering closer human bonds, more equal gender relations and, ultimately, a more economically and ecologically sustainable world.

³ The report that was launched at this event is entitled *21 Hours: Why a Shorter Working Week Can Help Us All Flourish in the 21st Century*. The report is available on the New Economics Foundation website: http://www.neweconomics.org/sites/neweconomics.org/files/21_Hours.pdf/.

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POLISH DAILIES

Gazeta Wyborcza: <http://www.wyborcza.pl/>; <http://www.gazeta.pl/>.

Rzeczpospolita: <http://www.rp.pl/>.

SOCIAL PARTNER ORGANIZATIONS, NON-GOVERNMENTAL ORGANIZATIONS, AND THINK-TANKS

Coalition Karat: <http://www.karat.org/pl/>.

Coalition of Persons Harmed by the Supermarket Chains “Biedronka”
<http://www.stowarzyszenie-biedronka.pl/>.

European Women’s Lobby: <http://www.womenlobby.org/>.

European Trade Union Confederation (ETUC): <http://www.etuc.org/>.

Feminoteka Foundation: www.feminoteka.pl/.

Heinrich Böell Foundation Warsaw: www.boell.pl/.

Political Critique: www.krytykapolityczna.pl/.

NSZZ Solidarność: www.solidarnosc.org.pl/.

PKPP Lewiatan: <http://pkpplewiatan.pl/>.

Women’s Rights Centre Foundation: <http://www.cpk.org.pl/>.

OTHER LINKS

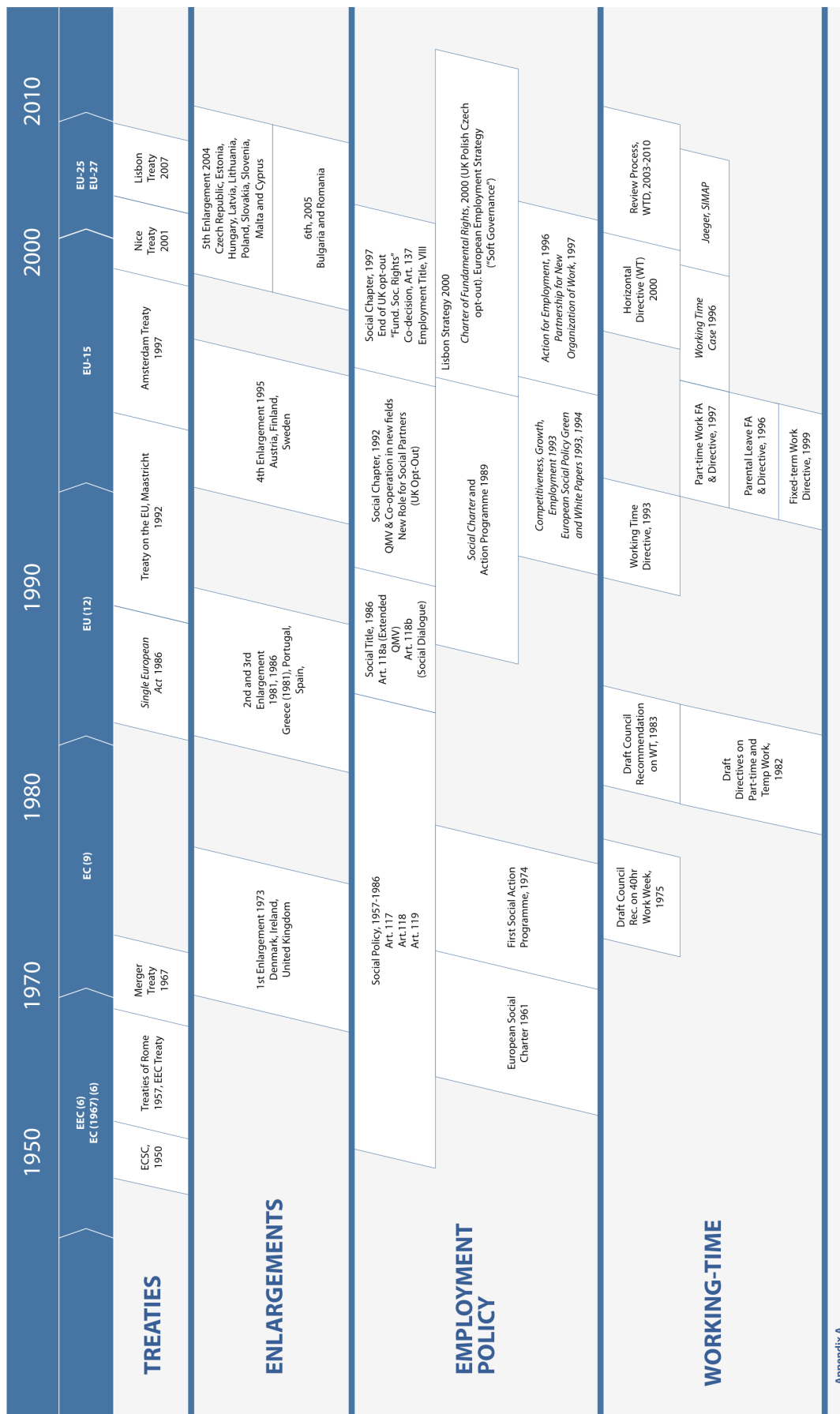
Gazeta Edukacja [Educational Gazette]: <http://edukacja.gazeta.pl/>.

Plakaty Propagandowe [Propaganda Posters]: <http://www.plakaty.poszukiwania.pl/>.

Appendix A

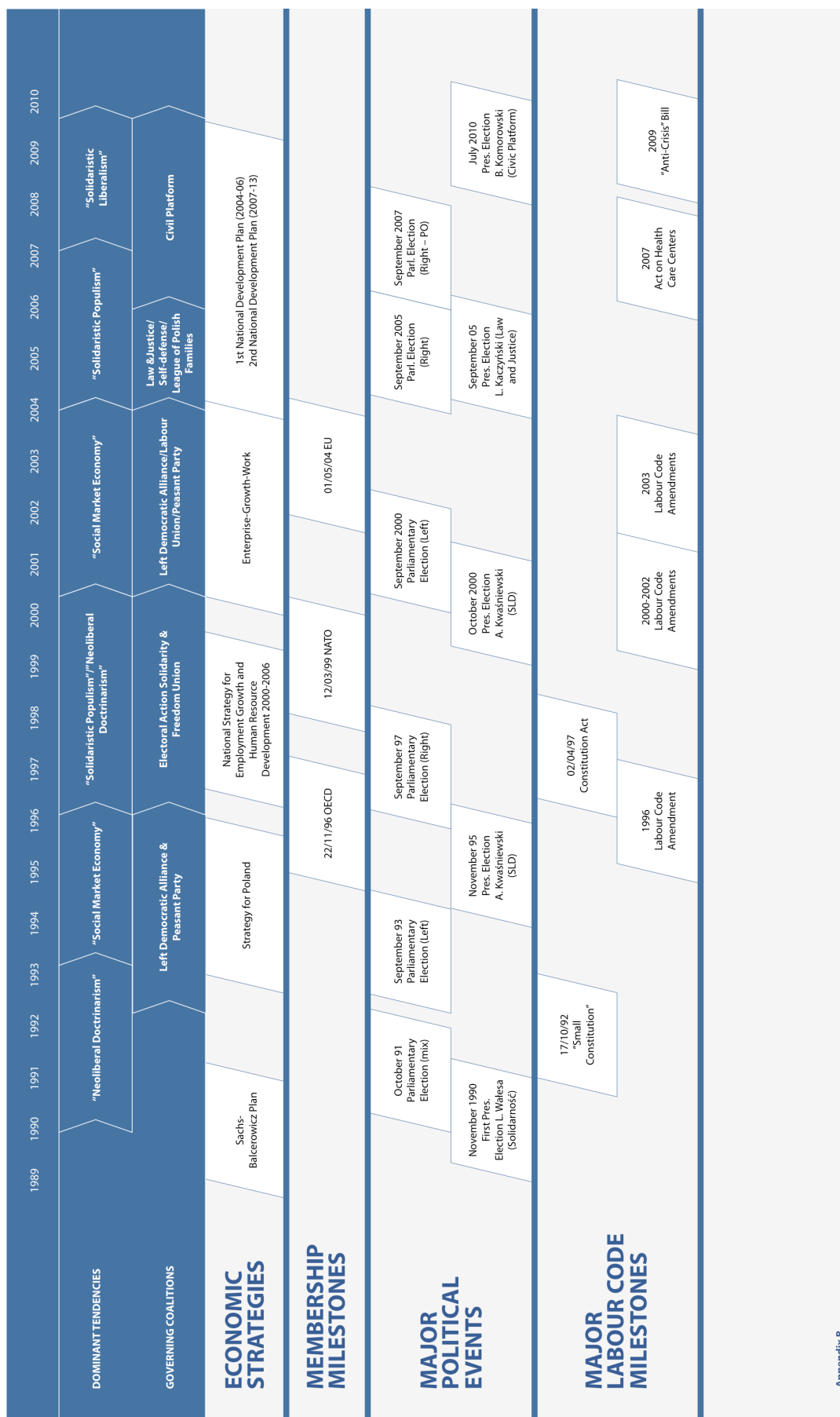
EU Institutional Architecture & Working Time Competences

See next page



Appendix B
Poland's Political, Economic, and Legal Timeline – 1989-2010

See next page



Appendix C Statistical Tables

Table 1. Poland: Gross Domestic Product, Constant Prices (% Change), 1990-2009

	1990	1991	1992	1993	1994	1995	1996	1997	1998	1999
GDP	7.171	-7.005	2.033	4.287	5.239	6.728	6.239	7.086	4.982	4.524
	2000	2001	2002	2003	2004	2005	2006	2007	2008	2009
GDP	4.253	1.205	1.443	3.867	5.345	3.617	6.227	6.785	5.127	1.650

Source: International Monetary Fund, World Economic Outlook Database, April 2011

Table 2. Poland: Unemployment Rate (Percent of Total Labour Force), 1990-2009

	1990	1991	1992	1993	1994	1995	1996	1997	1998	1999
Unemployment Rate	6.3	11.8	13.6	14.0	14.4	13.3	12.4	11.25	10.6	13.9
	2000	2001	2002	2003	2004	2005	2006	2007	2008	2009
Unemployment Rate	16.1	18.3	19.9	19.7	19	17.8	13.9	9.6	7.1	8.2

Sources: GUS Labour Force Survey 2005 (1992-2004); Eurostat Online

Table 3. Poland: Employment Activation (EA), Employment Rate (ER) as Percentage (%), by Gender, 15-64 Yrs.

	1992		1993		1994		1995		1996		1997		1998		1999		2000	
	EA%	ER%	EA%	ER%	EA%	ER%	EA%	ER%	EA%	ER%	EA%	ER%	EA%	ER%	EA%	ER%	EA%	ER%
Total	61.7	53.4	60.9	52.3	60.2	51.5	58.8	50.9	58.2	51.0	57.7	51.2	57.4	51.3	56.7	48.8	56.6	47.5
Men	70.2	61.6	69.2	60.4	68.2	59.3	66.8	58.7	66.2	59.0	65.9	59.6	65.6	59.4	64.4	56.4	64.1	54.9
Women	54.3	46.1	53.3	45.1	53.0	44.5	51.5	43.9	51.0	44.0	50.3	43.7	50.0	43.9	49.7	41.8	49.7	40.7

Table 3, cont.

	2001		2002		2003		2004		2005		2006*	2007		2008*	2009*
Total	56.4	46.1	55.4	44.4	54.8	44	54.7	44.4	55.2	45.9	54.5	53.5	48.4	59.2	59.3
Men	63.8	53.1	62.9	50.9	62.2	50.4	62.4	51	62.9	53.2	60.9	61.9	56.2	66.3	66.1
Women	49.5	39.7	48.6	38.4	47.9	38.2	47.8	38.2	48.1	39.2	48.2	45.9	41.3	52.4	52.8

Sources: GUS 2005 Labour Force Survey (1992-2004), GUS 2008 (2007), Eurostat Online

* Employment Rate only, Eurostat

Table 4. Poland: Part-Time Employment as Percentage (%) of Total Employment, by Gender, 15-64 Yrs.

	1992		1993		1994		1995		1996		1997		1998		1999		2000
Total	10.7		10.7		10.1		10.5		10.7		10.1		10.4		10.5		11.2
M W	8.9	12.9	8.9	12.8	7.8	12.9	8.2	13.3	8.1	13.8	7.9	12.7	8.1	13.1	8.5	13	8.7 14.2
	2001		2002		2003		2004		2005		2006		2007		2008		2009
Total	10.8		9.6		9.3		9.6		9.8		8.9		8.5		7.7		7.7
M W	8.8	13.2	7.3	12.2	6.9	12.1	7.1	12.5	7.0	13.3	6.2	12.2	5.8	11.7	5.1	10.9	5.0 10.5

Sources: GUS Labour Force Surveys (1992-2001), Eurostat Online (2002-2009)

Table 5: Poland: Hours of Paid Full-time Employment (Main Job), by Gender

	1992		1997		2002		2004		2007
	M	W							
Average hours of work per week	45.7	40.7	44.2	39.2	42.9	38.6	43.7	37.9	42.9*

Sources: GUS 2005 Labour Force Survey (1992-2004), Eurostat Online *Average only, Eurostat Online

Appendix D

Key Features of the Polish Working-Time Regime Over the Years

Table 1 Hours of Work and Overtime Limits

	People's Republic-era 1945-1989	Transition 1990-1997	Accession-era 1998-2004-on
Weekly/Daily Hours	46/8, 42/8	42/8 up to 9	42, 41, 40/8
Daily Hours Particular Categories	10, 12	10, 12	10,12 (seasonal)
Reference Periods	• 1 wk (basic), 2 wks (drivers) • 4 wks (retail, essential services, continuous work) • 3 wks (security, guarding) • 1 m (seasonal work) • 24 wks (anti-crisis)	• 3 m (basic) • 1 m (essential services) extendable to 3 m by collective agreement • 6 m (seasonal work)	• 3 m increased to 4 m in 2002 (basic) • 6 m (specific sectors) • 12 m (seasonal, technological process and production needs; special needs of employer)
Overtime Limits	48 or 56 per week maximum 120 per year	4-hour daily 150 per year Requirement to notify of overtime; right to refuse overtime	4hr daily; later increased to 5 48hrs/week 150 per year; with limits up to 416 per year permitted by collective agreement, workplace regulation or employment contract Rest periods: 11/d and 35/wk
Overtime Compensation	50 % first 2 hrs above norm 100% for additional hours above set norm, during night-time, Sundays, and holidays Time in lieu of overtime pay: EE's request	Lump sum payment	50 % for all hrs 100% holidays and Sundays Employers decide to pay out overtime or time off in lieu

Table 2 Special Accommodations and Non-standard Work Arrangements

	People's Republic-era 1945- 1989	Transition 1990-1997	Accession-era 1998-2004-on
Special Accommodations	Mat. Leave: 16, 18, 26 wks; 14 or 4 wks foster mothers. Child-raising Leave: 3 yrs Child-care Leave: 60 d/year Breastfeeding Breaks: 2x30min, or 45min Leave for Sick Child: 2 days (available to lone fathers)	Mat. Leave: 16, 18, 26 wks. Child-raising Leave: 3 yrs, extended to fathers Child-care Leave: 60 d/year Breastfeeding Breaks: 2x30min, or 45min Leave for Sick Child: 2 days (available to lone fathers)	Mat. Leave raised in 2001: 20, 30; later 26, 36wks (16 wks obligatory, non-obligatory portion extended to fathers) Mat. Leave reduced in 2002: 16, 18, 26 (14 obligatory) Child-raising Leave: option for both parents to take up at the same time Right to request reduced working time for employees eligible for child-raising leave and corresponding duty to accommodate 4 day annual "on demand" Leave Breastfeeding Breaks: 2x30min, or 45min Leave for Sick Child: 2 days (available to lone fathers)
Special Flexibility Measures and Non-standard Arrangements	No part-time provisions Variable start and end times (experimental) Self or team scheduling/"Own account" (experimental)	No part-time provisions Limit on number of consecutive fixed-term contract Provisions for collective negotiations of working-time reductions	Part-time work promotion; later equal treatment Temporary, fixed-term work equal treatment Interrupted working time, breaks of up to 5 hrs in 24hrs Weekend working, Reduced workweek, Individual working-time schedule

Appendix E

Key *Labour Code* Amendments 2001-2009

Provisions on Working Time and Work-Family Reconciliation

Amendment	Working Time	EU <i>acquis</i>	Work-Family Reconciliation And Equality	EU <i>acquis</i>
0.1.03.2001 Dz.U. Nr 28, poz 301	Art. 129 Working-time reduced to 40 (phased in; 01.01.2003)			
24.08.2001 Dz.U. Nr 123, poz 1354	<i>Repealed</i> Art. 129 ⁶ Working-time in road transport shifted to separate statute; “interrupted” working-time system deleted from <i>Labour Code</i>			
24.08.2001 Dz.U. Nr 128, poz 1405			Art. 189 ¹ para 1(2) Right for parents to share/take up at the same time child-raising leave , up to 3 months	96/34
21.12.2001 Dz.U. Nr 154 poz 1805			Art. 180, 180 ¹ Maternity leave reduced: 16 wks – first birth 18 wks – subs. birth 26 wks – multiple birth 8 wks – stillbirth Arts. 47, art. 50 para 5, art. 57 para 2, art. 163, art. 177 para 5, art. 180 para 5-7, art. 183 para 3 Parental rights extended to fathers	
26.07.2002 Dz.U. Nr 135, poz 1146	Art. 191 para 1, para 1 ¹ and 1 ² Ref. period extended: 4, 6 or 12m Art. 129 ^{5a} “Interrupted” work-time extended to all types of work organization Art. 129 ¹¹ para 2 No need to evidence working time in task- or project based work organization Art. 129 ¹⁰ para 2 and 3 60 min unpaid break during working-day Art. 134 Reduced overtime compensation	93/104	Art 167 ²⁻³ Employee entitled to a portion of annual leave (4 days) “on demand” Art. 186 para 3 Right to request reduced working-time for employees entitled to child-raising leave	

	Art. 133 para 2 Increased annual overtime to 416 Art. 143 para 2 Employer to decide whether overtime compensation paid out or time in lieu Art. 163 para 1¹ Employer not required to plan annual leave schedule Art. 167¹ Employee can be required to take up annual leave during the period of notice to dissolve contract			
14.11.2003 Dz.U. Nr 213			Art. 11³, 18^{3a}, 29² para 1 Prohibition of discrimination in employment, including on grounds of part-time and fixed-term work	2000/78 2000/43 99/70 97/81
14.11.2003 Dz.U. Nr 213	Art 129 Principle of averaging" 5-day workweek Art. 131 Maximum weekly time inclusive of overtime is 48 hours, averaged over the accepted reference period (Managerial workers excluded) Art. 132 Minimum daily rest periods: 11 hrs (Managerial and rescue workers excluded; entitled to equivalent rest periods) Art. 133 Minimum weekly rest period: 35 hrs, including at least 11 hours uninterrupted daily rest (Managerial, rescue workers and shift workers entitled to uninterrupted weekly rest of at least 24hrs); Rest day should be Sunday, or another day, if Sunday work permitted in the workplace/system of work organization. Art. 135-138 Various derogations from daily, weekly working time "equivalent working time" system, "supervision or machinery" or where readiness to work required, "guarding of property, lifesaving, firefighting", "where technological requirements, reasons related to work-organization or provision of essential services require that work not be interrupted	03/88/C 03/88/C 03/88/C 03/88/C	Art. 94 point 2a Employer to organize work in a manner least burdensome to worker, particularly work that is monotonous or at a set rate Art. 94² Employer to inform employee about possibility of full or part-time employment, and fixed term employees about permanent vacancies Art. 142 Individual working-time scheduling possible w/in the adopted working-time system Art. 148 Pregnant women or parents of children under 4 years of age not be employed in the systems of work prescribed by arts. 135-138, 143, 144 Art 154 Annual Leave 20 days – to 10 yrs 26 days - after Art. 292 para 2 Possibility of reducing working time to part-time Art. 25(1) Limits the number of fixed-term contracts; 3rd equivalent to permanent if break b/w consecutive contracts no longer than 1 month (Suspended until 01.05.04)	03/88/C 99/70 97/81 03/88/C 97/81 99/70

	Art. 143, Art. 144 Employee can request to work in system of reduced week and weekend-work (full-time hours) Art 151 Daily limit of possible overtime set by the 11-hour rest (art. 131) (previously 4 hrs) Art 151¹⁰ Sunday or weekend work permitted for shift workers Art. 151¹¹ Extended period for granting time off in lieu of holiday or Sunday work Art 151¹² Sunday rest – every 4th Sunday (previously 3rd) Art. 154² Annual leave calculation rules: by hour Art. 171 Annual leave can only be compensated through “in lieu” “equivalent” on dissolution of employment relationship	03/88/C		
19.12.2006 Dz.U. Nr 221 poz 1621 AA			Art. 180 Maternity leave extended 18 weeks 20 weeks 28 weeks (Also to foster and adoptive parents)	
24.08.2007 Dz.U. Nr. 176, poz 1239	Art. 151⁹⁻¹¹ Prohibition on work carried out by employees in retail on 12 additional holidays			
06.12.2008 Dz.U. Nr. 237 poz 1654			Art 180 para 1 Maternity leave extended Art. 180 para 6¹⁻³ Fathers entitled to portion of maternity leave if mother hospitalized Art. 182¹⁻² Additional, non-mandatory maternity leave (2 weeks, as of 2010; 4 weeks as of 2012; 6 weeks as of 2014) Also available to adoptive parents Leave can be combined with part-	

			time work Art. 182³ Father's leave – 1 week in 2010, 2 weeks as of 2012 Art 184 Right to maternity benefits extended to the non-mandatory leave portion and Father's leave Art. 186⁸ Special protection of workers entitled to child raising leave and taking advantage of reduced working-time arrangements (during 12months) Art. 189¹ Restrictions on sharing the additional non-mandatory maternity leave by both parents	
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Appendix F1

Sample Interview Questions – EU level

“Gendering Working Time in the European Union - Analysis of the EU Working Time Regime and its Impact on the Working Time Regime in Poland”

Participant's Name:

Institutional Affiliation:

*NOTE: The questions will be tailored to reflect the participants' role.

1. What was/has been the nature of your involvement with the WTD?
2. Since when have you/your organization/department been involved in the drafting/negotiations of/consultation on/lobbying related to the WTD?
3. What was the primary impetus/rationale for the WTD?
 - a. According to your organization? According to you?
 - b. To what extent was this consistent with the rationales adopted by the EC?
4. Have there been any changes in the rationale for the WTD since its initial adoption?
 - a. If so, what were they?
 - b. What has caused them?
 - c. How have they been justified?
5. What has been your organization's position on the inclusion of the individual “opt out” provision?
 - a. Has this position been consistent or has it evolved/changed over time?
6. Do you think the current working-time regulations are sufficiently flexible?
 - a. From a business/economic perspective?
 - b. From an employee/reconciliation of work and family/social policy perspective?
7. What changes/revisions would be necessary to improve working-time flexibility?
 - a. Do you think that they are possible given the recent stalemate in the negotiations over the revisions to the WTD?
 - b. To what extent, if at all, were issues such as work-family reconciliation and/or gender equality discussed as relevant considerations to the WTD? (i.e. the impact of long hours on equal access to employment)
 - c. To what extent have they been discussed as “working time” issues more broadly?
 - d. Has there been any change over time in your organization's position on this?

8. If gender equality was considered, can you explain why the WTD makes no mention/reference to it?
9. What makes the Part-time work and Parental leave directives distinct from WTD? Have you/your organization been involved in the drafting/lobbying/negotiations or consultations related to those working-time instruments?
 - a. Do you think these directives are the appropriate means for addressing the issues of work-family reconciliation and easing labour market access for working parents/caregivers?
 - b. Do you think this is sufficient or should EU social policy do more to address these issues?
10. What do you think will be the future of the WTD in light of its controversial past and the most recent round of negotiations?
11. Is there anything else that you would like to tell me in relation to the WTD or working-time policy?

Appendix F2

Sample Interview Questions - Poland

“Gendering Working Time in the European Union - Analysis of the EU Working Time Regime and its Impact on the Working Time Regime in Poland”

Participant's Name:

Institutional Affiliation:

*NOTE: The questions will be tailored to reflect the participants' role.

1. What was/has been the nature of your involvement in the revisions of the working-time rules under the Polish Labour Code (PLC)?
2. What was the primary rationale/impetus for the working-time rules revision? Were these changes prompted by the necessity to comply with the EC law, particularly the WTD? Were there other reasons? To what extent was this consistent with the rationales adopted by the EC in the WTD?
3. Since when have you/your organization been involved in the negotiations of/consultation on/lobbying related to the PLC working-time regulations? Related to Poland's position on the WTD?
4. What has been your organization's position on the individual “opt out” provision in the WTD and/or the working-time regulations of the PLC?
5. Has this position been consistent or has it evolved/changed over time?
6. Do you think the current working-time regulations in the PLC/WTD are sufficiently flexible?
7. From a business/economic perspective? Do you think they give Poland a competitive advantage? From an employee/reconciliation of work and family/social policy perspective?
8. What changes/revisions to the PLC/WTD do you think would be necessary to improve working-time flexibility (from either perspective)? Do you think that they are possible given the recent stalemate in the negotiations over the WTD?
9. (a) During revisions to the working-time rules under the PLC, were work-family reconciliation and/or gender equality ever regarded as relevant considerations?
(b) Has there been any change over time in your Ministry's/organization's position on this issue?
10. Is there anything else that you would like to tell me about the WTD policy-making process and your organizations involvement with it?

Appendix G1

Participant Informed Consent Form – English Version

“Gendering Working Time in the European Union - Analysis of the EU Working Time Regime and its Impact on the Working Time Regime in Poland.”

You are invited to participate in a study entitled “Gendering Working Time in the European Union – Analysis of the European Working Time Regime and its Impact on the Working Time Regime in Poland” that is being conducted by Ania Zbyszewska.

I am a graduate student in the Faculty of Law at the University of Victoria and you may contact me if you have further questions by e-mail at XX@uvic.ca.

As a graduate student, I am required to conduct research as part of the requirements for a degree of Doctor of Laws (PhD). It is being conducted under the supervision of Professor XX, and Professors YY and ZZ. You may contact my main supervisor, Professor XX, or by e-mail xx@uvic.ca.

This research is being funded by University of Victoria Graduate Studies, and the Inter-University Research Network on Work and Globalization (CRIMT).

Purpose and Objectives

The purpose of this research project is to investigate the extent to which the goals of gender equality were taken into account in the drafting and adoption of the various working-time instruments at the EU level, mainly the Working Time Directive (WTD). I am also interested in the impact that the EU-level instruments have had on the Polish working-time laws and regulations, and on the relative access to employment for men and women and/or on better reconciliation of work and family.

Importance of this Research

Research of this type is important because there has not been a comprehensive legal assessment of the EU working time instruments, particularly the WTD, from a perspective that focuses on their impact on men and women’s relative access to the labour market and meaningful work-family reconciliation. Understanding the particular rationales underlying policy and legislative choices is crucial to the meaningful assessment of the transformative potential of this legislation. Moreover, by investigating and assessing the impact of the EU working-time law in the context of a recent transition-economy and a new accession state, Poland, this study will make an important contribution to the state of knowledge and will be of interest to legal scholars and scholars interested in the dynamics of political, economic and legal transition.

Participants Selection

You are being asked to participate in this study because of your involvement in the drafting/negotiations/consultations related to the WTD and/or its subsequent revisions, or because of your involvement in the transposition of the WTD into the Polish Labour Code and/or negotiations/consultations/lobbying related to that process.

What is involved?

If you agree to voluntarily participate in this research, your participation will include meeting with me for an interview lasting approximately 2 hours, during which I will ask you a series of questions about your involvement in and knowledge of the events related to the WTD and/or its revisions and/or its transposition into the Polish law. The interview would be scheduled at a time that is convenient to you and would be carried out at your place of employment or at a mutually agreed public location. At the commencement of the interview, I will seek your permission to use an audio-tape device to record your responses. Subsequently, I may contact you again for a follow up interview and/or to ask you to review any specific information or quotations that I would like to attribute specifically to you in my PhD dissertation and/or article/book monogram.

Inconvenience

Participation in this study may cause some inconvenience to you. This includes the time required to participate in the initial interview or any follow up interviews should they be required.

Risks

There are no known or anticipated risks to you by participating in this research.

Benefits

The potential benefits of your participation in this research include an opportunity to explain the rationales for the positions taken by your organization on the WTD and to voice your concern about the extent to which this position has been taken into account in the policy-making process at the EU and national levels (Poland).

Moreover, this study will yield important information about the competing rationales and assumptions underlying regulation of working time, and particularly the extent to which gender equality concerns have been considered as pertinent to this area of regulation. Given the EU efforts to mainstream gender, improve equal opportunities and make work-family reconciliation a key priority, the consideration of the degree to which these goals have been reflected in the negotiations over the WTD (both past and current) would provide an important contribution to the state of knowledge on the EU social and economic policy.

Finally, a focus on the relationship between the legal norms and policy-making mechanisms of the EU and those of the new accession state and a new transition economy, Poland, will be of significant interests to legal scholars as well as researchers interested in institutional dynamics of transition and international political economy.

Voluntary Participation

Your participation in this research must be completely voluntary. If you do decide to participate, you may withdraw at any time without any consequences or any explanation. If you do withdraw from the study your data will not be used or will be used only if you give your permission.

On-going Consent

To make sure that you continue to consent to participate in this research, I will ask you to sign the consent form each time I meet with you and I will ensure that you are aware of your right to decline further participation at any time.

Anonymity

Given the nature of my study and your position as a public official or representative of an organization which has been involved in lobbying/consultation/negotiations pertaining to the EU WTD, I will not be taking special steps to protect your anonymity.

Confidentiality

Confidentiality of the data will be protected by ensuring that the audio tapes, transcripts and interview notes are stored in a secured location such as a locked cabinet and/or password protected electronic files on my personal computer.

WAIVING CONFIDENTIALITY PLEASE SELECT STATEMENT

I agree to be identified by name / credited in the results of the study.

I agree to have my responses attributed to me by name in the results.

_____ (Participant to provide initials)

Dissemination of Results

It is anticipated that the results of this study will be shared with others in the following ways: dissertation and/or published articles or a monogram, presentations at scholarly meetings.

Disposal of Data

Data from this study will be destroyed upon the completion of the PhD dissertation and publishing of the book monogram based on the PhD project in question. At that time, the audio recordings will be destroyed at a safe disposal facility, the paper copies of transcripts and interview notes will be shredded and the electronic files will be backed up on CD ROMS and permanently deleted from my computer.

Contacts

Individuals that may be contacted regarding this study include Ms. Zbyszewska, the principal investigator, and the project supervisor, Prof. XX. Contact information for both has been provided on page one of this consent form. In addition, you may verify the ethical approval of this study, or raise any concerns you might have, by contacting the Human Research Ethics Office at the University of Victoria (250-472-4545 or ethics@uvic.ca).

Your signature below indicates that you understand the above conditions of participation in this study and that you have had the opportunity to have your questions answered by the researcher

Name of the participant

Signature

Date

A copy of this consent will be left with you, and a copy will be taken by the researcher

Appendix G2

Participant Informed Consent Form – Polish Version

Świadoma Zgoda na Udział w Badaniach

“Gendering Working Time in the European Union - Analysis of the EU Working Time Regime and its Impact on the Working Time Regime in Poland.”

“Europejskie Normy Czasu Pracy i Płec – Analiza Wpływu Unijnych Norm Czasu Pracy na Prawna Regulacje Czasu Pracy i Równy Dostęp do Rynku Pracy w Polsce.”

Jest Pan/Pani zaproszona do udziału w projekcie badawczym prowadzonym przez Anne Zbyszewska, zatytułowanym “Europejskie Normy Czasu Pracy i Płec – Analiza Wpływu Unijnych Norm Czasu Pracy na Prawna regulacje Czasu Pracy i Równy Dostęp do Rynku Pracy w Polsce”.

Jestem doktorantką wydziału Prawa na Uniwersytecie Victorii w Victorii, Kanadzie. Jeżeli ma Pan/Pani jakiegokolwiek pytania związane z tym projektem, proszę skontaktować się ze mną pod numerem XXXX lub przez pocztę elektroniczną (xx@uvic.ca).

Przeprowadzenie tych badań jest niezbędną częścią uzyskania materiałów oraz informacji koniecznych do ukończenia mojej pracy doktorskiej i uzyskania tytułu Doktora Prawa (Ph.D.). Mój projekt uzyskał aprobatę Uniwersyteckiej Komisji do Spraw Etyki Badawczej, a moja obecna praca jest nadzorowana/promowana przez Profesor XX z Wydziału Prawa Uniwersytetu Victorii, jak również Profesorów YY i ZZ z Wydziału Politologii i Europejistyki. Jeżeli chciałby/chciałaby Pan/i uzyskać więcej informacji na temat moich badań może Pan/i skontaktować się z Profesor XX pod numerem XXX lub przez pocztę elektroniczną (xx@uvic.ca).

Fundusze na wykonanie tego projektu otrzymałam z Centrum Europejistyki Uniwersytetu Victorii oraz Między-Uniwersyteckiej Sieci Badawczej do Spraw Pracy i Globalizacji (Inter-University Research Network on Work and Globalization (CRIMT)), których jestem członkiem.

Cel i Założenia

Celem obecnego projektu jest zbadanie tego w jakim stopniu kwestie płci i równego dostępu do rynku pracy były wzięte pod uwagę w pracach przygotowawczych, dyskusjach i wprowadzeniu w życie Dyrektywy dotyczącej pewnych aspektów regulacji czasu pracy na szczeblu Europejskim. Ponadto, celem jest również zbadanie wpływu tej właśnie Dyrektywy i związanego z nią politycznego dyskursu, jak również ogólnych przemian politycznych i gospodarczych, na debaty, konsultacje i aktualne zmiany w Polskim Kodeksie Pracy wprowadzone w celu dostosowania Polskiego prawa pracy do realiów gospodarki rynkowej oraz prawa Unijnego.

Wartość Projektu

Jak dotąd prawna regulacja czasu pracy, szczególnie poprzez Dyrektywę dotyczącą pewnych aspektów organizacji czasu pracy, nie została jeszcze zbadana pod kątem jej wpływu na równy dostęp do rynku pracy i ułatwianie godzenia obowiązków rodzicielskich z profesjonalnymi. Blizsza analiza tej właśnie Dyrektywy oraz zmian w Polskim Kodeksie Pracy wprowadzonych pod jej wpływem jest potrzebna aby ocenić w jakim stopniu owe zmiany w organizacji czasu pracy będą w stanie ułatwić godzenie relacji praca-dom. Ponadto, badania te poszerza wiedzę w angielsko-języcznej literaturze prawnej co do relacji pomiędzy prawem Unijnym i prawem Polskim, jak również co do szerszej tematyki przemian prawnych i społecznych w krajach Europy Środkowej i Wschodniej.

Wybór uczestników

Jest Pan/Pani zaproszona do uczestniczenia w tym projekcie badawczym ze względu na Pańską/Pani pozycję oraz ekspertyzę co do prawnej regulacji czasu pracy/ iż uczestniczył/a Pan/i w negocjacjach, rozmowach, konsultacji oraz pracach legislacyjnych związanych z nowelizacją Kodeksu Pracy/zmianami w Kodeksie Pracy, między innymi, związanymi z dostosowaniem Polskiego prawa pracy do prawa UE.

Czego oczekiwać?

Jeśli zgodzi się Pan/Pani na udział w tych badaniach, udział ten będzie polegał na spotkaniu ze mną i udzieleniu mi wywiadu który nie potrwa dłużej niż 2 godziny, i podczas którego zadam Panu/Pani serię pytań związanych z Pana/Pani udziałem oraz/lub wiedzą na temat regulacji czasu pracy w Polsce i wdrażania norm Unijnych do Polskiego prawa pracy. Wywiad ten odbędzie się w czasie dogodnym dla Pana/Pani i w miejscu Pana/Pani pracy lub innym miejscu publicznym które będzie dla Pana/Pani dogodne. Na początku naszej rozmowy, poproszę o Pana/Pani zgodę na nagranie naszej rozmowy. Możliwe jest również, że po naszej rozmowie będę musiała się z Panem/Panią ponownie skontaktować jeżeli będę miała dodatkowe pytania.

Niedogody związane z uczestnictwem

Jedyną niedogodą związaną z Pana/Pani uczestnictwem w tych badaniach będzie czas poświęcony na nasz wywiad i dodatkowe rozmowy/kontakt jeżeli będą one potrzebne.

Ryzyko

Uczestnictwo w tych badaniach nie łączy się z jakimkolwiek ryzykiem, lub nie jest one przewidywane.

Zysk

Uczestnictwo w tych badaniach ma wiele pozytywnych aspektów. Daje ono na przykład szansę na wytłumaczenie i uzasadnienie propozycji i pozycji przyjętych przez Pana/Pani organizację lub departament wobec zmian w przepisach regulujących czas pracy oraz podczas procesu wdrażania dyrektywy Unijnej związanej z czasem pracy do ustawodawstwa polskiego. Również, daje ono szansę do oceny tego w jakim stopniu owa pozycja była wzięta pod uwagę w procesie politycznym i ustawodawczym i została ona odzwierciedlona w Kodeksie Pracy lub innych ustawach.

Badania o których tu mowa uzupełnią wiedzę na temat związku pomiędzy regulacją czasu pracy a równym statusem kobiet i mężczyzn na rynku pracy w Polsce oraz w Uni Europejskiej.

Również, badania związku pomiędzy normami prawnymi a mechanizmami tworzenia polityki społecznej i gospodarczej w Uni Europejskiej, z szczególnym uwzględnieniem nowych krajów członkowskich, jest tematem który wzbudza zainteresowanie wśród badaczy i w literaturze anglojęzycznej wielu dziedzin, w tym prawa.

Świadoma zgoda

Zgoda na uczestnictwo w tych badaniach musi być w charakterze świadomego wyboru. Jeżeli zdecyduje się Pan/Pani na udział, może Pani/Pan wycofać się w każdej chwili bez potrzeby uzasadnienia tej decyzji. Jeżeli zdecyduje się Pan/Pani wycofać, informacje uzyskane podczas naszego wywiadu nie będą wykorzystane lub będą wykorzystane tylko i wyłącznie za Pana/Pani zgodą.

Nieprzerwana zgoda na uczestnictwo

Aby upewnić się że zgoda wyrażona przez Pana/Panią jest aktualna, poproszę Pana/Panią o podpisanie tej formy przy okazji każdego spotkania. Przy każdym kolejnym spotkaniu będę również Pana/Panią informowała o możliwości wycofania się z uczestnictwa.

Anonimowość

Ze względu na typ badań oraz publiczny charakter Pani/Pana pozycji, nie zamierzam podjąć specjalnych kroków aby chronić Pana/Pani anonimowość.

Klauzula Poufności

Gwarancja poufności danych będzie to iż dane zebrane podczas wywiadu, czyli nagrania audiofoniczne, transkrypcje oraz notatki, będą, do momentu publikacji lub przedstawienia referatu na seminarium naukowym, przechowane w bezpiecznym miejscu jak na przykład w zamkniętej szafce lub w plikach komputerowych do których dostęp będzie jedynie miał upoważniony badacz czyli Pani Zbyszewska.

Zrzeczenie Poufności (Proszę wybrać)

Godzę się na umieszczenie mojego nazwiska w publikacji rezultatów badań.

Godzę się na publikację moich wypowiedzi w rezultatach badań.

_____ (Inicjały uczestnika badań)

Publikacja rezultatów

Oczekuję że rezultaty obecnych badań zostaną opublikowane w formie pracy doktorskiej, opracowań lub monografii, oraz referatów głoszonych na seminariach naukowych.

Pozbycie się danych

Dane uzyskane poprzez te badania będą zniszczone w wyznaczonym bezpiecznym miejscu przeznaczonym do tego celu. Nastąpi to po ukończeniu pracy doktorskiej oraz referatów, opracowań lub monografii do których są te dane niezbędne. Dotyczy to nagrań audiofonicznych oraz transkrypcji tych nagrań, notatek przygotowanych podczas wywiadów oraz plików znajdujących się na osobistym komputerze badacza, Pani Zbyszewskiej.

Kontakty

Jeżeli ma Pan/Pani dodatkowe pytania związane z projektem badawczym Pani Zbyszewskiej, może Pan/i skontaktować się z nadzorcą projektu oraz promotorem pracy doktorskiej Pani Zbyszewskiej, Profesor XX. Kontakt Pani XX znajduje się powyżej. Dodatkowo, aby uzyskać potwierdzenie iż obecny projekt uzyskał aprobatę Komisji Etyki Badawczej może Pan/i skontaktować się z Biurem Etyki Badawczej Uniwersytetu Victorii (250-472-4545 or ethics@uvic.ca).

Poniższy podpis świadczy o tym że rozumie Pan/i powyższe warunki uczestnictwa w projekcie badawczym, uzyskał/a Pan/i odpowiedź na jakiegokolwiek pytania związane z uczestnictwem i świadomie decyduje się Pan/i na uczestnictwo.

Nazwisko Uczestnika

Podpis

Data

Otrzyma Pan/i jedną kopię tej formy a jedną zatrzyma badacz.