Eurofound

Opting out of the European Working Time Directive

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European Foundation for the Improvement of Living and Working Conditions

Opting out of the European Working Time Directive

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The European Foundation for the Improvement of Living and Working Conditions (Eurofound) is a tripartite European Union Agency, whose role is to provide knowledge in the area of social and work-related policies. Eurofound was established in 1975 by Council Regulation (EEC) No. 1365/75, to contribute to the planning and design of better living and working conditions in Europe.

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Introduction

The European Working Time Directive (EWTD) 2003/88/EC guarantees maximum weekly working hours and minimum periods of rest and annual paid leave to all workers in the European Union. One of its main features is a maximum average working week of 48 hours (including overtime) as part of the provisions laying down minimum safety and health requirements for the organisation of working time.

The directive, however, also provides the option for Member States not to apply (or to opt out of) the 48-hour weekly working limit. Not all Member States allow the use of this opt-out possibility and the conditions under which it can be used vary significantly from country to country. Additionally, very little is known about its use and its impact on employers and workers.

Drafted following a request by the Committee on Employment and Social Affairs of the European Parliament, this report describes how the Member States make use of the working time opt-out, how widely it is used and what its impacts are on workers and employers. The first part presents background to the EWTD, including the provisions for opting out and their limits. The second part looks at the application of the opt-out at national level both formally and in practice. It describes briefly whether and how each Member State has transposed the option to deviate from the maximum working week and looks at the extent to which opt-outs have been used. The third part is dedicated to the current debates involving social partners and governments about the use of the opt-out and long working hours. Finally, the fourth part briefly discusses what the available research says about potential consequences of the use of the opt-out.

This report is based mainly on the contributions from Eurofound's Network of European Correspondents for the annual updates on collectively agreed working time. The contributions stem from the replies to a common questionnaire that included specific questions regarding the use and impact of the opt-out from the EWTD (see Annex 1).

European Working Time Directive

Main provisions

The Working Time **Directive 2003/88/EC** concerning certain aspects of the organisation of working time was adopted by the European Parliament and the Council of the European Union under Article 137(2) of the EC Treaty (now Article 153(2) of the Treaty on the Functioning of the European Union, TFEU) with the main purpose of establishing minimum safety and health requirements for the organisation of working time. This directive consolidates the former **Council Directive 93/104/EC of 23 November 1993** as amended by **Directive 2000/34/EC** of the European Parliament and of the Council of 22 June 2000.

The EWTD requires EU Member States to guarantee certain rights for all workers, including:

- a limit to weekly working hours, which must not exceed 48 hours on average, including any overtime;
- a minimum daily rest period of 11 consecutive hours in every 24;
- a rest break during working hours if the worker is on duty for longer than 6 hours;
- a minimum weekly rest period of 24 uninterrupted hours for each 7-day period, in addition to the 11 hours' daily rest;
- paid annual leave of at least 4 weeks per year;
- extra protection for night work.

The EWTD, built on a legal foundation focused on 'safety and health', is a very important element of the EU's social policy acquis. The directive must be understood as being firmly embedded in a wide range of international standards and fundamental rights, including conventions of the International Labour Organization (ILO), the European Social Charter, the Charter of Fundamental Rights of the European Union, and so on, which are very much interdependent.

The fact that all workers in the EU are entitled to certain limits to working hours has been clearly inscribed in the **Charter of Fundamental Rights of the European Union**, which became legally binding in December 2009 with the Lisbon Treaty. Article 31 (paragraphs 1 and 2) of the Charter provides for 'fair and just working conditions', including that:

- 'every worker has the right to working conditions which respect his or her health, safety and dignity';
- 'every worker has the right to limitation of maximum working hours, to daily and weekly rest periods and to an annual period of paid leave.'

Attention must also be paid to the so-called 'horizontal clauses', in particular the gender mainstreaming clause (Article 8, TFEU) and the social clause (Article 9, TFEU) which are to be read in conjunction with the overall social objectives of the Union enshrined in Article 3 of the Treaty on European Union (TEU). That means that in defining and implementing its social policies and activities the EU must consider all those aspects, including social progress and a high level of protection.

Additionally, the European Union Court of Justice (ECJ) has already recognised in several instances (cases such as Dellas, case C-14/04, BECTU, case C-173/99, Wippel, case C-313/02, among others) that the directive's provisions concerning maximum working time, paid annual leave and minimum rest periods 'constitute rules of Community social law of particular importance, from which every worker must benefit as a minimum requirement necessary to ensure protection of his safety and health'.

Opting out of the EWTD

Despite being of general application in the EU, the EWTD refers to some situations and conditions under which its requirements for working hours, rest, annual leave, periods of reference, and so on, can be deviated from. These provisions are generically known as derogations and, in relation to the EWTD, can take essentially three different shapes.

First, there are derogations related to specific roles such as managing executives or others with autonomous decision-making powers, specific activities or situations (for example, activities requiring a permanent presence such as security/surveillance, press, radio or television), shifts and split work, and doctors in training. These are covered in Article 17 of the EWTD and include the possibility to derogate from the maximum weekly working time of 48 hours. This means that, for example, if the Member States opt for this derogation, self-employed workers are not covered by the right to the limit to weekly working hours.

Secondly, there are derogations by means of collective agreements, which means that employers and workers' representatives (or representative organisations) can deviate from most of the EWTD provisions (including rest periods and annual paid leave) except for the provision on the maximum weekly working time of 48 hours established in Article 6 of the directive.

Finally, Article 22, paragraph 1 of the directive (see text box below), determines that, under certain conditions, Member States can decide to allow the non-application of the weekly maximum of 48 hours provided that the principle of protection of workers' health and safety is guaranteed and there is an agreement between the employer and the worker concerned. This possibility was already available in Article 18, paragraph (b)(i) of Directive 93/104/EC, and should have been reviewed before 23 November 2003 (together with other provisions of the directive).

Article 22(1) of the EWTD

A Member State shall have the option not to apply Article 6 [maximum weekly working time], while respecting the general principles of the protection of the safety and health of workers, and provided it takes the necessary measures to ensure that:

(a) no employer requires a worker to work more than 48 hours over a seven-day period, calculated as an average for the reference period referred to in Article 16(b), unless he has first obtained the worker's agreement to perform such work;

(b) no worker is subjected to any detriment by his employer because he is not willing to give his agreement to perform such work;

(c) the employer keeps up-to-date records of all workers who carry out such work;

(d) the records are placed at the disposal of the competent authorities, which may, for reasons connected with the safety and/or health of workers, prohibit or restrict the possibility of exceeding the maximum weekly working hours;

(e) the employer provides the competent authorities at their request with information on cases in which agreement has been given by workers to perform work exceeding 48 hours over a period of seven days, calculated as an average for the reference period referred to in Article 16(b).

The opt-out contained in Article 22, paragraph 1, is only applicable in relation to the maximum weekly working time (in Article 6), and not to other provisions of the directive such as minimum daily and weekly rest, paid annual leave, and limitation of night and shift work.

Limits to the opt-out

The directive does not provide explicit limits on the hours workers who opted out can agree to work; nor does it set limits on the period of time over which the opt-out will be effective. Apparently, workers can agree on working a virtually unlimited number of hours and for an unlimited period of time. However, there are two implicit limits, as identified in the European Commission Staff Working Paper about the EWTD (European Commission, 2010a). The first is that working hours cannot exceed 78 hours per week. This maximum results from the application of the minimum periods of daily and weekly rest (90 hours = 11 hours x 5 days + 35 hours of weekly rest or 11 hours x 6 days + minimum of 24 hours of rest) when deducted from the 168 hours in a week. In fact, the European Commission acknowledged this as a problem and in its 2004 proposal to amend the current directive proposed an absolute maximum limit (European Commission, 2004). The proposal suggested that ‘no worker works more than sixty-five hours in any one week, unless the collective agreement or agreement between the social partners provides otherwise’.

The second extremely important implicit limit concerns the respect for the general principles of the safety and health of workers. Article 22 states that the competent authorities may ‘for reasons connected with the safety and/or health of workers, prohibit or restrict the possibility of exceeding the maximum weekly working hours’. The reasons connected with the safety and/or health of workers under which the opt-out can be forbidden remain to be concretely defined but in its paper the Commission asks ‘whether allowing opted-out workers to work up to 78 hours per week, on average, for a prolonged time could be compatible with the health and safety principles underlying the Directive’ (European Commission, 2010a).

Further, the directive does not indicate whether the limits of working time and rest periods should be applied per worker or per contract. If the limits are applied per worker, that would mean that the total number of hours worked by a worker, regardless of the number of employers he or she works for, must respect the directive's provisions. If they were set per contract, the limits would be applicable to each employment relationship separately, regardless of the total number of hours worked. In practice, if the limits to the opt-out are set per contract, there might be situations in which workers can work well beyond the maximum set in the directive itself (European Commission, 2010a). A similar problem takes place with the application of the opt-out: should the opt-out provisions be applicable to the worker, covering all the employment relationships he or she might have, or to each employment contract separately?

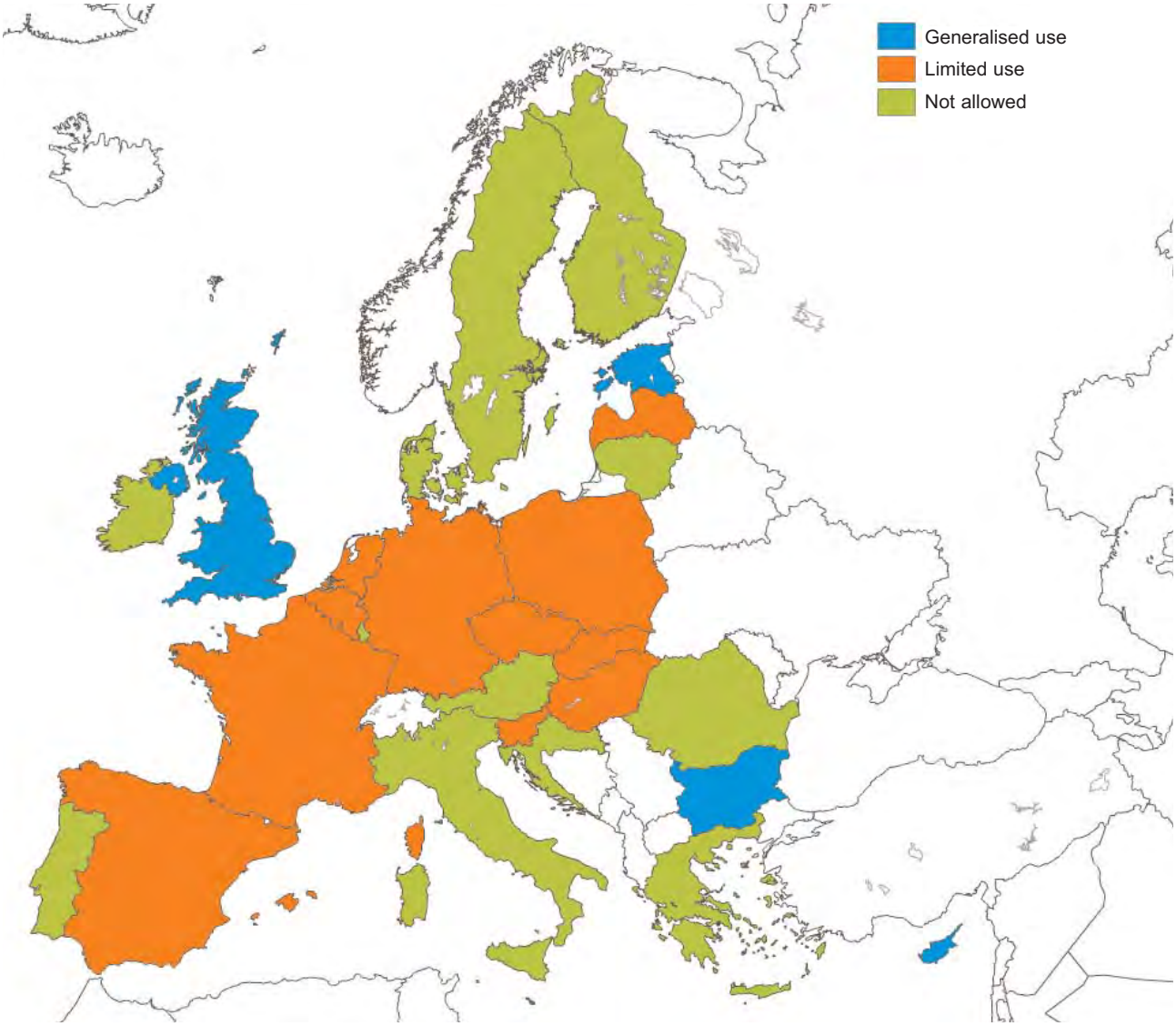
In that respect, the provisions in place in the Member States vary. In Malta, Latvia, Poland, Slovakia and Spain, for example, the application of the opt-out takes into consideration each employment contract, which means that in practice workers may accumulate opt-outs above the implicit limits contained in the EWTD. By contrast, the provisions in Bulgaria, Germany, Hungary and the United Kingdom tend to be more protective as the total number of hours worked per worker has to comply with the directive independently of the number of jobs they might have. In **Latvia**, for example, it is possible for agreed working time to exceed 40 hours and even 48 hours, if workers have concluded full-time, or even part-time, employment contracts with several employers. Latvian labour law does not prohibit employment with several employees and does not restrict the accumulated working time. As a consequence, the reporting of total working time is not a requirement, except for young workers (for example, the labour law establishes that the time spent on studies and work shall be summed and may not exceed 7 hours a day and 35 hours a week for those under 18). It is therefore not possible for employers and inspection authorities to know how many working hours are agreed in different individual employment contracts.

All things considered, it seems that there are also strong arguments to support an application of the directive, and therefore of the opt-out, in absolute terms. This means that, if allowed, the opt-out should apply to the worker, taking into account all the hours worked in all his or her jobs, and not to the different employment contracts separately. First, the Charter of Fundamental Rights, which is legally binding, refers to workers and not employment relationships. Long working hours accumulated in different jobs might have serious negative impacts on the safety and health of workers whereas employment relationships are 'immune' to safety and health issues. Second, a qualified or per-contract application would attribute all the responsibility to the individual, who could inadvertently end up working very long hours and disregarding his or her own safety and health. Who keeps track of all situations and informs workers that they might be harming themselves by opting out of the EWTD in their various jobs? Self-motivation may be important to explain long working hours but external factors such as work schedules, financial rewards, career opportunities and market competition can also force people to work above the limits advisable for their safety and health.

Opt-out provisions in the EU Member States

The EU Member States can be divided into three groups according to the use of the opt-out under Article 22(1) of the EWTD (referred to as individual opt-out or just opt-out hereafter). There is a group of five countries where the individual opt-out can be used irrespective of the sector of activity or occupation and a group of 11 countries where the opt-out can (or could) be used only in certain sectors or occupations. The remaining countries do not allow the use of the opt-out (Figure 1).

Figure 1: *Use of the EWTD Article 22 opt-out by the EU Member States*



Source: *Eurofound's Network of European Correspondents; information as of January 2015*

The following sections describe the opt-out provisions in all the EU Member States as of the beginning of 2015. A table summarising the main elements of those national provisions can be found in Annex 2.

Opt-out provisions

General use of the opt-out

The five EU Member States that allow the use of the opt-out, irrespective of the sector of activity or occupation, are Bulgaria, Cyprus, Estonia, Malta and the United Kingdom. The main requirements for the application of the individual opt-outs in these countries follow very closely the conditions defined in points a) to e) of Article 22 of the EWTD (see text box above) and are described briefly here.

Bulgaria harmonised its labour legislation before entry into the EU in 2007. The transposition of the EWTD was one of the major changes adopted at the time. The country's stance regarding this transposition was established after discussions in a tripartite working group. The main motivation of the government (which was preserved during the subsequent discussions concerning the eventual revision of the directive in 2007, 2008 and 2009) is that the opt-out allows workers to work more hours if they wish to further their economic interests. Article 113 of the Labour Code stipulates that the maximum hours of work under an employment contract for additional work, along with the duration of working time in the main employment relationship cannot be more than 40 hours per week for workers under 18 years of age and 48 hours per week for workers over 18. Where there is written consent, workers can work more than 48 hours (or 40 hours for those under 18). In all cases, the total hours of work may not infringe the uninterrupted minimum daily and weekly rest periods established by the Labour Code.

In **Cyprus**, Article 7.4 of Law 63(I)/2002 allows for use of the individual opt-out but subject to the general principles of the protection of health and safety of workers. In particular, it states that any of the first three sections of Article 7 – maximum working week, mode of calculation, and reference period – which are subject to the general principles of the protection of health and safety of workers, may not apply under the following five conditions:

- the worker consents to perform the work concerned;
- the worker is not subjected to any adverse consequences by his/her employer if he/she does not agree to perform such work;
- the employer keeps up-to-date records of all workers engaged in such work;
- the records are placed at the disposal of the competent authority (Department of Labour Relations of the Ministry of Labour, Welfare and Social Insurance) which may prohibit or restrict the possibility of exceeding the maximum weekly working hours for reasons of the health and/or safety of the workers;
- the employer provides the competent authority at its request with information regarding the consent of the workers.

In relation to a worker's consent, the law does not explicitly state that there should be written consent. However, according to the provisions of Article 20d of the same regulation, inspectors can have access to the records that are related to the organisation of working time at any time and can ask for any relevant proof. It can be assumed that 'records' mean those in written form.

In **Estonia**, according to the Employment Contracts Act (2009) Article 46, it is possible to opt out and not apply the limit on working time. In general, working time shall not exceed on average 48 hours per week over a calculation period of up to four months. However, an employer and employee may agree on longer working hours than the 48 hours. The working time must not exceed 52 hours on average per week over a reference period of four months. The same regulation establishes that the agreement must not be detrimental to the employee's health and safety.

The employee may cancel the agreement at any time, notifying the employer two weeks in advance. An employee has the right to refuse to work overtime on the basis of this agreement, and the labour inspectorate has the right to prohibit or limit overtime work if the employer fails to fulfil the conditions, including if the agreement is detrimental to the employee's health and safety. The employer shall keep separate accounts of employees working on the basis of this agreement and submit these to the labour inspector and the employees' representatives at their request.

In **Malta**, there is provision to exceed the 48-hour weekly working limit. Regulation 20 of the Organisation of Working Time Regulations (2003) states that 'no worker shall be required to work more than forty eight hours over a seven-day period … unless the employer has first obtained the worker's agreement to perform such work'. The regulation covers

the whole economy, applying to all workers in all sectors of activity. It states that employees who do not agree to perform such work shall not be subjected to any disadvantage by the employers. The employer is obliged to keep updated records of workers working more than 48 hours and to place such records at the disposal of the Director of the Department for Industrial and Employment Relations. The director has the right to prohibit or restrict the possibility of exceeding the maximum weekly working hours for reasons of workers' health and safety. There is consensus among the major political parties and social partners in Malta that the opt-out clause in the EWTD should be retained.

In the **United Kingdom**, workers aged 18 and over can choose to opt out of the 48-hour week, either indefinitely or for a limited period. The opt-out must be voluntary and in writing. It cannot be contained in an agreement which covers the whole workforce. Employers can ask individual workers if they would be willing to sign the opt-out. Workers cannot be dismissed or treated unfairly (for example, refused promotion) for refusing to sign an opt-out agreement. A worker can cancel their opt-out agreement whenever they want (giving their employer at least seven days' notice), even if it is part of their employment contract (UK Government, 2015a).

For some specific types of workers the opt-out cannot be invoked. Employers must not allow the following staff to opt out:

- workers on ships or boats;
- airline staff;
- workers in the road transport industry, such as delivery drivers (except for drivers of vehicles under 3.5 tons using Great Britain's domestic drivers' hours rules (UK Government, 2015b);
- other staff who travel in and operate vehicles covered by EU rules on drivers' hours, such as bus conductors;
- security guards on vehicles carrying high-value goods.

Restricted use of the opt-out

The countries where the use of the opt-out is (or was) possible only in certain sectors or for certain occupations are Belgium, the Czech Republic, France, Germany, Hungary, Latvia, the Netherlands, Poland, Slovakia, Slovenia and Spain. The common feature in these countries is that most of the opt-out provisions cover only the health and/or emergency sectors (or typical occupations of those sectors, such as doctors, nurses and firefighters) or are related to jobs demanding a significant amount of on-call time.

The situation in most of these countries has not changed significantly in recent years. The Czech Republic and Spain are the exceptions. The provisions for the individual opt-out in these two countries were provisional and have expired in the meantime.

The main provisions and circumstances under which the individual opt-outs can (or could, in the case of the Czech Republic and Spain) be resorted to in this group of Member States are described briefly below.

In 2009, the European Commission criticised **Belgium** for the fact that medical professionals were excluded from the working time provisions in the labour law. In response, the Law of 12 December 2010 was passed. It regulates the working time of doctors, dentists, veterinarians, candidate doctors in training, candidate trainee dentists and student interns. For these groups there is now a maximum working time of 48 hours per week on average over a period of 13 weeks. The working hours in any given week cannot exceed 60 hours. Workers in the above-mentioned occupations should also never work more than 24 consecutive hours. Exceptions are allowed only in cases of force majeure. If an employee has worked more than 12 consecutive hours, he or she must rest at least 12 hours before returning to work.

The very specific possibility of individual opting-out in the Belgian context is that employers may conclude individual agreements with workers to perform duties outside the 48-hour maximum working week, on a voluntary basis. The written agreement must include the wage premium for the additional services, which cannot exceed 12 hours per week. The employers are obliged to keep records of these agreements for five years in the premises and make them available to the labour inspectorate. The employee may refuse at any time to take on the additional work and cannot be treated detrimentally for doing so. In the public sector, a comparable ruling exists for employees of emergency posts (medical staff and firefighters). The individual opt-out is possible for a maximum 10 hours above the 38-hour maximum and in very particular cases with a possible maximum of 52 hours.

In the **Czech Republic**, the derogation from the EWTD as per its Article 22 was applied temporarily, from October 2008 to December 2013, to medical staff in the healthcare sector. An extension of the 48-hour weekly working limit was allowed by Article 93a of the Labour Code (Act No. 262/2006, as amended by Act No. 294/2008), which stipulated that employees in healthcare facilities with continuous operation could agree with employers on a higher number of overtime hours than what would correspond to the normal statutory limit. The reason for the derogation was the shortage of medical staff. In addition to the conditions that result from Article 22 of the EWTD, the Labour Code stipulated the maximum number of overtime hours above the statutory weekly limit, that is on average 8 hours per week (12 hours per week in the case of emergency medical services) within a compensatory period of 26 successive weeks, unless a collective agreement extended this period to the maximum of 52 successive weeks. The agreement between an employer and an employee on the extension of overtime hours had to be concluded in writing, could not be concluded during the first 12 weeks from the date of commencement of the employment relationship, could not be agreed for a period longer than 52 consecutive weeks, and could be cancelled with immediate effect, even without stating any reason, within a period of 12 weeks from its conclusion. The agreement could be terminated later on any grounds or without stating any reason with a notice period of two months, unless a shorter notice period had been agreed (the same notice period had to be agreed both for the employer and for the employee). The temporary derogation was not extended. The Ministry of Health formally forbade all illegal practices by ensuring that the legal framework corresponds to the European legislation.

The information available regarding **France** is rather scarce. The opt-out has been implemented in a very limited fashion and through scattered pieces of legislation (the Commission working paper of 2010 refers to Decree No. 2002-1421 of 6 December 2002 and following ones, and the Decree of 30 April 2003). The current situation allows excess hours to be worked on a voluntary basis by doctors and pharmacists in public health services, but there is not always a legal requirement of individual consent in advance.

In **Germany**, according to the Working Time Act (Arbeitszeitgesetz), 8 hours of work per day are the standard. The act, however, allows working hours to be temporarily extended up to a maximum of 10 hours a day, if within 6 months, or 24 weeks, an average of 8 hours a day is not exceeded. This possibility existed even before the EWTD came into force; there has been no recent change to the Working Time Act in this respect. The opt-out is subject to regulation by collective agreement or works council agreement or, in the absence of an agreement, to approval by the labour inspectorate.

That means that the first condition for such deviations is the existence of a collective agreement that allows them in principle, and the second condition is the individual consent of the employee. There are various collective agreements in the public sector and most notably in healthcare which provide for deviations under the conditions described above. Usually, an upper limit is set above which no deviation is possible. For example, the general framework agreement for the public service – special section for hospitals (Tarifvertrag öffentlicher Dienst, TVöD – Besonderer Teil Krankenhäuser, BT-K) allows a maximum working week for hospital doctors of 54 and 58 hours, respectively, depending on the workload involved in their position.

Public civil servants (Beamte) are not covered by the Working Time Act but by the respective laws regulating their working time (Arbeitszeitverordnung) at federal (Bund) or the federal state level (Länder). The provisions concerning deviations for civil servants with a substantial amount of on-call work, however, are similar to the Working Time Act. The individual consent of the civil servant is equally imperative and there is also an upper limit which, for example, at federal level, is set at 54 hours per week. As most firefighters are public civil servants they also fall under these provisions.

In **Hungary**, the functioning of the healthcare system has long been hampered by a shortage of qualified personnel. Consequently, the government and the parliament decided to derogate from the 48-hour weekly working time limit of the EWTD as long ago as 2003. The modifications have confirmed the opt-out clauses while fine-tuning the legislation's wording to align it fully with the EWTD, the relevant European judgements and the new Labour Code (Act 1 of 2012).

Healthcare workers may undertake extra work above the normal weekly 40 hours or maximum average of 48 hours. This voluntary extra work can take the form of on-call time or 'ordinary' overtime. During the on-call time health workers only perform duties which are necessary for the smooth functioning of the healthcare institutions or cannot be delayed until the beginning of the regular working hours the following day. The on-call time is considered as working time – in other words, both the time of the actual medical activities and the time when the worker is ready and prepared to undertake these activities whenever requested. During ordinary overtime, which is much less frequently used in the healthcare sector, health workers perform the same medical activities as during normal working hours.

Extra work should not exceed 12 hours per week on average, or 24 hours per week, if the extra work covers exclusively performing on-call medical duties during on-call time. In practice, this means that normal working hours plus on-call time plus additional ordinary overtime together cannot exceed 60 hours a week, or 72 hours if the worker performs exclusively on-call duties during on-call time. Medical on-call time and ordinary overtime together should not exceed 416 hours a year (taking into consideration 40 working hours per week as the basis).

The requirements for the use of the opt-out in the Hungarian healthcare sector follow those set in Article 22 of the EWTD, including that:

- the healthcare workers cannot be forced to undertake extra work;
- worker and employer have to conclude a written agreement for the extra work;
- the agreement can be concluded for an indefinite period;
- the employer has to keep records of the extra work performed;
- the healthcare state administration may prohibit or restrict work above 48 hours per week due to professional reasons.

In **Latvia**, the Medical Treatment law, adopted on 12 June 1997, was amended on 18 April 2009 to set forth specific regulations regarding working time extension for medical practitioners. The latest amendments, on 21 June 2012, specify that these norms are applicable also to non-medical emergency service team members. The opt-out is applied to ensure general access to medical treatment, upon the initiative of a medical practitioner or a medical treatment institution.

The law determines that the norms of employment relations are applicable to a medical practitioner insofar as it is not specified otherwise in the Medical Treatment law. This law allows the extension of normal working hours of a medical practitioner as long as they do not exceed 60 hours per week and 240 hours per month and the general principles of work safety and health protection are observed. Workers who do not agree with an extension of the normal working hours

cannot be penalised or unfavourably treated. The institution concerned must receive written consent for the extension of working hours from the workers, must keep records of these cases and must make all the related information available to the labour inspectorate.

In the **Netherlands**, the law amended in 2005 allows working beyond the legal maximum of 48 hours per week in jobs for which on-call time is important, such as health service workers or firefighters, by using the opt-out. Its use must comply with the following requirements:

- only applicable to workers whose jobs involve on-call time;
- required for continuity and quality of service provision;
- cannot be avoided by a different organisation of work;
- requires a collective agreement and the individual consent of the worker concerned;
- applicable only where immediate compensatory rest is provided for any missed daily or weekly rests;
- maximum 60 hours per week including on-call time, averaged over 26 weeks.

In **Poland**, according to Article 96 of the Act on Medical Activities of 15 April 2011 (*Ustawa o działalnosci leczniczej*), workers in medical occupations can agree, in writing, to work more than 48 hours per week. Polish legislation follows the provisions of Article 22(1) of the EWTD as employers are not allowed to discriminate against employees for not agreeing to opt out (Article 96 point 4). Work which exceeds 48 hours per week must be remunerated in the same way as overtime (Article 96 point 7 of the Act on medical activities and Article 151(1) of the Labour Code).

In **Slovakia**, the opt-out is possible for healthcare workers. According to the Labour Code, where the EWTD is implemented, weekly working hours may be longer than 48 hours for employees in the healthcare sector. Overtime work for a healthcare employee may not exceed on average 16 hours per weeks in a period of at most four consecutive months (if the employer has not agreed a longer period with the employee representatives; in any case, at most 12 consecutive months). This implies that the maximum weekly working time of these employees can be 56 hours. Nevertheless, the total overtime work of healthcare workers must not exceed the allowed maximum 400 hours in a year.

In **Slovenia**, the opt-out is only used in the health sector. Article 41b of the Medical Services Act 2006 and Article 52 of the Health Services Act 2004 provide that a worker (including medical workers in hospitals or health centres) may work longer than the usual limit (48 hours per week, averaged over a reference period), if the employer has first obtained the worker's agreement. The protective conditions from Article 22(1) (a) to (e) of the EWTD appear to have been correctly transposed. The Health Services Act also specifies that the opt-out agreement should indicate the number of weekly overtime hours, and the period for which the opt-out remains valid. The opt-out is understood to be widely used within the Slovenian health sector, although no statistics are available. There have been no recent legislative changes regarding regulation of overtime work in the sector.

The 'Framework Statute of statutory staff in health services' (Law No. 55/2003) introduced a limited opt-out in **Spain**. It applied only to doctors and nurses in public health services, and only where necessary to ensure that on-call services could be provided. By request of a health centre or hospital, a worker could agree to work in excess of the maximum 48 hours in a week. The agreement should have been a freely given individual consent in writing of the worker concerned. An opted-out worker could not exceed the normal 48-hour limit by more than 150 hours in total per year (equivalent to a total working time of slightly over 51 hours per week, if averaged over 12 months). This provision was transitional as it was destined to expire 10 years later, in 2013 (as indicated in the sixth transitory provision of the Law).

Since December 2013, with the expiry of the transitional provision, the opt-out clause is no longer in force. This relatively recent change touches on a controversial issue among health professionals. The fact that the public health system is regulated by autonomous communities (at a regional level) as well as the organisational complexity of health centres concerning shifts and on-call work make it even more difficult to adapt to these new working time conditions (González Sánchez, 2014). In May 2014, the Medical Trade Union of Seville (Sindicato Médico de Sevilla) claimed that there was still a lack of regulatory definition regarding the working conditions of doctors working in 'reachable on-call' ('guardias localizadas') (Sindicato Médico de Sevilla, 2014).

Opt-out not allowed

Austria, Denmark, Finland, Greece, Ireland, Italy, Lithuania, Luxembourg, Portugal, Romania and Sweden are the countries which did not avail of the possibility to opt out from the weekly maximum of 48 hours. Croatia, which joined the EU in 2013, is now also part of the group. However, in practice, Austria could now be omitted from this group of Member States because of the introduction, in 2015, of opt-outs for hospital doctors.

A representative survey commissioned by the Austrian Medical Chamber, composed of 2,000 telephone interviews with hospital doctors and carried out in 2013 by the Institute for Empirical Social Studies, shows that the average weekly working time decreased from 59 hours in 2006 to 54 hours in 2012. A majority of respondents stated that they would like to have an average weekly working time of 42 hours. Moreover, 76% argued for a compulsory decrease of the limit of a single working period down to 25 consecutive hours.

The Hospital Working Time Act (Krankenanstalten Arbeitszeit Gesetz, KA-AZG), in place since 1 January 2015, temporarily introduced the opt-out for doctors working in hospitals in Austria. It implements an individual opt-out accompanied by a step-by-step reduction of the maximum working week to 48 hours until 2021. Until the end of 2017 the opt-out is limited by a maximum of 60 hours a week, and from 2018 to mid-2021 the opt-out clause will be reduced to a maximum of 55 hours a week. From mid-2021 there will be no opt-out clause any longer. Even though the working time of hospital doctors can then still amount to 72 hours in particular weeks, the average calculated over a four-month period has to be 48 hours. The reference period can be extended up to 52 weeks but this would require a works agreement at hospital level. The maximum duration of one working period will also be decreased in stages from 32 or 49 (on weekend inclusive stand-by) down to 25 hours.

Extent of use of opt-out

Now that the existing provisions for the individual opt-out in the Member States have been briefly described, it is important to assess to what extent they have been used in practice.

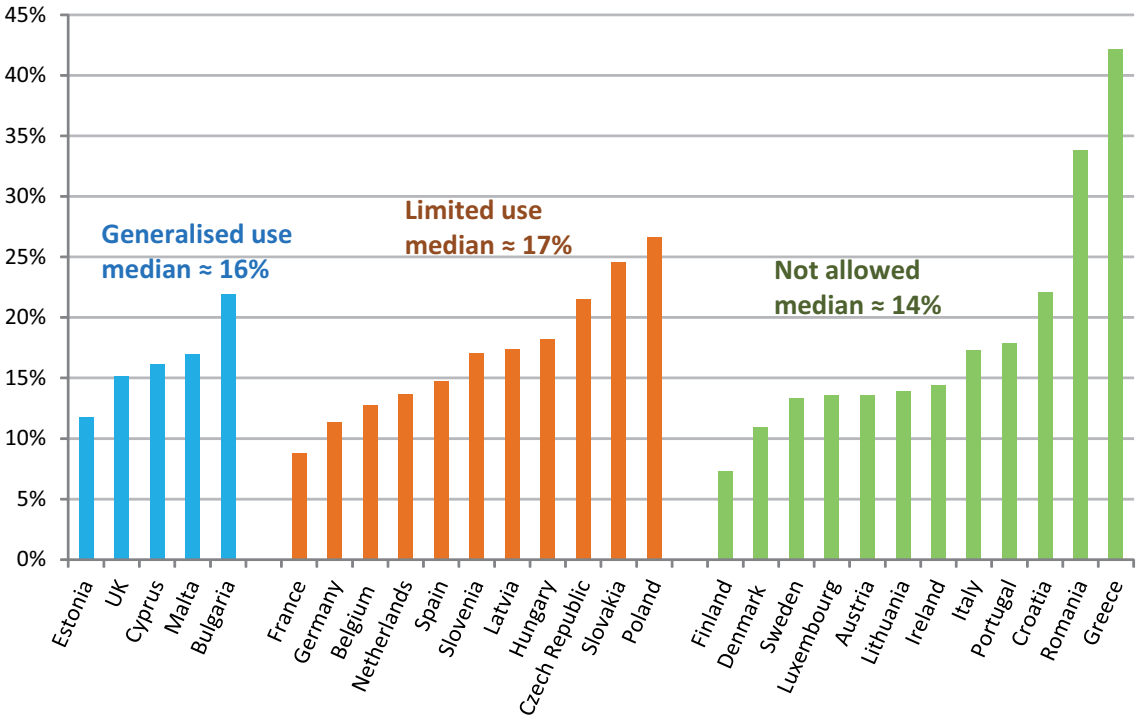
According to Article 22, paragraph 1, of the EWTD, the employers are supposed to keep up-to-date records of all workers who carry out such work and place them at the disposal of the competent authorities. This means that, in principle, it should be relatively simple to collect information about the number and main characteristics of the opt-out cases in each Member State. However, this is not the case. It is extremely difficult to find any publicly available data related to opt-outs in most Member States with such provisions.

The most notable exception is perhaps the United Kingdom, where data from the 2011 Workplace Employment Relations Study (WERS) outlines the use of the opt-out practice in the UK (BIS, 2013). In 32.4% of the surveyed workplaces there were at least some workers who had signed an opt-out agreement. In 15.6% of workplaces all employees had signed an opt-out agreement. The highest rates are found in construction, other business services, and transport and communication. In addition to data on the use of the opt-out, WERS also reports that some 11.5% of all employees surveyed usually worked more than 48 hours per week, with the highest rates in transport and communication, construction and education.

A report published by the UK Department for Business, Innovation and Skills (BIS) in December 2014 into the impact of the EWTD on the UK labour market summarised a range of evidence relating to the working time regulations in the UK (BIS, 2014). It notes that Work–Life Balance Employer Surveys and other surveys indicate lower use of the opt-out than reported in WERS, though 'it is clear that many UK businesses use the opt-out'.

Data from Eurofound's fifth European Working Conditions Survey may shed some light on a potential relationship between the existence of opt-out provisions and the share of workers in the Member States declaring that they work more than 48 hours a week (Eurofound, 2012). Figure 2 depicts the share in each of the Member States, which are grouped by 'type of opt-out provisions', but the result is rather inconclusive. The median of the group of countries without the opt-out is, in fact, slightly lower than the other groups where provisions for opting out exist. Nevertheless, it is in Romania and Greece, where the opt-out is not allowed, that the shares of workers reporting that they work over 48 hours per week are also higher than everywhere else.

Figure 2: *Share of workers reporting that they usually work more than 48 hours per week (including main and second job), EU Member States, 2010*



Source: *Fifth European Working Conditions Survey*

A potential relationship between opt-out provisions and a culture of long working hours does not emerge here, which seems to indicate that the roots of long working hours should perhaps be investigated within the context of work and working time organisation at the workplace level and even national traditions and customs, for example.

It is interesting to note that, according to Eurofound research on the institutional framework influencing how working time is regulated, in the countries with 'generalised use' of the opt-out the negotiations at company and individual levels are, beyond the national legislation, the most important determining factor for establishing workers' weekly working time (Eurofound, forthcoming). In the United Kingdom, at least, this means weaker or non-existent infrastructures for collective bargaining and therefore reduced bargaining power for the individual workers in relation to their working time (Barnard et al, 2004).

Compulsion and compliance

The lack of information about the extent and characteristics of use of the opt-out and the doubts about where the boundary lines should be drawn prompts additional questions about the level of compliance with the established rules. Some of these questions relate to the conditions under which the agreements to opt out are signed. It is not certain that all those signing the agreements to opt out are doing so of their complete free will. According to a 2004 report by the BIS, in the **United Kingdom**, there have been claims of workers being pressured into signing the opt-out. The report refers to some examples.

- Evidence provided by the Trades Union Congress (TUC) to the House of Lords EU Committee in 2004 suggested that approximately a quarter of those working long hours 'faced some kind of compulsion to sign the opt-out, although the evidence was based on "some quite limited polling"'.
- Some situations of employers pressuring individuals to opt out have been cited in Cambridge University research carried out for the European Commission; the case studies in the banking sector showed in some instances it was 'compulsory' for workers to sign the opt-out as it took the form of a clause of the employment contract offered to them.
- A 2001 survey of workers' experiences of the Working Time Regulations found that '23 per cent of long hours workers who had not signed an opt-out said they had experienced employer pressure to work longer, around half of whom thought it was understood as a condition of working at their workplace'.
- A 2004 survey by the Charted Institute of Personnel and Development (CIPD) found that 21% of those who had signed the opt-out 'felt a certain degree of employer compulsion, although this was based on a small sample' (BIS, 2014).

The labour inspectorate in **Slovenia** in its Annual Report for 2013 showed that the share of overtime work is increasing to a significantly greater extent than allowed by labour legislation. The main impacts of the derogations from the maximum 48 weekly hours are violations regarding recording, assignment and redistribution of overtime work at the last minute without written instructions. Some employees therefore work 50 or more hours of overtime per month. The Trade Union of Metal and Electrical Industry (SKEI) has also reported on the practice of some companies where employees work at least 56 hours a week, throughout the year, with the employers often failing to pay them for overtime work.

There is no evidence of whether similar situations are taking place in other Member States. In 2007, the Economic and Scientific Policy Department of the European Parliament drew attention to the fact that all the Member States infringed the EWTD in one way or another in relation to the legal provisions related to on-call work, including reference periods, rest periods and multiple contracts. At the time, the department suggested a more detailed analysis of the legislative situations in the Member States regarding the implementation of the EWTD (European Parliament, 2007). Similarly, the current lack of information about the level of compliance with the rules for use of the opt-out jeopardises a well-informed debate. In fact, it also raises questions about the adequacy of resources devoted to keeping track of and controlling the use of this important exception to the EWTD.

Debate on the opt-out and related matters

In general, there are opposing perspectives in relation to the use of the opt-out and, in particular, to the individual agreement between employer and worker. On the one hand, some actors insist that employers need a degree of flexibility while individual workers should have a choice on their maximum working hours, and the opt-out allows both. On the other hand, some stakeholders see the individual opt-out as undermining the basic principle of the EWTD, the purpose of which is to protect the health and safety of workers and prevent the exploitation of individual workers' unequal bargaining position. This section briefly describes the main recent discussions and debates about the opt-out and related

subjects. In fact, as will be shown, often the discussions are about long working hours and not specifically about opting out of the EWTD.

Debates over the opt-out

According to the information provided by Eurofound's Network of European Correspondents, some of the 12 countries that do not allow individual opt-outs from the regulations on the maximum weekly working time have ongoing issues or debates about the opt-out. In Croatia, the opt-out has been touched on in the context of wider discussions about reforms of national labour legislation. In the Czech Republic, France and Spain, discussions are taking place around the specificities of the health sector. Greece, Ireland and Italy have been referred by the European Commission to the ECJ for not complying with the EU rules on working time.

Opt-outs in the framework of labour legislation overhaul

In 2014, the **Croatian** government opened negotiations with the social partners on a new labour law. In relation to working time, the proposal was to apply a reference period of six months over which the average working time (including overtime) must not exceed 48 hours a week, with a weekly maximum of 56 hours. In addition, this reference period could be extended up to 12 months in collective agreements. The government also considered the possibility of regulating questions such as the redistribution of working hours, shifts and overtime by collective agreements and employment rules depending on the specifics of certain industries and professions.

The possibility to agree in writing to different arrangements of working time (opt-out) was also considered in these negotiations. The Croatian employers' representative organisations supported the government's push towards what was considered a greater liberalisation of working time. By contrast, the trade unions firmly opposed the idea of liberalisation of working hours and underlined that the provisions on working time are key provisions of the labour law in terms of harmonisation of obligations with family life and work. The workers' representatives pointed out the need to look at both sides of the employment relationship and not deem it an exclusive right of the employers to organise the work only according to their needs.

Opting out in the health sector

If the opt-out is used by institutions which have to find solutions to overcome staff shortages and guarantee a continuous provision of health services, the risks associated with working long hours can spill over from the medical staff to patients. Patients can suffer because of inadequate treatment due to mistakes and poor judgement by staff suffering from fatigue as a result of being asked to work more hours.

In the **Czech Republic**, debates over the derogations from the EWTD during 2014 focused on the expiry of the derogation in the healthcare sector as of 31 December 2013. The first months of 2014 showed that healthcare facilities were not prepared for the change in the organisation of working hours, in particular due to a lack of doctors and a lack of budget for new positions. There is evidence that the provision of permanent healthcare has not been possible without the use of 'contracts for services' (agreements to complete a task or perform some work which do not create an employment relationship). Both the Czech Medical Chamber (ČLK) and healthcare trade unions (in particular the Czech Doctors' Trade Union, LOK–SČL) criticised this practice, which they believe is in contradiction with both Czech and European legislation, and asked employers to comply with the law. Among other objections, they warned of a high risk of mistakes made by overworked doctors and called for greater support for doctors, improved medical education and higher salaries. Both trade unions and employers in the sector criticised the government and especially the Ministry of Health for a loose approach and reproved them for not having looked for solutions while the derogation was still valid.

The Ministry of Health, Ministry of Labour and Social Affairs (MoLSA) and its subordinate body the National Labour Inspectorate (SÚIP) have provisionally tolerated the existing practice in the absence of other solutions. The issue of

overtime in healthcare was, nevertheless, intensively discussed throughout 2014. The new Minister of Health Svatopluk Němeček (Czech Social Democratic Party, ČSSD) promised the social partners that he would prepare systematic measures to solve the situation in accordance with the requirements of trade unions and ČLK. He said the existing practice should not be tolerated starting from 2015. Following consultation with all relevant stakeholders, the minister presented a reform of the educational system in healthcare, which should contribute to a more efficient and balanced use of capacities of medical staff. Amendments of relevant legislation will be approved during 2015.

A position paper of the **French** anaesthetists' trade union (Syndicat National des Praticiens Hospitaliers Anesthésistes Réanimateurs) pointed out the dangers of on-call time and opting out of the maximum weekly working week for both doctors and patients. It showed, for example, how the fatigue associated with long working hours is likely to cause medical mistakes and how prolonged working hours impact negatively on doctors' reconciliation of working and private life (SNPHAR, 2004).

In **Spain**, in March 2013, the medical trade unions had already complained that the requirement for a 48-hour weekly working limit was not being met among workers working long hours on duty (for example, doctors working 24 hours at the hospital on 'reachable on-call'), and that rest times were not being respected either (Sindicato Médico Andaluz, 2013). This issue is especially controversial among trainee doctors (or medical intern residents), as well as forensic doctors. In fact, in 2014 the European Commission asked Spain to better regulate forensic doctors' working times, as the requirements of working limits and rest times were not being met.

Opting out to improve work–life balance?

Although not a member of the EU, **Norway** is currently having a very interesting public debate on opting out and working long hours. The government circulated a proposal to amend the working time regulations in the Working Environment Act for consultation. The rationale for the proposal was to, among other things, make it easier for workers to have working time arrangements adapted to their personal needs as related to age, sex and circumstances of life. The amendments cover average calculation of working time, special working time arrangements and overtime work. Individuals will be given a right to enter an agreement with their employer for the purpose of average calculation of working time increasing the daily working time from 9 to 10 hours a day with a weekly limit of 48 hours. This is the only amendment as regards individual agreements, as the rest relates to derogations made by collective agreements or by the labour inspectorate. However, the proposal has led to a debate on dangers of long working hours and the need or wish for flexibility among employers and workers. All trade unions argued against the proposal, and referred to occupational doctors' advice against long working hours. The Norwegian Confederation of Trade Unions (LO) argued that this kind of agreement should be laid down by those parties with knowledge of the work in question, the industry, the protection needs and risk of injuries: workers, employers and their representative organisations.

The proposal was warmly welcomed by the employers, who argue that it will make it easier for them to adapt the workforce to what is actually needed, for instance for companies that face great variation in production levels. The Confederation of Norwegian Enterprise (NHO) says that increased flexibility could benefit the workers as well, by allowing them longer periods off work. This will for instance benefit foreign workers who want to travel to their home country when they have time off. The Norwegian Association of Local and Regional Authorities (KS) believes the amendment that makes it easier for the parties at company level to enter into agreements could reduce some of the challenges the municipalities have with part-time work, as the new regulations would make it easier to get people to work during weekends.

The labour inspectorate reacted negatively to the amendment. In the comments to the consultation the inspectorate stressed that many companies do not make accurate assessments of the risk of the working time arrangements practised. The inspectorate also pointed at the problems related to individual agreements, and questioned whether such agreements

can be said to be voluntary. Furthermore, it commented that the risk of poor judgement among workers on long hours increases more than proportionally with the increase in number of hours worked. This emphasises that it is not only the total worked hours, but also how the working hours are arranged that matters, and that the proposal will lead to negative health and safety consequences.

Debates over long working hours

In many instances, the debate is not specifically about the possibility of opting out of the EWTD but rather about long working hours. These debates are equally important because if 'long' working hours can be defined as working 48 hours a week or more (Eurofound, 2012), then opting out of the EWTD is synonymous with accepting long working weeks. Some of the most interesting recent examples of incidents or debates about long working hours across the EU are described below.

Breaches of the EWTD

In recent years, the European Commission has taken a number of decisions relating to breaches of the EWTD.

In November 2012, the Commission asked **Belgium** to take measures to correctly apply the EWTD to teachers in residential schools. The overnight on-call time at the workplace worked by teachers in residential schools was not counted fully as working time (an overnight shift of eight hours was counted as three hours of actual working time). The teachers could be obliged to perform up to four overnight duties per week and night duty could be further combined with a daily shift, potentially leading to breaches of the EWTD provisions.

In September 2013, **France** was asked by the Commission to respect the rights of hospital doctors to a 48-hour average working week and to minimum rest periods after working extra hours at night. The doctors could be required to work over the 48-hour limit in several situations without their consent and there were no guarantees to protect the doctors from being penalised if they refused to work the excess hours. The rules for measuring working time of hospital doctors were also not very clear, meaning that in practice doctors were required to work excessive hours. At the time, practices in public hospitals meant that doctors who were called out at night to deal with emergencies after their normal working hours sometimes could not take adequate rest before having to return to work.

In January 2014, the Commission asked **Spain** to respect the rights of the Spanish Civil Guard (*Guardia Civil*) to minimum rest periods and the 48-hour limit on average weekly working time, as required by the EWTD. Under the current law, certain categories of Civil Guard workers are not entitled to those rights (in particular, workers with command, managing, teaching and investigative functions) and 'are vulnerable to working excessive hours without adequate rest periods'. According to the EWTD, Member States may exclude individuals with autonomous decision-taking powers from the 48-hour limit and the minimum rest periods. However, the majority of Civil Guard workers do not have genuine and effective autonomy over both the amount and the organisation of their working time, and therefore this derogation does not apply to them.

There have, however, also been some recent cases in which the Member States were referred to the ECJ.

On 20 November 2013, the Commission referred **Ireland** to the ECJ for breaching the EWTD in its treatment of non-consultant hospital doctors (NCHDs). In its statement, the Commission mentioned that '[t]here are still numerous cases where junior doctors are regularly required to work continuous 36-hour shifts, to work over 100 hours in a single week and 70–75 hours per week on average, and to continue working without adequate breaks for rest or sleep'.

Responding to the referral, the Irish Medical Organisation (IMO), which represents NCHDs, said that it had agreed a roadmap with the Health Service Executive (HSE) on the ending of the 'archaic practice of overworking NCHDs', but

retained some degree of scepticism about the willingness of the HSE to enforce that agreement. Therefore, this EU move will help keep the pressure on the authorities to meet their obligations. The HSE underlined that ongoing progress had been made in relation to achieving compliance with the provisions of the EWTD in respect of NCHDs. Data collected by the HSE show that average working hours for NCHDs have fallen significantly in the past six years. In 2009, the average was 60 hours per week; this had reduced to 54 hours per week in 2012 and to 51.1 hours by the fourth quarter of 2013. Also according to the HSE, by September 2013, less than 3% of NCHDs were working more than 68 hours in a week.

Greece and Italy have also been referred by the Commission to the ECJ for not complying with the EU rules on limits to working time for doctors in public health services:

- in November 2013, **Greece** was referred for failing to ensure that in practice these doctors work no more than 48 hours per week on average, including any overtime;
- in February 2014, **Italy** was referred because its law deprives doctors of their right to a limit on weekly working hours and to minimum daily rest periods.

According to estimates by doctors' representatives, including the Greek Federation of Hospital Doctors (OENGE), doctors in public hospitals work more than 64 hours on a weekly basis and in some cases more than 90 hours, hence endangering the health and safety of both doctors and their patients. OENGE, as well as various local doctors' unions, has presented several cases of circumventing the legal working time limit before courts and the National Supreme Court (Court of Auditors) had repeatedly issued relatively unfavourable reports about the situation. As a consequence, the Commission referred Greece to the ECJ (European Commission, 2013).

Italy was referred to the ECJ mainly because

> *several key rights contained in the Working Time Directive, such as the 48-hour limit to average weekly working time and minimum daily rest periods of 11 consecutive hours, do not apply to 'managers' operating within the National Health Service. The Directive allows Member States to exclude 'managing executives or other persons with autonomous decision-taking powers' from these rights. However, doctors working in the Italian public health services are formally classified as 'managers', without necessarily enjoying managerial prerogatives or autonomy over their own working time* (European Commission, 2014).

In October 2014, the Italian Chamber of Deputies adopted Law No. 161 of 30 October 2014 (the so-called 'Legge europea 2013-bis'), which repeals the two legislative rules that were incompatible with the EWTD. With this measure, the maximum average working time of 48 hours, stipulated in Article 4 of the Legislative Decree No. 66/2003, will apply to all national health service staff bringing the situation back in line with EU law. The non-compliant provisions will only be repealed in November 2015 to enable the Italian regions to reorganise their health services to ensure the provision of essential levels of health services. On the basis of this, the European Commission has withdrawn the case from the ECJ and closed it.

National debates

In **Austria**, apart from the issues related to the implementation of the Hospital Working Time Act, there is a debate over the general possibility of prolonging the maximum daily working time from 10 to 12 hours. This is mainly claimed by the employers' representative organisations but the trade unions have indicated they are not keen to discuss the possibility. The issue is part of the ongoing negotiations between the social partners and the government regarding a package of modifications to the labour legislation.

In **Bulgaria**, the last quarter of 2014 was marked by several protests by prison guards across the country. Some of their main demands were directly related to the change of working hours. Shifts are currently for 12 consecutive hours whereas the guards want to return to shifts that take into consideration the circadian cycles, that is the natural day cycle of light and darkness. Prison officials also demanded higher wages and an increased number of staff on each shift – currently some 15 guards for every 500 prisoners.

In **Germany**, a joint tripartite action brought the potential health impacts of long working hours to the top of the agenda. In September 2013, the Ministry of Labour, the German Confederation of Trade Unions (DGB) and the Confederation of German Employers' Associations (BDA) issued a joint declaration in which the three sides stressed the need to address not only physical but also psychological risks at work. This included a commitment to address health problems related to long working hours. On 4 December 2014, Reiner Hoffmann, Chair of the DGB, along with Jörg Hofmann, Deputy Chair of the German Metalworkers' Union (IG Metall) and Michael Vassiliadis, Chair of the Mining, Chemicals and Energy Industrial Union (IG BCE) presented the so-called DGB-Index on decent work, an annual employee survey on working conditions. One of the findings was that 62% of employees said they worked more than 40 hours a week. The three union representatives stressed that long working hours is considered a serious problem and that in particular older workers needed options to reduce working time in order to safely reach the regular retirement age.

In **Hungary**, the introduction of a 10-hour working day in the Prime Minister's Office in 2014 triggered a lively debate about the use of the opt-out clause of the EWTD (Index, 2014). This was considered unlawful by some legal experts but government officers say they do not see any legal constraint. Although, according to official information, the staff at the Prime Minister's Office agreed to the new work schedule and the increase of their working time, the media released information showing that some parents with small children allegedly gave up their jobs because the new working time arrangements are not compatible with the opening hours of their children's kindergartens, nurseries or schools.

In **Lithuania**, there are also ongoing debates about extending the working week in the context of discussions between representatives of employers, trade unions and policymakers about the liberalisation of labour relations. Employers are calling for more flexible labour relations, including more flexible setting of working hours (in particular, overtime), whereas trade union representatives are against it. The discussions intensified during 2014 with the launching of the project 'Creation of the legal and administrative model of labour relations and state social insurance' which aims at improving legislation governing employment and social security, including the Labour Code. Some controversy occurred when, in the context of the project, proposals were made to liberalise working time and extend the maximum length of the working week. According to the Labour Code, working time in Lithuania may not exceed 40 hours per week, and a daily work period must not exceed 8 working hours.

In **Spain**, the main recent debates concerning the EWTD affect the Civil Guard. The European Commission considered that the Spanish General Order (OG 4/2010) which regulates the Civil Guard working conditions is incompatible with the EWTD. Some aspects related to working times, rest times, among others, were not clearly specified, and there were too many references to 'the needs of the job' or 'the requirements derived from job responsibilities' when establishing working times. Currently, negotiations are taking place between the Public Administration and the Spanish Association of Civil Guards (AEGC). The Public Administration is working on adapting the General Order OG 4/2010 to the EWTD, but Civil Guard workers are afraid that the new order jeopardises some of the rights that were included in the previous order (AEGC, 2013). In fact, in January 2014, as indicated on p.16, the European Commission asked the Spanish public authorities to respect the EWTD when elaborating the new General Order, taking into account working times and minimum rest times for Civil Guard members (particularly for some specific positions in management, research and education) (Europa en breve, 2014).

During 2014, the debate in **Sweden** was focused on overtime, in particular concerning white-collar workers and the healthcare sector. The Swedish Confederation of Professional Employees (TCO) claims that overtime is becoming increasingly independent of business cycles and that possible solutions to the problem of high levels of overtime include compensating employees with paid leave or reducing the number of overtime hours per year from 200 to 150. Meanwhile, the Swedish Work Environment Authority reported the county of Västernorrland to the prosecutor after receiving a complaint from the Swedish Medical Association (Läkarförbundet) concerning doctors working more than 200 hours overtime annually without the county paying compensation to the union. The Swedish Association of Local Authorities and Regions (SKL) claimed that since overtime was partly regulated in the collective agreement with the Swedish Medical Association, the Working Time Act was not relevant in the case. The investigation over the case against the country continues, with the Swedish Medical Association hoping that the issue will be resolved through the payment of compensation and eventually through regulation of overtime in the collective agreement.

In the **United Kingdom**, the opt-out has been controversial since the adoption of the EWTD, and debates about the regulation of working time since then have been dominated by the long hours issue. Various, ultimately unsuccessful, attempts to amend the EWTD, including moves to restrict and/or phase out the opt-out (see **UK0506104F** and **UK0901039I**) have brought the debate in the UK to the fore. In its 2013 publication *Hazards at work*, the TUC underlined that:

- the law that protects against longer working hours is weak in the UK;
- knowledge and enforcement of the law is poor;
- unpaid overtime is increasingly common in white-collar jobs;
- there is a 'culture' of long hours which is expected by the employers and accepted by the employees (TUC, 2013).

Impacts of the opt-out

Because there are very few data on the extent of the use of the opt-out of the EWTD, it is not surprising that specific research about the impact of its use, on workers and employers, is virtually non-existent. There is little information available on the importance of the opt-out for employers, but there are a considerable number of studies that 'show a link between long working hours, particularly over prolonged periods, and negative effects such as increased rates of accidents and mistakes (also affecting colleagues and customers), falling productivity, increased difficulties in reconciling work and family commitments, stress and fatigue levels, and short-term and long-term health impact' (European Commission, 2010a).

As explained above, opting out of the EWTD under the conditions of its Article 22(1) means accepting long working hours. Therefore, research about long working hours can provide some very useful information on what the impacts of the opt-out may be.

Impact on employers and business

The little evidence about the importance of the opt-outs on employers and business in general comes from Malta and the United Kingdom, where the opt-out is of generalised use.

In **Malta**, social partners have, over the years, consistently argued in favour of the opt-out. Employers' associations (including the Malta Employers' Association and the Malta Chamber of Commerce, Enterprise and Industry) believe that the existing derogation is essential for Maltese enterprises as it increases their flexibility to respond to changes in demand, thus maintaining their competitiveness. The manufacturing, tourism, health, transportation and construction

sectors have all been mentioned as benefiting from the current opt-out clause. Remarkably, the major trade unions in Malta (including the General Workers' Union and the Union of United Workers – Union Haddiema Maghqudin) are also against the removal of the opt-out clause, a stance that is diametrically opposed to that of most other European trade unions. In essence, the unions contend that workers in Malta should not have their overtime capped because of their relatively low wages. The unions believe that if workers are allowed to do as much overtime as they want they are in a better position to maintain their families' standard of living. The issue of workers' health and safety appears not to be given much importance by the social partners.

The BIS report notes the importance of the opt-out for the **United Kingdom** by stating that '[a] strict limit on working in excess of 48 hours a week would affect 3.35 million employees and place significant costs on UK business' (BIS, 2014). The report also notes that for employers the individual opt-out is important because a signed opt-out provides certainty, particularly when it may be unclear which employees qualify for managerial derogations. The annual Confederation of British Industry (CBI) employment trends survey for 2014 reported that the opt-out is essential for promoting a flexible labour market (CBI/Accenture, 2014). Some 72% of businesses said its loss would have a negative impact, with the majority of these saying the impact would be 'significant' or 'severe'. The most common ways in which a ban on the opt-out would affect businesses were thought to be a negative impact on employment relations (55%) and reduced ability to respond to growth opportunities (47%). By contrast, the TUC has consistently argued that there is no evidence that working long hours has produced any competitive advantage (as cited in the BIS report), and has argued that there are health and safety risks which follow from working long hours (TUC, 2013).

Impact on workers

Eurofound has contributed significantly to the research available on the relationship between long working hours and workers' health and well-being. Analysis of data from Eurofound's fourth European Working Conditions Survey (EWCS) showed that long working hours are linked to poor working conditions. 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. The impact on work–life balance is even more substantial: 'three times as many long-hours workers report that their working hours do not fit their social and family commitments' (Eurofound, 2008 and 2009).

Analysis of data from Eurofound's fifth EWCS confirmed that people who work more than 48 hours a week

> *report more problems in terms of work–life balance and health than those who do not. They are indeed four times less likely to report that they have a good work–life balance. Besides health problems associated with working long hours, people who work 48 hours or more also indicate that they are more exposed to work intensity, think more often that their health and safety is at risk because of their work and think less (albeit not very much) that they might be able to do the job until they are 60.*
>
> (Eurofound, 2012)

More recently, research carried out by Eurofound in cooperation with the European Agency for Safety and Health at Work (EU-OSHA) has shown that '[i]n Europe 25% of workers say they experience work-related stress for all or most of their working time, and a similar proportion reports that work affects their health negatively. Psychosocial risks contribute to these adverse effects of work' (Eurofound and EU-OSHA, 2014).

There are also many pieces of research conducted in the various Member States which validate and confirm these findings.

The **Austrian** survey of hospital doctors, mentioned previously, revealed that 36% of the respondents stated that it was rather improbable and another 28% that it was very improbable that they will be able to do their work until the retirement

age of 65. In other words, nearly two-thirds of hospital doctors assess their current working conditions as not sustainable with respect to their health. The extended working time is one, if not the most important, factor in this respect.

Research studies on the impacts of the derogation from the maximum working week in the **Czech Republic** healthcare sector point out negative consequences on the health of doctors. A survey covering 7,428 Czech doctors, conducted by the Czech Chamber of Medicine (ČLK) and the First Faculty of Medicine of the Charles University in Prague (1.LF UK) in 2013, revealed that every third doctor suffered from burn-out and 83% of doctors felt threatened by it. The problem was most pronounced among young medical staff. The time-load was identified as the most intensive stressor. Doctors also appeared to suffer more often from depression than the general population, which according to the authors of the study can be attributed to overall fatigue and burn-out syndrome. The authors also stress the consequences of burn-out on work efficiency and communication with patients (see Ptáček and Raboch, 2013a and 2013b).

Czech research also underlined that the reduction in free time obviously impacts negatively on work–life balance (for example, Brůha and Prošková, 2011) and that long working hours are also denounced as one reason for the ageing workforce in the healthcare sector and a permanent lack of suitable staff with fewer job openings and fewer young doctors entering the sector (Kubek, 2014). Many stakeholders (including employer and worker representatives) however point to advantages for individual employees in the healthcare sector. For many doctors, the main benefit of extensive overtime is additional pay that appears to compensate for otherwise inadequate salaries, and this is particularly relevant for young doctors with lower wages. Moreover, long working hours enable young doctors to obtain practice and experience much faster than without overtime.

A recent study by the **Finnish** Aalto University and the Confederation of Unions for Professional Managerial Staff (Akava, 2014) shows that for many highly educated employees, work spills over into their personal lives. According to the study, about 15% of work is being done outside office hours, with, in most cases, the working day being extended into the evening. When all the time used for work is added, the average working time for the employees in the survey was over 43 hours. Akava finds that the current Working Hours Act, which is based on an '8 to 4 working culture' should be renewed. The 1,677 respondents in the survey represented six of Akava's member unions.

An epidemiological study by Finnish researchers also found that people who worked 11 or more hours per day compared with those who worked a normal, eight-hour day had a 60% higher risk of heart-related problems such as death due to heart disease, non-fatal heart attacks and angina (Virtanen et al, 2010).

Recurrent studies by the Federal Institute for Occupational Safety and Health (BAuA) in **Germany** show that working very long hours carries considerable risks for the health of workers. At its 23rd Conference on Occupational Health in November 2014, in Dresden, Saxony, BAuA presented findings from its 2012 employee survey. More than one-fifth (22.3%) of those with a contractual weekly working time of between 40 and 47 hours effectively worked 48 hours or more. Those working 48 hours per week or more reported more frequent health problems and felt more often under stress than those with fewer working hours.

In **Hungary**, various studies show that there are several reasons why people work very long hours. Self-motivation may lead to excessive work, but external factors such as work schedule, financial rewards, career opportunities and market competition can also force people to work more than would be advisable. Some of the harmful consequences of working long hours identified include complaints about fatigue, anxiety disorder, panic attacks and depression, and reports of sleeping and resting less than would be necessary.

In October 2014, the **Spanish** Trade Union Confederation of Workers' Commissions (CCOO) published a report on illegal overtime in the financial sector. According to this report, non-paid overtime is common in the Spanish financial

sector, and the proportion of non-paid overtime has increased during the crisis years. Some 70% of the staff work overtime. The report estimates that between 2008 and 2013 the lack of social security contributions and tax payments linked to illegal overtime led to losses amounting to €2.3 billion of public income. The report also links illegal overtime to negative effects on occupational health and on work–life balance (CCOO, 2014). Several surveys in different financial groups (such as Barclays, Sabadell, Citibank, Bankia and La Caixa) carried out by CCOO indicate the worsening of workers' health, reflected in panic or anxiety disorders and stress, linked to too much work pressure.

In 2006, a **Swedish** experimental study on long working hours was conducted by dividing 18 office workers into two groups that worked 40 and 60 hours during one week respectively. The study concluded that one week of very long working hours resulted in increased sleepiness and fatigue, but did not have any major effect on physiological stress markers such as cortisol, heart rate and blood pressure (Dahlgren, 2006). Later, in 2010, the Swedish Stress Research Institute (Stressforskningsinstitutet) published a research review on the effect of working hours on health. The study was financed by the employer association SKL and the Swedish Association of Health Professionals (Vårdförbundet). It concluded that working very long hours (defined as over 10 hours a day) increases risks to safety and the incidence of disease, and that the upper safety and health limit of weekly working hours for a job with a moderate workload was 48–56 hours. Above that limit, the working time starts cutting dangerously into rest time, causing increased safety and health risks. The research review concluded that the effect depends on individual factors such as sex, age and family status, and that there is a need for more quantitative research that better controls for confounding factors (Kecklund et al, 2010).

The safety and health paradox

From the employer's point of view, the use of the individual opt-out can be seen as a factor contributing to increased organisational flexibility in dealing with variations in demand for goods and services. Therefore, it can play its part in the companies' ability to compete in the market or to ensure the continuity of the provision of important, often public, services such as medical care or emergency support.

However, apart from the fact that the levels of workers' productivity tend to decrease naturally the longer the working hours, long hours do not seem to be necessarily associated with the 'best performing' countries or sectors of activity in the EU, nor do they contribute to increased productivity of workers. On the contrary, it seems that some of the most productive countries and sectors of activity in the EU are those where collectively agreed weekly working time is defined below the limits established in the EWTD. For example, in Denmark, where the opt-out from the EWTD is not allowed, the agreed weekly working time in the Danish industry agreement, which is then followed by the agreements in the other sectors, has been 37 hours per week since 1990.

Nevertheless, opting out of the EWTD to be able to work more hours can be seen by workers as a means to increase their income or simply to increase their chances of being promoted or gaining the experience required to get a different job. This raises a number of important questions, for example in relation to whether wages are set at such a level that people must have two jobs (or more) just to make ends meet. Or whether the way workers are evaluated to progress in their career values and rewards a variety of elements and not just the number of hours worked.

All things considered, if the main purpose of the EWTD is to establish minimum safety and health requirements for the organisation of working time, including by guaranteeing to all workers in the European Union the right to a limit to weekly working hours (which might not exceed 48 hours, on average), it seems paradoxical that the directive contains in itself a mechanism which ends up allowing behaviours that put workers' safety and health at risk through deviations from the weekly working time limit of 48 hours.

Conclusions

The European Working Time Directive (EWTD) 2003/88/EC lays down minimum safety and health requirements for the organisation of working time and applies to all sectors of activity, public and private, with few exceptions. The main objective of this report was to describe how the Member States make use of one of those exceptions, namely the possibility of opting out of the maximum weekly working time on the basis of an agreement between individual workers and employers, as established in Article 22, paragraph 1 of the EWTD.

The general configuration across the EU is virtually the same as five years ago with three distinct groups of countries. In five countries – Bulgaria, Cyprus, Estonia, Malta and the UK –the opt-out is of generalised use, regardless of the sector of activity or occupation concerned. In a second group of 11 countries – Belgium, the Czech Republic, France, Germany, Hungary, Latvia, the Netherlands, Poland, Slovakia, Slovenia and Spain – the opt-out is limited to specific sectors or occupations, mainly in the health sector or jobs requiring workers to be on call. In the third group – Austria, Croatia, Denmark, Finland, Greece, Ireland, Italy, Lithuania, Luxembourg, Portugal, Romania and Sweden –the opt-out was originally not allowed.

Austria introduced the possibility to deviate from the EU rules through the Hospital Working Time Act at the beginning of 2015. The intention is to progressively reduce the maximum weekly working hours allowed to the EU rule of 48 hours by 2021.

Because of increasing numbers of complaints to the European institutions, Greece, Ireland and Italy, which had also formally decided not to allow the opt-out, have been referred to the European Court of Justice (ECJ) recently for not complying with EU rules on limits to working time for doctors in public health services. So far, only Italy has acted successfully to bring the contentious legislation in line with EU law by November 2015, leading the European Commission to withdraw the case.

In the Czech Republic and Spain, the existing provisions for departing from the maximum weekly working time in the health sector were only transitional and expired in 2013. However, the available evidence shows that in both countries the practice of working long hours in the sector continues and that the authorities are struggling to manage the situation in order to comply with EU regulations.

More than 20 years after Council Directive 93/104/EC came into force, there are almost no data available on the extent of use of the individual opt-out – how many workers and companies or organisations use it. Even less is known about the characteristics and content of the opt-out agreements – what kind of workers and companies use them; why they use them; for how long the opt-out agreement will be in effect; and under what conditions these agreements are signed.

The information available shows that the opt-out is mostly seen by employers as a way of gaining the flexibility necessary to cope with variations in demand and sustaining their competitiveness and, in principle, they do not support its elimination. Yet, there is a vast body of studies and research showing the negative effects of working long hours, especially over long periods of time, on workers, clients, patients and consequently on employers. However, if the positive aspect of the opt-out is just to obtain flexibility in working time arrangements which can be beneficial for both employers and workers, then the individual opt-out is not the best option.

All things considered, there are strong reasons to think that time limits are beneficial for everyone: workers see their safety and health safeguarded, patients and clients do not risk being submitted to increased levels of stress or fatigue on the part of the workers dealing with them, and employers benefit from a more efficient use of resources and avoid the

risk of losing clientele because of reduced quality of service, production losses and waste associated with overworked staff, or even the risk of increased numbers of accidents at work.

Because there is too much at stake in deviating from the existing limits on working time, any discussion about the subject should be fully informed. This modest report has shown there are still some important knowledge gaps that should be addressed with further research to achieve a more comprehensive understanding of the matter. One of the most important topics to be studied further is the extent to which the provisions for individual opting out at national level are adequate and in line with the main principles of the EWTD. It is particularly important to make such an assessment in the context of the interplay between the different forms of derogation foreseen in the EWTD which exist in each Member State and in the context of the varied employment contracts available nowadays (for example, zero-hours contracts). It would also be important to look at the trade-offs involved in the decision-making of workers and employers when considering the possibility of opting out and assess to what extent health and safety is, in fact, taken into consideration. Finally, it would also be beneficial to know more about the means and resources available to the competent authorities to keep track of existing opt-out agreements, and the extent to which they are able to enforce and ensure compliance with legislation and provide information to employers and workers about the provisions in place.

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Annexes

Annex 1: Questionnaire: Questions on the use and impact of the opt-out from the European Working Time Directive

Derogations from maximum working week

One of the main provisions of the Working Time Directive 2003/88/EC is a maximum average working week of 48 hours (including overtime, calculated over a four-month reference period). The directive establishes, however, some possibilities for Member States of not applying the 48-hour weekly working limit. These are derogations from the Directive.

Article 22 of the Working Time Directive determines that, under certain conditions, Member States can decide for not applying the weekly maximum of 48 hours provided that the principle of protection of workers' health and safety is guaranteed and there is an agreement between the employer and the worker concerned. In this situation, the Directive does not provide, however, an explicit ceiling to the maximum hours that could be worked.

There are opposing perspectives in relation to the use of these derogations and, in particular, the individual agreement between employer and worker. On the one hand, some advocate that employers need some flexibility while individual workers should have a choice on their maximum working hours. On the other hand, some stakeholders the individual opt-out as a threat to health and safety which exploits workers' unequal bargaining position.

It is known that some Member States currently allow the use of this opt-out possibility (but not all) and that the conditions under which this possibility can be used vary significantly from country to country. However, very little is known about its use and its impact on employers and workers.

1.1 **Is there a possibility for not applying the 48-hour weekly working limit in your country?** Please briefly describe if and how the possibility of **not applying the weekly maximum of 48 hours** has been transposed into national legislation, mentioning its range of coverage (whole economy or just in some sectors or occupations) and the main conditions under which it can be resorted to by employers and workers.

1.2 **Is there national data available on the use of derogations from the 48-hour weekly working limit?** Please report about the most **recent data available on the extent of use of the possibilities to derogate from the weekly maximum of 48 hours** in your country. If available, please include breakdowns by sex, age, occupation, educational level, sector of activity, or other relevant variables which may help to characterise and understand better the phenomenon.

If these derogations are not a possibility in your country, please report about the most recent data on very long working hours (i.e., more than 48 hours per week, including overtime), including, if possible, breakdowns by sex, age, occupation, educational level, sector of activity, or other relevant variables which may help to characterise and understand better the phenomenon.

1.3 **What are the main impacts of the derogations from the 48-hour weekly working limit for employers and workers?** Please report about the findings of research articles or studies on the advantages and disadvantages or on the impact(s) of the use of these derogations for employers and/or for workers. If these derogations are not a possibility in your country.

If these derogations are not a possibility in your country, please report about the findings of most recent research findings about working very long hours data (i.e., more than 48 hours per week, including overtime).

1.4 Please briefly report about any **relevant debates on the use of these derogations during 2014** in your country, without forgetting to mention the actors/organisations involved and their positions in that debate.

If these derogations are not a possibility in your country, please report about any relevant debates on working very long hours (i.e., more than 48 hours per week, including overtime), during the year of 2014 in your country, without forgetting to mention the actors/organisations involved and their positions in that debate.

Annex 2: Summary of national provisions of individual opt-outs as per Article 22(1) of the EWTD

Country	Brief description
Austria	Austria is formally one of the Member States that have not allowed the use of the opt-out clause in its legislation. In practice, the opt-out has been available to hospital doctors since January 2015 under the Hospital Working Time Act.
Belgium	Since December 2010: doctors, dentists, veterinarians, candidate doctors in training, candidate trainee dentists and student interns; cap at 60 hours per week; also in the public sector, for emergency workers (such as medical staff and firefighters).
Bulgaria	Yes, irrespective of the sector or occupation; cap at 13 hours per day.
Croatia	Not allowed.
Cyprus	Yes, irrespective of the sector or occupation.
Czech Republic	Temporary provision in the Labour Code between October 2008 and December 2013 for medical staff in the healthcare sector; opt-out for no longer than 52 weeks.
Denmark	Not allowed.
Estonia	Yes, irrespective of the sector or occupation; cap at 52 hours on average over a period of 4 months.
Finland	Not allowed.
France	Allows excess hours to be worked on a voluntary basis by doctors and pharmacists in public health services, but there is not always a legal requirement of advance individual consent.
Germany	Working Time Act (Arbeitszeitgesetz) allows for opt-out when 'substantial amount of on-call or emergency service time exists on a regular basis'; it is applied in various collective agreements, notably in the health sector; cap at 54 and 58 hours, depending on the workload. Same provisions apply to civil servants with a cap at 54 hours per week. Applicable per worker.
Hungary	Provisions for the healthcare sector since 2003, in the Healthcare Act (amended in 2004, 2007, and 2012 – Act LXXXIX); cap at maximum 12 hours per day.
Ireland	Not allowed.
Italy	Not allowed.
Latvia	Provisions in Medical Treatment Law (amended in 2009 and 2012); applicable to medical and non-medical emergency service team members; cap at 60 hours per week/240 hours per month.
Lithuania	Not allowed.
Luxembourg	Not allowed.
Malta	Yes, irrespective of the sector or occupation; no cap; applicable per employment contract.
Netherlands	Applicable to jobs which make use of on-call time, such as health service workers and firefighters; cap at 60 hours.
Norway	Not allowed.
Poland	Act on Medical Activities, of 2011; medical doctors; applicable per employment contract.
Portugal	Not allowed.
Romania	Not allowed.
Slovakia	Provisions in the Labour Code for healthcare workers; cap at 400 hours of overtime per year; applicable per employment contract.
Slovenia	Provisions in the Medical Services Act, of 2004, for medical workers in hospitals or health centres.
Spain	Provisions in Framework Statute of statutory staff in health services, Law No. 55/2003; transitional provision which expired in December 2013; it was applicable per employment contract.
Sweden	Not allowed.
United Kingdom	Yes, irrespective of the sector or occupation; no cap; applicable per worker.

Source: *Eurofound Network of European Correspondents*

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The European Working Time Directive lays down minimum safety and health requirements for the organisation of working time in the EU by, for example, establishing that all workers have the right to a limit to weekly working time of 48 hours. However, it also contains the possibility for Member States to allow for the opting out of that maximum as long as the individual workers agree. This report looks at how the Member States make use of the possibility of opting out, the extent of its use and its main impacts. Although national data about its use are scarce, the opt-out and long working hours continue to be the subject of heated debates involving governments and social partners across the EU. According to the research currently available, there are strong reasons to think that the limitation of working time is beneficial for everyone, including workers, employers, patients and clients.

The European Foundation for the Improvement of Living and Working Conditions (Eurofound) is a tripartite European Union Agency, whose role is to provide knowledge in the area of social and work-related policies. Eurofound was established in 1975 by Council Regulation (EEC) No. 1365/75, to contribute to the planning and design of better living and working conditions in Europe.

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