



# Revisions to the European working time directive: recent Eurofound research

## *Background paper*

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This report summarises recent Eurofound research and data on working time and work–life balance issues. Its specific objective is to present findings relevant to the ongoing political debate in relation to the proposed revisions of the Working Time Directive (2003/88/EU). The report includes findings from the European Working Conditions Surveys (1991–2005) and the Establishment Survey on Working Time (2004–5) as well as from the European Industrial Relations Observatory, relevant to the following topics:

- Long working hours (> 48 hrs per week)
  - Who works long hours?
  - Working time in second / other jobs
  - Impacts of long working hours
- National statutory maximum working weeks
- On-call work
- Working time flexibility and work–life balance

#### **Proposed revision of the EU Working Time Directive**

The Council Common Position agreed by qualified majority in June 2008 and formally adopted on 15 September 2008 sets out a number of important changes to the existing legislation:

- A definition of on-call time which differentiates between ‘active’ and ‘inactive’ working time.
- Extension of the reference period used to calculate the 48-hour maximum weekly working hours threshold from four months to one year.
- New provisions on work–life balance ensuring that employers inform workers in due time of any substantial changes in their working time patterns and encouraging employers to examine requests for flexible working.

The Council Common Position also retains the option of individual opt-out from the 48-hour working week limit while attaching a number of new conditions to its use, including an explicit 60-hour weekly limit (65 hours if inactive on-call time is included). The revisions do not alter many of the existing provisions of the directive, for instance in relation to obligatory periods of daily and weekly rest, of annual paid holiday leave and in relation to night work. The Commission, whose original proposed revision dates back to 2004 and has been blocked for over four years, has indicated its support for the Council Common Position. The dossier has returned to the European Parliament for a second reading.

## **Long working hours**

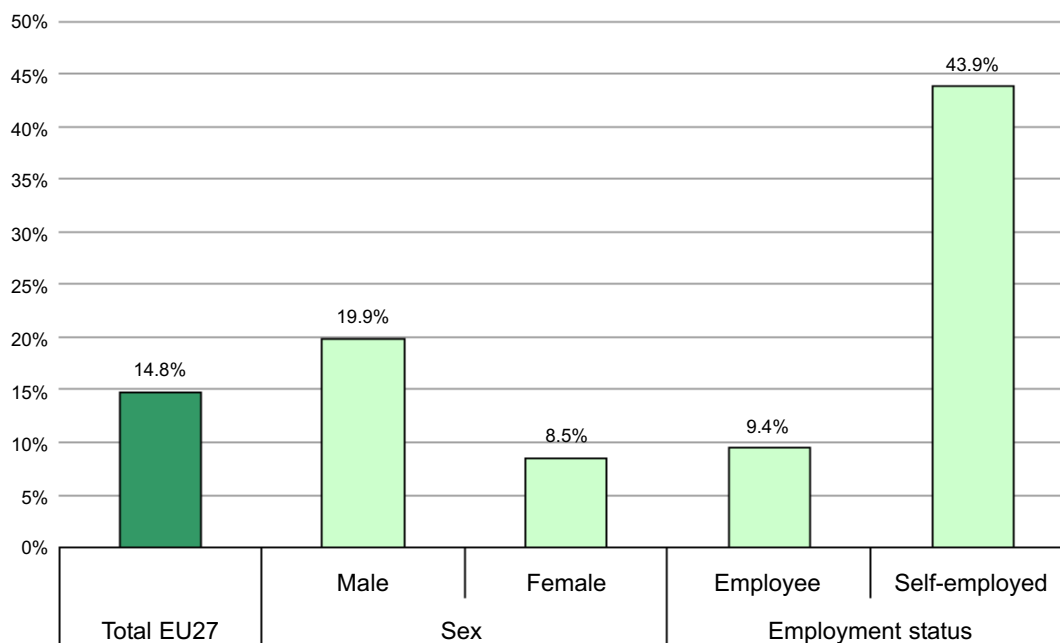
### **Who works long hours?**

According to the Fourth European Working Conditions Survey, some 15% of the EU27 workforce report that they usually work more than 48 hours per week, the standard threshold established by the European Working Time Directive (Directive 2003/88/EC).

Long working hours is much more prevalent amongst the self-employed than employees. 44% of the self-employed report themselves as usually working over 48 hrs per week. The genuinely self-employed are not covered under the terms

of the directive to the extent that they are ‘persons with autonomous decision-making powers’ whose ‘duration of [...] working time is not measured and/or predetermined or can be determined by [...] themselves’. Less than one in ten employees reports working more than the weekly threshold established by the Directive.

Figure 1: Long working hours by gender and employment status

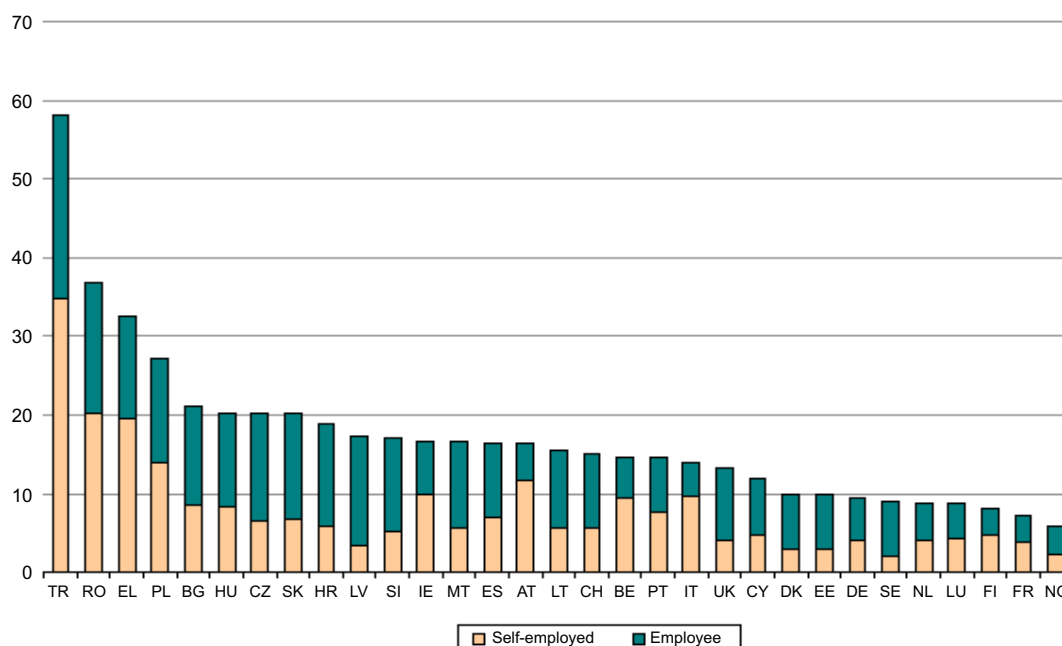


Source: *4EWCS*

Long working hours is a predominantly male phenomenon in Europe. Men are more than twice as likely to normally work over 48 hours per week than women.<sup>1</sup> Figure 2 shows the proportion of people working more than 48 hours a week in different countries, again based on the Fourth European Working Conditions Survey. In general, the country rankings in the incidence of long working hours track closely those of average weekly working hours. It might be surprising to see that the UK does not stand out in this indicator (considering the importance of this debate in the British context), being around the average: actually, the UK only stands out when we consider the working hours of male full-time employees.

<sup>1</sup> However, this refers to paid working hours in the labour market; inclusion of unpaid work in the household presents a quite different picture of the gender division of labour and in particular of long working hours – see, for example, Parent-Thirion et al (2007), p. 26-27.

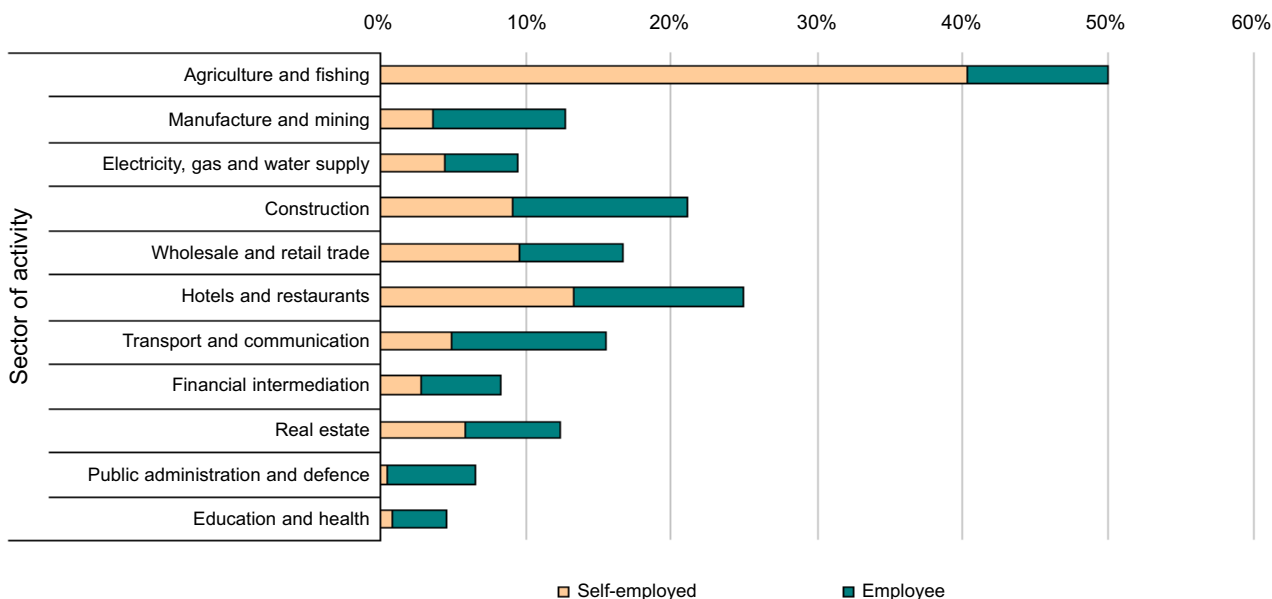
Figure 2: The incidence of long working hours in Europe



Source: 4EWCS, 2005

The sectors most affected by long working hours are agriculture, hotels and restaurants and construction (all with more than 20% of workers in this category); in terms of occupations, it is managers and agricultural workers who most often work more than 48 hours. Again, it should be noted that some of the categories of workers most likely to work long weeks, according to survey data, are also subject to derogations from the directive. Corporate managers will generally be exempt under Article 17 of the Directive if they fall into the category of ‘managing executives or other persons with autonomous decision-taking powers’. This phrase is also likely to describe the large majority of agricultural workers who are self-employed.

Figure 3: Long working hours by sector



Source: 4EWCS, 2005

It is clear that many of those working over 48 hours per week fall into categories subject to derogations from the directive. An increasing number of workers also come under the terms of the individual opt-out (Article 22) from the 48 hour limit, whose use has become common in the wake of the Simap and Jaeger European Court of Justice judgements in 2000 and 2003 respectively. According to the Commission, ‘in 2000, only one Member State actually used [the opt out]. In 2008, some fourteen Member States explicitly provide for use of the opt-out’ (see Annex for further information on derogations and the opt-out provision). In the majority of countries, use of the opt-out addresses the fact that authorities are obliged to regard all time spent on-call – notably in the health sector – as working time following the above-mentioned cases.<sup>2</sup> One member state that has not applied to use the opt out, Greece, has recently become the subject of a letter of formal notice from the Commission for failure to comply with the directive. The alleged breaches relate to doctors in the public health service working between 60 and 93 hours per week.<sup>3</sup>

The ECJ judgements are an important background element to the proposed revisions of the working time directive and raise in particular the issue of long working hours in the health sector. Evidence from the 4EWCS does not support the idea of a long hours culture in the health sector. However, if we look at more recent data on working hours by occupation based on larger samples from Eurostat’s European Labour Force Survey, it is clear that ‘life science and health professionals’ – a category principally made up of doctors and senior medical staff – is amongst those with the highest proportion of workers working long hours (21%).<sup>4</sup>

Figure 4: Percentage of workers by occupation whose usual weekly working hours  $\geq$  48hrs



Source: Eurostat, ELFS 2007 (Eurofound analysis)

<sup>2</sup> There are different national working time regulations in relation to on-call work (see page 10) and many of these differentiate between active and inactive periods of on-call work in order to discount time spent on call but not actively working when measuring compliance with maximum working time thresholds. By invalidating this differentiation, the ECJ judgements have had the effect of making national regulations incompatible with the EU directive and have encouraged increased recourse to the opt-out.

<sup>3</sup> European Commission (2008b).

<sup>4</sup> Note that the ELFS data refer to those working  $\geq$  48 hrs, the EWCS data to those working  $>$  48 hrs pw.

Of the 30 million EU27 workers who usually work 48 or more hours each week, over 80% are concentrated in the twelve occupational categories shown in Table 1.

Table 1: *Occupational categories with highest numbers of long hours workers (EU27)*

Occupation	Isco2d	Pop (,000s)
Managers of small enterprises	13	3757
Corporate managers	12	2901
Skilled agricultural and fisheries workers	61	2707
Extraction and building trades workers	71	2311
Drivers and plant mobile operators	83	2224
Personal and protective services workers	51	2163
Other associate professionals	34	1954
Other professionals	24	1437
Metal, machinery and related trades workers	72	1275
Professionals: physical, mathematics, engineering	21	1242
Models, salespersons	52	1194
Other craft and related trades workers	74	877

Source: Eurostat, ELFS 2007 (Eurofound analysis)

### Long working hours and multiple job holding

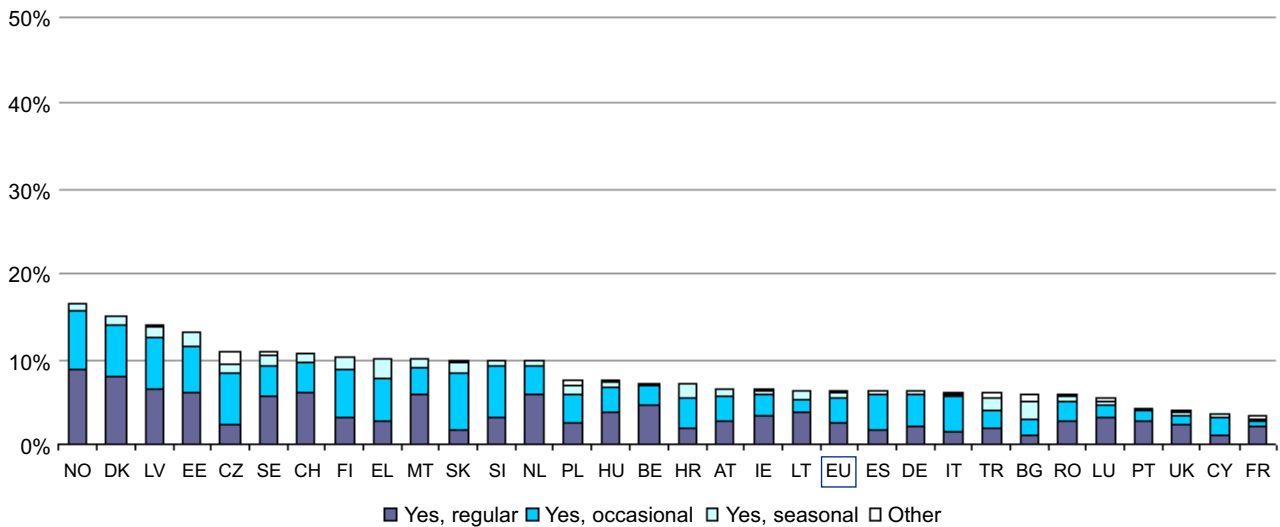
The EU working time directive does not expressly provide for any guidance on whether the 48 hour weekly threshold takes account of individual workers' main jobs only or their total work hours in all paid jobs<sup>5</sup>. There may be practical reasons of enforcement for not extending the requirements to cover multiple job holders. How, for instance, would it be decided which employer bears the responsibility for breaches of the directive in the event that cumulative hours worked exceed the directive limits but hours worked in individual employment relationships did not?

However, given that the original intention of the directive was to restrict excessive work hours on health and safety grounds and that second jobs inevitably increase the proportion of workers working over 48 hours per week, it is reasonable to look at the incidence of second jobs among the working population in the EU27, and to assess the extent to which total hours worked in second jobs or jobs other than the main paid job increases the overall incidence of long hours working.

Questions in the 4th European Working Conditions Survey allow us to perform these calculations. First of all, we start by looking at the breakdown of multiple job holding by country.

<sup>5</sup> In its 2000 report on the implementation of the WT directive, the Commission indicates that Member State legislation 'should provide for appropriate measures in order to ensure that the limits [...] are respected in the case of workers concurrently under two or more employment relationships [...]'. In its September 2008 Communication, the Commission indicates that 'its understanding is that at least 12 Member States presently apply these provisions per-worker while at least 12 others apply them per-contract'.

Figure 5: Percentage of multiple job holders in different countries

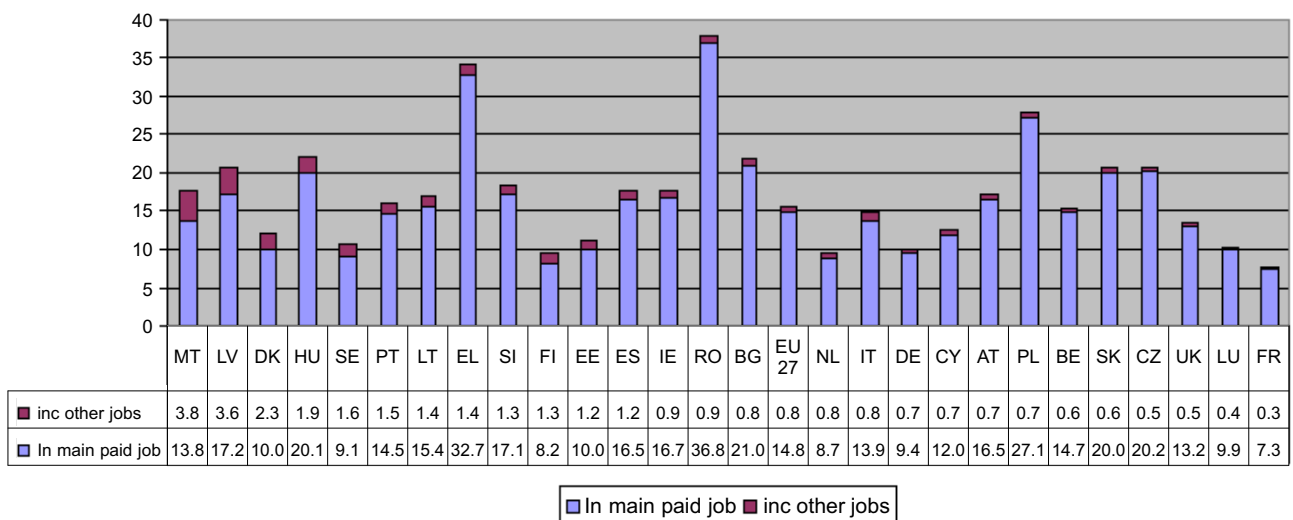


Source: 4EWCS, 2005

On average in the 31 countries covered in the 4th EWCS, less than 7% of the workers have more than one job. Although in all countries the proportion is rather small (only in Norway does it go beyond 15%) the differences by countries are important, as we can see in figure 5. The Nordic countries have considerably higher proportions of workers with more than one job than the rest, and this phenomenon is somewhat high in Eastern Europe as well. In the rest of Europe, multiple job holding is very marginal.

Given the limited proportion of workers with more than one job and the fact that workers tend to devote substantially fewer hours to jobs other than their main paid job (mean: 11.8 hrs pw), the net impact of second jobs on overall working hours is not dramatic.

Figure 6: Percentage of workers working > 48 hrs (in main jobs / in main and other jobs)



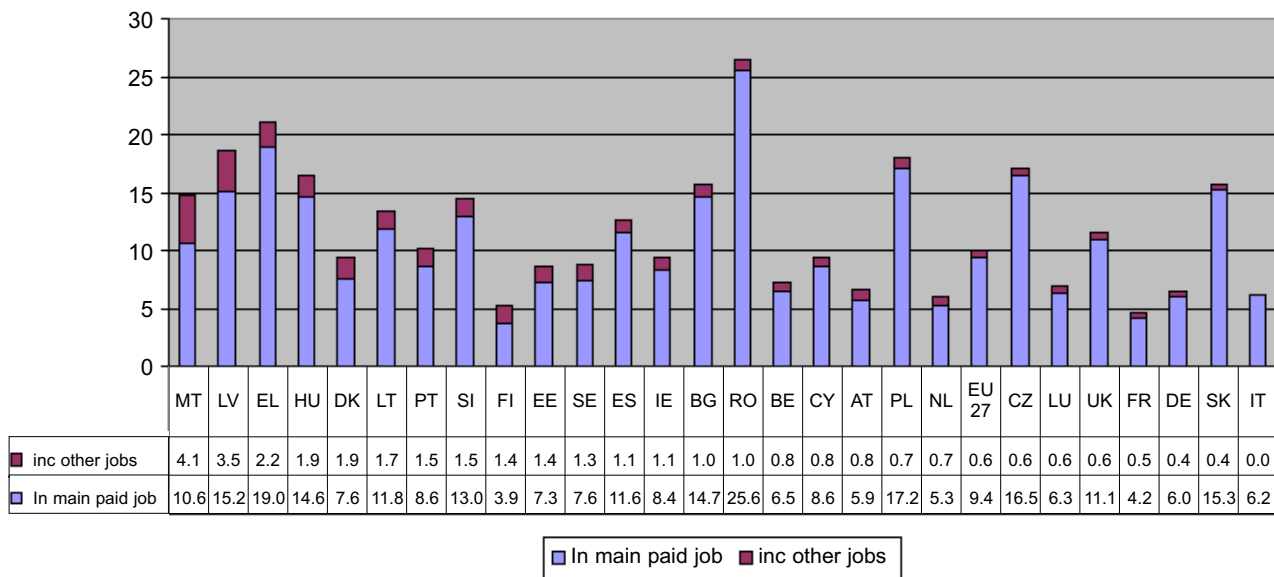
Source: 4EWCS, 2005



The effect of taking into account working time in jobs other than the main paid job is to raise the percentage of workers in the EU27 usually working over 48 hrs per week from 14.8% to 15.6% of the working population.

Though small in percentage point terms, over the EU workforce as a whole (c. 218 million workers), this extra 0.8% represents an extra 1.7 million EU workers whose usual working week exceeds the directive’s threshold as a direct consequence of time spent working in second jobs. In Denmark, Latvia and Malta, inclusion of multiple job holders adds at least two percentage points to the overall incidence of long working hours.

Figure 7: Percentage of employees working > 48 hrs (in main jobs / in main and other jobs)



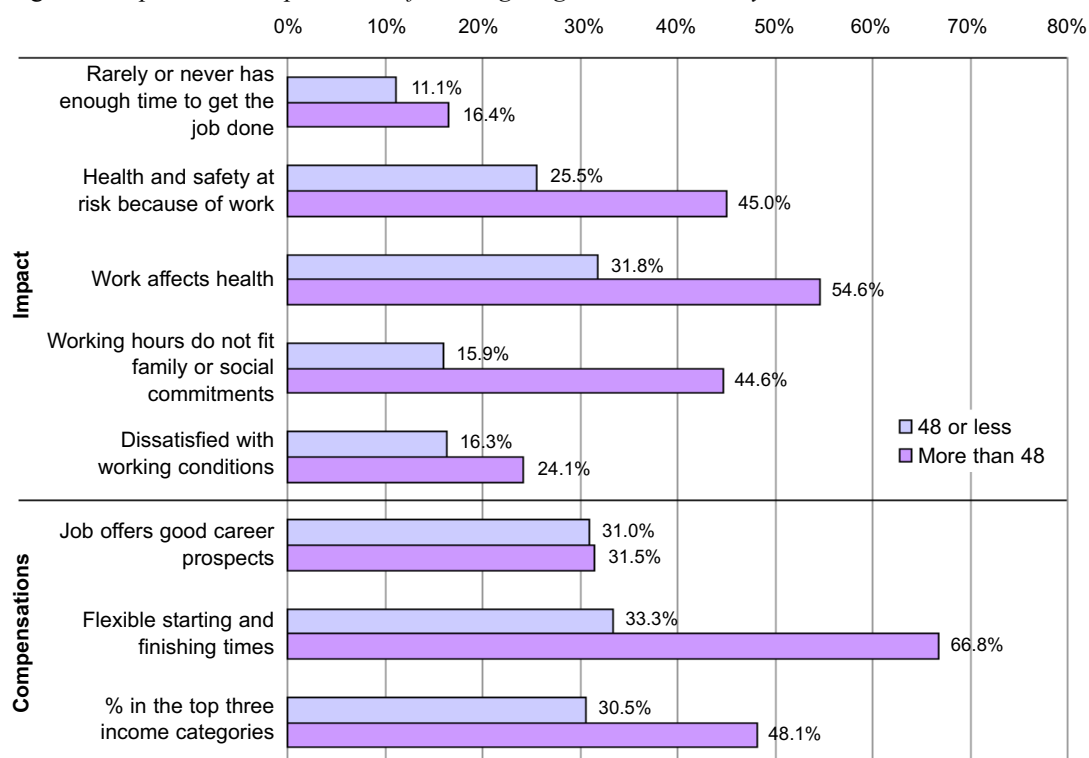
Source: 4EWCS, 2005

If we restrict our focus to look just at employees (i.e. exclude the self-employed, a category amongst whom long hours working is especially prevalent), the effect is not so great. The EU27 percentage of long hours working is raised from 9.4% to 10%. The countries affected most, i.e. where the proportion of employees working long weekly hours increases the most following inclusion of hours worked by multiple job holders, are again Hungary, Denmark, Latvia and Malta with the addition this time also of Greece.

**Some impacts of long working hours**

As already indicated, the various restrictions envisaged in the Working Time Directive have as an objective to ensure the health and safety of workers. The Fourth European Working Conditions Survey allows us to compare various work-related outcomes (including self-reported health outcomes) between those working less than and more than the 48-hour weekly threshold.

Figure 8: *Impact and compensation of working long hours, EU27 only*



Source: *4EWCS, 2005*

The first indicator shown is the proportion of workers complaining that they rarely or never have time to get their job done. It is higher for those working very long hours. Of course, the causality here can go both ways, but it shows an interesting relationship between working time and flexibility that merits further exploration.

The data from other survey questions shows that working long hours has a substantial impact on health and safety: those who work more than 48 hours a week are almost twice as likely to consider that their health and safety is at risk because of their work, and that their job affects their health. But where working long hours has a more substantial effect is in work–life balance: three times as many long-hours workers report that their working hours do not fit their social and family commitments.

On the other hand, if we look at satisfaction with working conditions, the difference between long-hours workers and the rest is much lower, probably because of the existence of compensations for working long hours. Although working long hours does not improve career prospects, it does pay: half of those working more than 48 hours a week are in the top three income deciles. Also, there may be a certain degree of exchange of long hours by flexibility: as figure 8 shows, two thirds of those working more than 48 hours have flexible starting and finishing times, compared with only one third of those working less than 48 hours a week.

### National statutory limits on weekly working hours

The European Working Time Directive establishes a framework for weekly working hour limits throughout the EU but Member States are free to fix lower limits in national implementing legislation. According to the recent EIRO annual report, *Working Time Developments 2007*, ten countries (including Norway) have set their statutory maximum working week at 40 hours, one (Belgium) has set it at 38 hours while 17 Member States have directly transposed the Directive’s 48 hour weekly limit.

Table 2: Statutory maximum working week, 2007

Country	Max hours per week	Some comments / qualifiers
Cyprus	48	
Czech Republic	48	
Denmark	48	must be observed on average within a period of four months
France	48	
Germany	48	no explicit weekly maximum is set in Germany; the 48-hour figure represents an average based on daily maximum rules
Greece	48	
Hungary	48	
Ireland	48	
Italy	48	
Lithuania	48	
Luxembourg	48	may be increased by collective agreement to a maximum of 60 hours during 6 weeks per year in specific sectors subject to workload peaks
Malta	48	weekly working hours may be exceeded if the worker agrees to work longer and his or her health and safety are not put at risk
Netherlands	48	must be maintained on average over a 16-week reference period, while a 55-hour average must not be exceeded over four weeks, unless otherwise agreed by the employer and trade union or works council. The absolute weekly limit is 60 working hours
Poland	48	weekly working time, including overtime, may not exceed 48 hours over a four-month reference period
Romania	48	exemptions in eleven sectors
Slovenia	48	may be extended temporarily to 56 hours, where working hours are unevenly distributed
United Kingdom	48	weekly working hours may exceed 48 hours as long as this average is maintained over a 17-week reference period
Austria	40	may be varied up to 50 hours over a reference period, by agreement, if an average 40-hour working week is maintained
Bulgaria	40	may extend to 48 hours but only involving a total of 60 working days a year and not for more than 20 consecutive days
Estonia	40	may extend up to 48 hours over a four-month period, if overtime is included
Finland	40	weekly working hours may be varied up to 45 hours over a 52-week reference period, if an average 40-hour week is maintained
Latvia	40	
Norway	40	may vary up to 48 hours as long as 40-hour maximum is maintained over a reference period of up to one year
Portugal	40	may be increased to 60 hours by agreement, if the statutory maximum is maintained on average over a reference period
Slovakia	40	may extend up to 48 hours over a four-month period, if overtime is included
Spain	40	may be higher if a 40-hour average is maintained over a reference period
Sweden	40	collective bargaining can set a different maximum, while employees may also work 200 hours of overtime a year with a maximum of 50 hours in any month
Belgium	38	

Source: *EIRO Working Time developments – 2007*

In the first, larger group of 17 countries, the statutory 48-hour maximum is in excess of average collectively agreed as well as usual or actual weekly working hours, as confirmed by Eurofound and Eurostat data. The maximum operates essentially as a safety net. In the second group of 11 countries, the national statutory maximum is much closer to average weekly working hours though there is generally scope to increase working hours in the context of working time flexibility schemes allowing weekly working hours to be varied around an average over a reference period. Because of the complexity of many countries' rules relating to overtime and variable working time, the differences in practice between countries with maximum thresholds of 40 hours and 48 hours may not be that great. The lower limit of 40 hours often serves purposes other than that of fixing a more restrictive limit on maximum weekly working hours, for example, to set a threshold after which the employer is obliged to pay overtime premia.

### The regulation of on-call work

In some countries, there appears to be increasing use of 'on-call' work or duty arrangements. Generally speaking, this is work done on an 'as-needed basis', whereby workers must be available at certain times to be called into work when required by their employer. It thus involves unpredictable or irregular working hours for the workers involved. On-call work is most prevalent in the healthcare, transport, and hotels and catering sectors.

In its judgments in the *Simap* and *Jaeger* cases, in 2000 and 2003 respectively, the European Court of Justice ruled that all time spent on-call should be classified as working time, even where the employer provides a place to sleep while the employees are not actively engaged in their duties. Both cases referred to doctors' on-call periods. The rulings have had important effects at national level as the legislation in many Member States does not regard all time spent on call as working time. One consequence of the ECJ rulings is that, by compelling Member States to consider all on-call time as working time, many employers – especially employers in the health sector where doctors in training have traditionally worked long hours and have had substantial periods of on-call time, both active and inactive – have become non-compliant with the EU directive.

Looking at national regulations, on-call work or duty is understood and regulated differently in different countries. While in some countries attention appears to centre on on-call work as an additional or integral part of a normal job, in others, such as Belgium, Italy and Norway, the focus is more on on-call work as a form of employment contract in itself, often for short hours and quite casual. Similarly, the Netherlands has specific forms of short-term on-call contracts known as 'min/max' and 'zero hours' contracts.

Collective agreements play an important role in regulation in some relevant sectors in Belgium, Denmark, Estonia, Finland, Germany, the Netherlands, Slovakia and Sweden, and to a lesser extent in Malta – where legislation does not regulate on-call work – as well as Norway and Spain.

In the context of the working time directive's 48 hour maximum weekly limit, it is on-call work involving working time additional to standard working hours that is clearly most relevant. But even here there are further distinctions in national law or collective agreements which differentiate between different forms of on-call work in terms of how they count towards weekly working hours. In Germany, for example, there is a distinction between 'background service' [*Rufbereitschaft*] whereby employees have to be available by telephone contact to be called in by their employer, and 'standby duty' [*Bereitschaftsdienst*] whereby employees have to be available for work at a place designated by their employer.

The various forms of on-call work are treated differently both in terms of pay and working time. For hospital nurses in Denmark, for example, every hour spent on call at home but without being called on to work counts as 20 minutes of effective working time while every hour spent on call at the working place, but without being called on, counts as 45

minutes of effective working time. In general, provisions relating to on-call work are often intended explicitly to deal with health sector work. In Hungary, until 2007 laws fixed an upper limit of six periods of on-call duty per month in the health sector<sup>6</sup>. In Slovenia, a law on doctor's services regulates in some detail doctor's 'turns of duty' and differentiates between these and periods of 'readiness' where they are obliged to be contactable for advice or for urgent calls.

And, in many countries, legislation imposes upper limits on on call time per se, independently of general working time restrictions. In Sweden, employees may not be on call for more than 48 hours during a four-week period. In Slovakia, the Labour Code defines separate weekly (8 hrs), monthly (36 hrs) and yearly (100 hrs) limits for 'standby work' though allowing for longer limits with the employee's consent.

Clearly, there is a great diversity of national approaches to regulating on-call work. The fact that the starting conceptions of on-call work are quite different both amongst the Member States and the European institutions has complicated interpretation of, and compliance with, the directive especially as regards obligatory periods of daily and weekly rest as well as adherence to the daily and weekly working hour limits. The 2006 EIRO annual report on *Working Time Developments* summarises court cases in ten countries in relation to on-call work, mainly in the health and residential care sectors and mainly dealing with payment for on-call time and whether on-call duties count as working time.

## Working time flexibility and work–life balance

The European Commission has made clear its preference that revisions to the directive would include new measures to 'encourage the Member States to take steps to improve the compatibility of work and family life'. This could be achieved by expanding possibilities for working time flexibility (e.g. phasing out of working hours for elderly workers, facilitation of part-time work, time credit systems). The original Directive and its consolidated revision in 2003 contain no specific provisions on work–life balance but reconciliation measures have featured in the Commission's proposed revisions in 2004 and have been retained in the Common Council Position which is currently being debated.

The new provisions, if passed, would oblige Member States to ensure that employers inform workers in due time of any substantial changes in their working time patterns and 'encourage' employers to examine requests for flexible working. Two Eurofound surveys deal in detail with conciliation issues and include questions about changeable work schedules and levels of control over working time as well as perceptions of work–life balance.

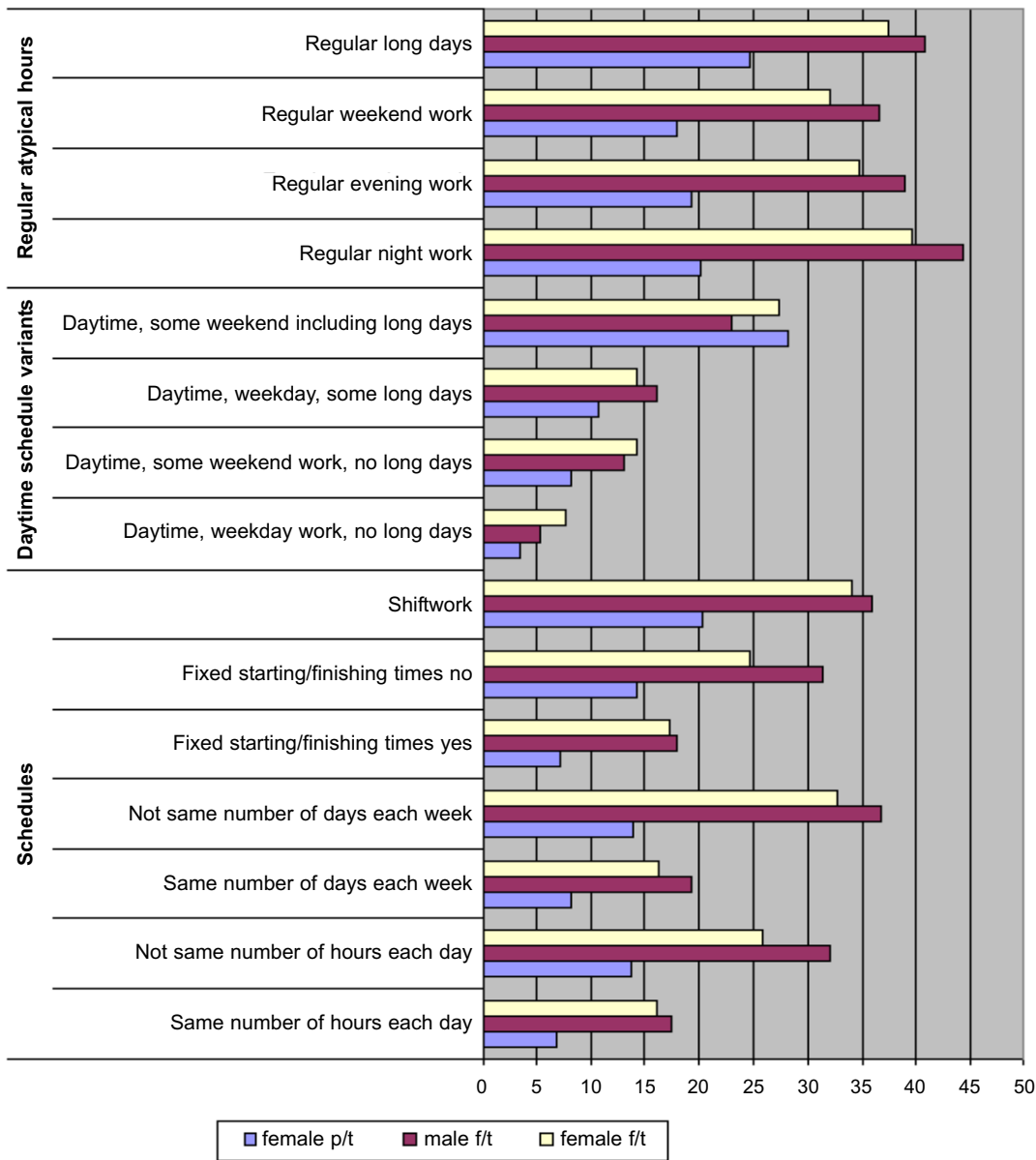
## Non-standard working hours

As we have already seen, volume of hours worked is a key factor influencing perceptions of work–life balance: the longer hours one works the more likely one is to express dissatisfaction in relation to reconciling work and non-work responsibilities. Another important factor affecting self-reported levels of work–life balance is how working time is organised both in terms of regularity, predictability and also with reference to the 'standard' working schedule (c.35-40 hours per week, daytime, weekday work).

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<sup>6</sup> This law was repealed after being found unconstitutional. For national definitions / regulations on on-call work, see EIRO(2006), p.39-46.

Figure 9: Different schedules and dissatisfaction with work–life fit (%) (male full-time /female part and full-time)



Source: 4EWCS, 2005

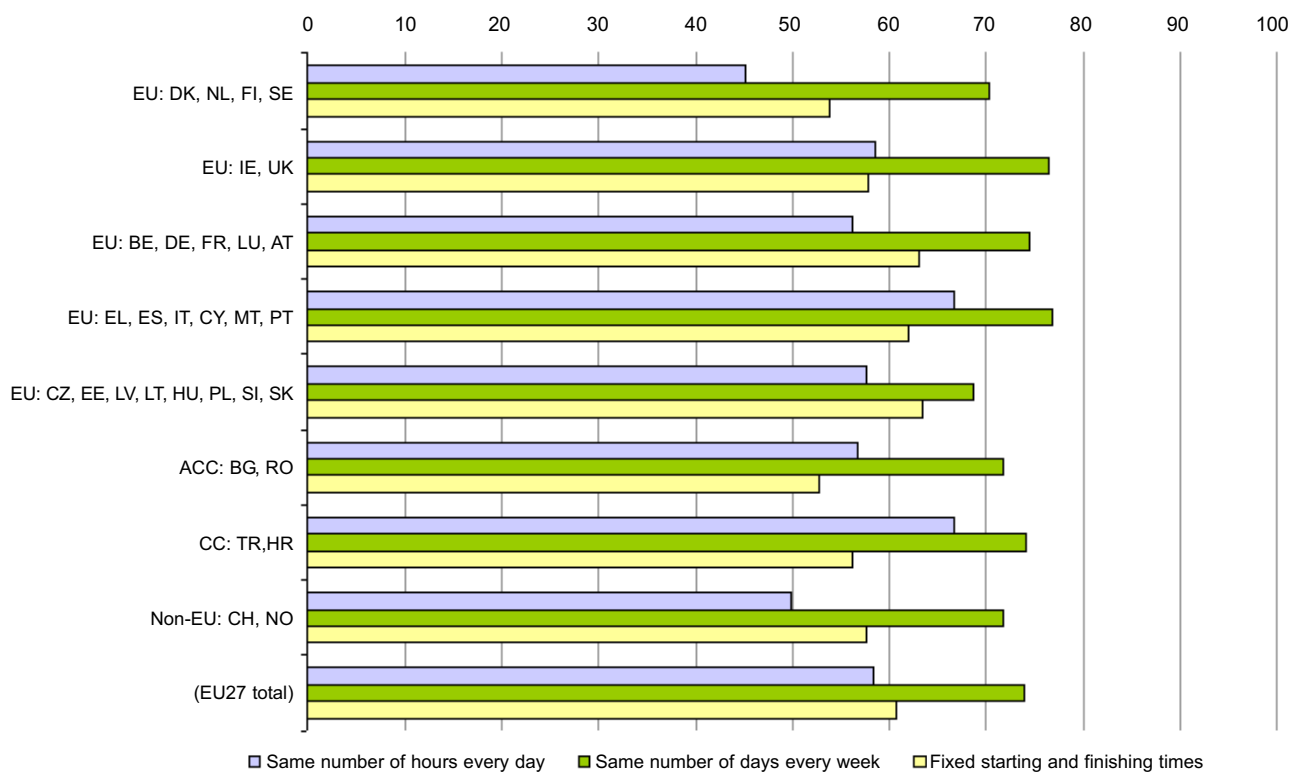
Notes: regular weekend work is defined as four or more Saturdays/Sundays worked per month; regular night work, regular evening work and regular long days (>10hours) as five or more per month in each case; male part-timers excluded due to small number of cases in individual categories. Proportions are of respondents answering 'not well' or 'not at all well' to the question 'Do your working hours fit in with your family or social commitments outside work?'.

Many societal time arrangements (shop, public institutions, school opening, etc) are organised to be broadly consistent with standard daytime working hours. It is not unexpected, therefore, that the optimal schedule from a work–life fit perspective is the standard one of daytime work during weekdays with no long days. Individual workers who regularly have to work outside these limits report more dissatisfaction with their work–life balance. Those having to carry out regular nightwork are especially affected.

Consistent and regular schedules also lead to enhanced work–life balance while any deviations from a consistent working pattern tend to raise the levels of work–life balance dissatisfaction. Working the same number of days per week / hours per day is considered preferable to working a variable number of days or hours; fixed starting and finishing times are considered preferable to variable ones.

This raises the question as to what proportion of European workers have more or less standard, unchanging working patterns and what proportion have changing or irregular working time patterns. Evidence from the 4EWCS confirms that more than half of all workers (including employees and the self-employed) work the same number of hours every day, with fixed starting and finishing times, and the same number of days every week.

Figure 10: *Regularity of work schedules: do you work...?*



Source: 4EWCS, 2005

The differences between different groups of countries in these indicators are important with a polarisation according to geographical poles: in Northern Europe, work schedules are more flexible (only around 45% of workers work the same number of hours every day, and around 53% have fixed starting and finishing times) whereas in Southern European countries, the proportion of workers with fixed schedules and fixed working hours is higher than the average (around 67% of Southern European workers work the same number of hours every day, and around 62% have fixed starting and finishing times). There is much more variation in the number and regularity of hours per day than in the number of days per week, which are much more similar. Only Eastern European countries stand out with a slightly lower proportion of people working the same number of days every week.

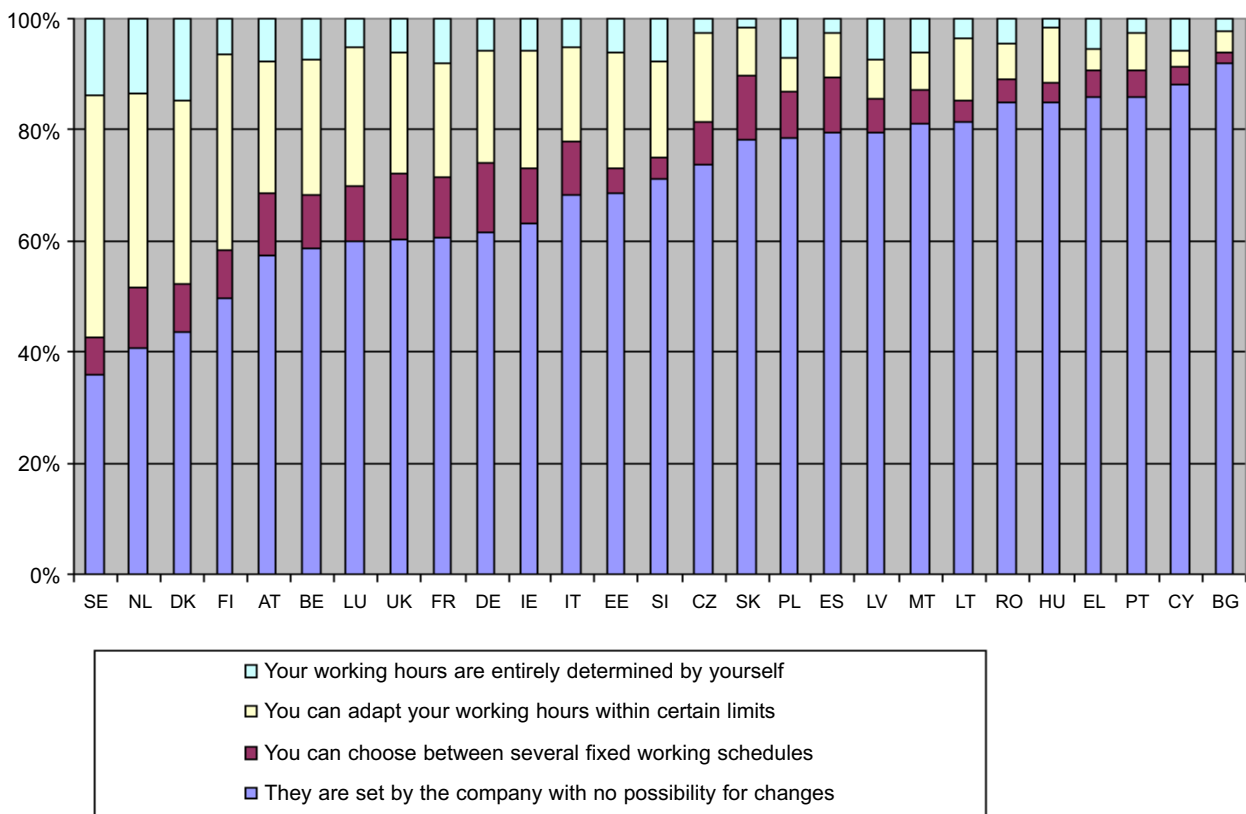
### Working time discretion

In a context of widespread discussion about the merits of flexible working time arrangements and ‘win-win solutions’ designed to meet the working time needs of both employers and employees, preferences noted above for more

traditional, fixed working schedules may appear surprising and contradictory. One possible explanation may be that reality has yet to catch up with rhetoric – that flexible working has yet to be broadly implemented in the majority of workplaces. According to this hypothesis, traditional preferences for standard working hours persist in the absence of a more visible employee-driven flexible working time model which could, and probably would, represent a more desirable arrangement to many workers, in particular those with young children or other caring responsibilities.

4EWCS data shows that two out of three (66%) European employees still have their working time arrangements set by their company with no possibility for changes. A similar percentage report working fixed starting and finishing times. Working time flexibility – even limited manifestations such as the ability to start or conclude work within a range of hours rather than at a fixed time – remains the preserve of a minority of European workers. Only in the Nordic countries and Netherlands do more than half of the workers have some measure of control over their working time arrangements.

Figure 11: How working time arrangements are set by country (employees only)



Source: 4EWCS, 2005

Where flexible working has been implemented, it does appear to have a beneficial work–life balance impact. Controlling for volume of working hours, the minority of workers that actually have flexibility or control over their working time are also those with the highest level of satisfaction with their work–life balance.

**Periods of notice regarding changes in work arrangements**

One of the proposed amendments to the Working Time Directive agreed by the Council and Commission would require employers to inform workers ‘in due time’ of any substantial changes in the organisation of their working time. This is an issue addressed in Eurofound’s first Establishment Survey on Working Time (2004–5) which may provide a useful reference for deciding what constitutes an adequate amount of advance notice.



According to information provided by managers in the company survey, the majority of employees are usually informed well in advance of such working time changes. 53% of managers state that the notification period in their establishment is two weeks or more. Another 24% informs eligible employees between four days and two weeks in advance. In only a relatively small share of establishments are employees informed less than four days in advance: In 10% of the cases the notification period is between one and three days, 7% of the establishments normally give their employees even less than one day of notice.

Table 3: Notification period for work at changing hours (shift work etc.)

Size-class	< 4 days	4 days to < 2 weeks	> 2 weeks
10 to 19 employees:	20%	25%	48%
20 to 49 employees:	18%	25%	53%
50 to 199 employees:	14%	23%	58%
200 to 499 employees:	8%	19%	70%
500 or more employees:	6%	15%	74%
<b>All size classes</b>	<b>17%</b>	<b>24%</b>	<b>53%</b>

Source: *ESWT 2004–5. Base: Establishments with employees whose working hours change regularly due to the nature of their jobs*

One note of caution should be sounded however. the probability of having to change work shifts at very short notice is much higher in smaller than in larger companies. While only 6% of personnel managers of large establishments with 500 or more employees state that they give employees a notification period of less than 4 days, this share increases to more than 20% in establishments with between 10 and 19 employees.

### Health impact of non-standard working hours

Of the different types of non-standard working time schedule, nightwork (work after 2200 hrs) is the one most associated with negative health symptoms, notably – and not surprisingly – insomnia or sleeping problems which is three times more likely to be reported by nightworkers than daytime workers. This result, based on worker’s self-reported account of their working conditions, is confirmed by managers and workers’ representatives interviewed in the Eurofound company survey on working time and work–life balance (2004–5).

The report, *Extended and unusual working hours in European companies*, based on data from the company survey, concluded that managers of establishments with unusual and changing hours report more difficulties with respect to sickness and absenteeism, motivational problems and with staff turnover than managers of establishment without unusual hours. According to managers’ assessment, ‘the situation appears to be worse in establishments that have night work and changing working hours – for both incidences, data indicate that the likelihood of encountering difficulties with sickness and absenteeism is 1.6 times greater than in establishments that do not observe such hours. As for the incidence of weekend work, data show similar results for both the cases of Saturday and Sunday work. Here, the likelihood of sickness and absenteeism problems is still 1.3 times greater compared to establishments that do not require staff to work on the weekend.’

### Some conclusions and policy pointers

- The proposed work–life balance measures are uncontroversial – and have been diluted from earlier versions – but raise the issue of whether a directive whose legal base is Article 137 – ‘to implement improvements of the working environment to protect workers’ health and safety’ – is appropriate for addressing work–life balance issues.
- The lack of clarity regarding the derogation for ‘managing executives or persons with autonomous decision making powers’ has prompted certain Member States to avail of opt-outs rather than run the risk of infringement based on a wide interpretation of those covered by the derogation. There should be guidance / further clarification about these categories of workers.
- Workers on short-term contracts or who work less than ten weeks in a year for the same employer are not covered by some of the new proposed protections applying to the opt-out – for example, the explicit upper limits of 60/65 hours per week will not apply for those availing of the opt-out. This is likely to be contested given the background that the working time directive revisions have been agreed in tandem – as a ‘package’ – with the new temporary agency directive whose guiding principle is that temporary agency workers enjoy the same rights from day one as permanent counterparts in terms of pay and leave.
- In general, the proposed revisions of the working time directive have polarised opinion amongst member states as well as the social partners. ETUC is set against most of the main revisions of what it considers a key piece of social legislation: ‘These proposals, far from improving the existing law, represent several steps backwards, undermining workers’ protection and weakening trade unions’ ability to bargain on their members’ behalf. If adopted in final legislation, they would turn the Working Time Directive into a façade without any real content, and represent the first regression ever in European legislation in the social policy field.’ On the other hand, Business Europe have indicated their support for the provisions of the Common Council position. They contend that ‘the opt-out is a vital tool for companies and many individuals value the opportunity it offers to earn more money by working additional hours’. Regarding the proposals to differentiate between active and inactive on-call time, Business Europe has commented: ‘The Council provided a sensible solution to problems arising from various cases in the Court of Justice.’

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## Annex

### Derogations and the opt-out from the Working Time Directive (2003/88/EC)

Under specific conditions, Member States may derogate from some articles of the Working Time directive. The idea of derogation is to retain the principles set out in the directive while allowing flexibility in the application of those principles.

#### *Derogations (Article 17)*

- Derogation where the duration of working time is not measured and/or predetermined or can be determined by the workers (eg managing executives, family workers and workers officiating at religious ceremonies).
- Derogation from regulation of leave, break and rest periods in accordance with a set of criteria set out in detail in the Directive, followed by examples (e.g. press, radio and agriculture). Does not allow for derogation from maximum weekly working time. Derogations are permitted on the condition that workers are afforded equivalent periods of compensatory rest and appropriate protection.
- Finally, derogations by means of collective agreements are permitted for key principles – except for maximum weekly working time. In this case, equivalent compensatory rest periods must be provided.

#### *Individual opt-out (Article 22)*

Member States may provide in their national legislation for a worker to work, on average, more than 48 hours per week, provided that:

- the worker has given – in a free and informed way – his/her individual agreement
- the general principles of the protection of safety and health of workers are applied, subject to complying with other specific conditions.

#### *Application of the derogation for managers*

The most important derogation from the working time directive 48-hour limit is that applying to ‘managing executives or other persons with autonomous decision-making powers’. The stated objective of the derogation is to allow Member States to exempt workers where the ‘duration of their working time is not measured and/or predetermined or can be determined by the workers themselves’. As evidenced in the ELFS and EWCS data cited in the text, workers likely to fall into this category tend to work very long hours. Nearly one in two ‘managers of small enterprises’ normally works over 48 hours per week as does a similar proportion of self-employed persons.

According to a British House of Lords report on the directive, uncertainty about the correct definition of autonomous decision-maker had discouraged employers from using it and had prompted them to rely instead on the voluntary individual opt-out. The same report also reported evidence given by the Confederation of British Industry that in the Netherlands all workers earning more than three times the national minimum wage are automatically exempt from the directive. The authors of the report suggested that the term should be clarified. Independently, such a clarification could help to extend the protections of the directive to those self-employed persons who may not have ‘autonomous decision making powers’. This is important given the spread of forms of false self-employment where workers are nominally self-employed but in practice have an employment relationship with a single employer and work alongside employees carrying out similar work.

#### *Application of the opt-out*

The UK was the first member state to opt out from the maximum weekly working time of 48 hours. On the accession of 10 Member States in May 2004, Cyprus and Malta also introduced a generalised opt-out. Following the rulings of the EJC on on-call time (Simap and Jaeger), France, Germany, Luxembourg and Spain put in place measures to allow the opt-out in specific sectors, in particular in the health care and hotel sectors, where working time regularly includes time spent on-call. More recent information suggests that at least 14 Member States are now utilising the individual opt-out in particular to ensure that health sector employers are not contravening the maximum weekly work limits.

While there is generally a clear division of sympathies regarding the retention of the opt-out between the two sets of social partners – with employers supporting the opt-out and unions campaigning for its abolition – there are notable counter-examples. In Malta, there seems to be strong bipartite interest to maintain the opt-out from the 48-hour limit. Trade unions as well as employers organisations are united in their opposition against the proposed phasing out of the opt-out clause. The social partners pointed to the economic benefits for both workers and employers by maintaining flexibility and thus giving workers the choice to work longer in order to improve their income.

Organisations representing Hungarian doctors petitioned for a higher working hours limit at the time of the negotiation of the Act on Certain Aspects of Healthcare Activities in 2003. One provision of the Act (subsequently repealed) was to include special premia for doctors working over 48 hours per week up to a maximum of 60 hours per week averaged over a reference period. Agreeing to voluntary working hours in addition to the 48-hour week was encouraged by a special rate 50% higher than the overtime premium, while such voluntary hours were also taken into account as an extra service period in the calculation of old-age pensions. The Hungarian Chamber of Physicians [MOK], commenting on the draft version of the Act, proposed a maximum of 72 hours a week for healthcare activities, probably, according to the Hungarian EIRO correspondent ‘on the grounds that Hungarian doctors are more interested in increasing their salaries than in reducing their working hours’. In other Member States, an important element of negotiations on working time reductions between organisations representing junior doctors and health sector employers has been to manage transitions in a way that makes allowance for the fact that overtime pay has traditionally been a significant element of junior doctors’ salaries, up to 100% in some cases.