

ETUI Policy Brief

European Economic, Employment and Social Policy

N° 5/2019

Regulating uncertainty: variable work schedules and zero-hour work in EU employment policy

—
Agnieszka Piasna

Agnieszka Piasna is a Senior Researcher at the European Trade Union Institute (ETUI) in Brussels.

Key points

- In view of the increasing unpredictability and irregularity of working hours, there is a pressing need for laws and regulations that would limit the incidence, magnitude and consequences of such work patterns.
- Despite the existence of legal grounds for the EU institutions to address the quality of working time and regulate the use of irregular work schedules, a commitment to labour market flexibility prevails on the policy agenda.
- The newly-approved Directive on Transparent and Predictable Working Conditions is the first piece of EU legislation explicitly to address the risks of variable work schedules such as on-demand work, platform work or zero-hour contracts.

Introduction

An increasing diversification of working time patterns has become a common experience of European workers. In 2015, one in three employees in the EU28 had an irregular work schedule (Figure 1). The most common forms included working a different number of hours every day (38.5 per cent of employees, up from 36.5 per cent in 2010), not having fixed start and finishing times (32.7 per cent, up from 30.7 per cent in 2010) and working a different number of hours every week (31.2 per cent, up from 26.7 per cent in 2010). This boom is largely linked to the cost-saving human resource strategy of closely matching staffing levels to fluctuating demand, facilitated both by technological developments enabling easy task allocation and changing lifestyles. Irregular working hours have infamously materialised as zero-hour contracts, but also as on-demand work without guaranteed working hours, online labour platforms, voucher-based work or 'gig' economy work more broadly.

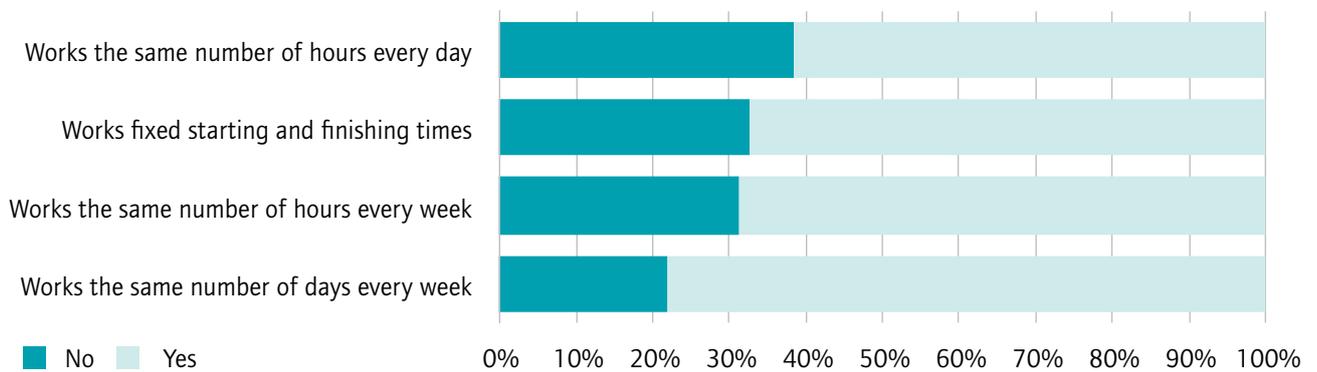
The main concern related to irregular working hours is that they translate into unstable earnings and insufficient work, offer little (if any) protection for workers *vis-à-vis* the employer and carry unpredictability that makes the planning of responsibilities outside work, such as caring for dependants, very difficult. While proponents point to the benefits for workers stemming from flexibility and autonomy in planning their work, the prevailing experience is that of uncertainty, stress and poor work-life balance (Figure 2). Therefore, there is a growing need for laws and regulations that would limit the incidence, magnitude and consequences of working unpredictable and irregular hours.

Against this background, this policy brief considers what is the scope for addressing the challenges linked to irregular work schedules in EU social and employment policy (see also Piasna 2019). Are there sufficient grounds and an appropriate policy climate at EU level for sound regulation which addresses zero-hour types of work? What are the prospects for ensuring basic rights and standards for workers with irregular working hours set by the employer?

To address these questions, this policy brief first describes EU competence in the areas of work and employment conditions in order to assess what the EU institutions can *de jure* do to address irregular work schedules. We then evaluate what the EU can *de facto* do based on the current direction and agenda of its employment policy. This is followed by a more detailed discussion of two legislative acts at EU level in the areas most pertinent to irregular and variable work schedules, that is working time and employment contracts. This serves to present the views of the European social partners on regulating irregular work schedules and their recent proposals in this area.

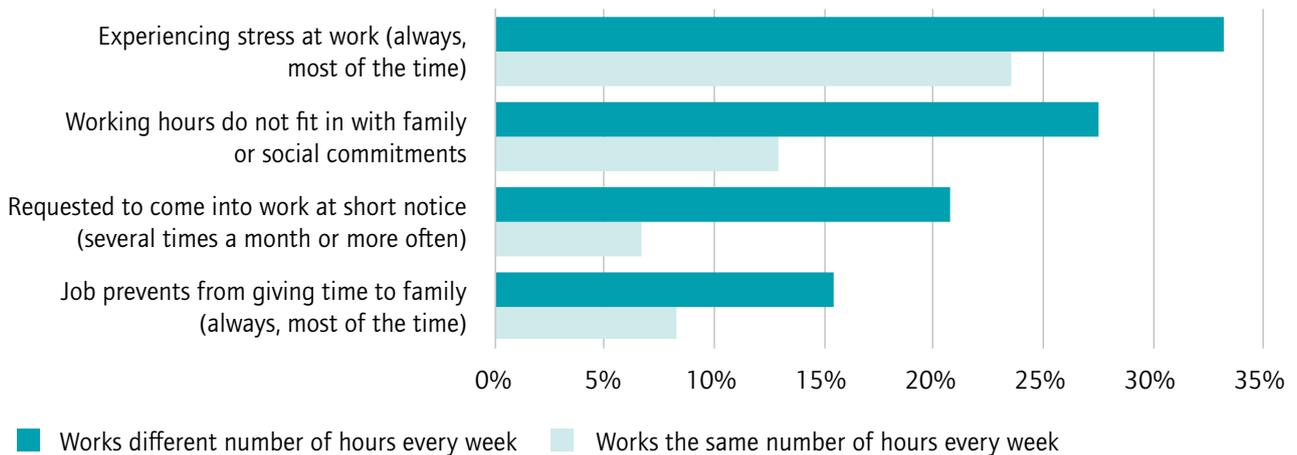
etui.

Figure 1 Prevalence of irregular work schedules among employees in EU28 (2015)



Source: Own calculations from EWCS data.

Figure 2 Negative outcomes of irregular work schedules among employees in EU28 (2015)



Source: Own calculations from EWCS data.

EU competence in regulating variable work schedules

The role of the EU in ensuring a certain degree of harmonisation and transparency among its members has the advantage of providing common minimum standards applicable in all countries and thus limiting the scope (at least to some extent and in those areas directly addressed by the directives) for a race to the bottom in terms of social protection.

There are several levels at which the EU institutions can address the issues of work and employment conditions. At a general level, primary legislation, in the form of the Treaties, sets out the general objectives for EU action in the areas of working conditions and health and safety. The Treaty on the Functioning of the European Union (Article 153) makes reference to the working environment and working conditions as a field in which the EU can adopt binding rules to support and complement the activities of the member states. Moreover, the Charter of Fundamental Rights of the EU, which has the same legal value as the Treaties, gives the right to fair and just working conditions by emphasising respect for

health, safety and dignity at work (Article 31). Arguably, therefore, EU primary law provides a sufficient legal basis to address the precariousness inherent in variable work schedules.

The principles and objectives set out in the Treaties (primary legislation), form the basis for deriving binding legal instruments, in the form of regulations, directives and decisions (secondary legislation). Historically, working time was regulated, in EU secondary law introduced in the social field, on a health and safety legal basis even though other legal bases, including working conditions, could also potentially have been used. In consequence, the main issues identified in the area of working time regulation include: limits on long working hours; minimum rest periods; and paid leave (as in the Working Time Directive). While these provisions in principle may also apply to workers with irregular and variable hours, as far as they protect their health and safety at work, they do not address the specific risks and precariousness involved in such work nor will they curb the use of zero-hour types of contract.

Moreover, the execution of the rights and provisions contained in the existing directives remains an issue. This is the case especially

for workers in the most vulnerable employment situations who are often not in a position to avail themselves of the formal rights afforded by EU employment regulation because of their extreme marginality and the absence of collective representation.

Finally, EU directives addressing non-standard work (i.e. part-time work, fixed-term work and temporary agency work) seek to curb the risk of precariousness by means of equal treatment with workers on standard contracts. The problem with the equal treatment and non-discrimination principle is that it is often very difficult, if not impossible, to identify a comparable worker with a standard employment contract (i.e. full-time and open ended), with the same organisation and nature of work and in the same enterprise as a non-standard worker. Such standard employment comparators might not be available in particular for those working in enterprises which rely heavily on atypical forms of work.

The direction of EU employment policy

The policy objective of constructing social Europe, which gained speed in the 1990s and early 2000s, resulted in a dynamic development of the regulation of non-standard employment, working time, and health and safety at EU level. However, with the focus on equal treatment and non-discrimination, the legislative acts of that period were not designed in a way that would effectively challenge the pervasiveness of casual or atypical work arrangements. Moreover, the implementation of social policies weakened considerably in the period following the 2008 crisis. Whatever was proposed or recommended to improve the situation on the EU labour market tended to come with the caveat that it should not limit in any way the necessary flexibility for employers nor create barriers for business. Preference was given to measures that favoured entry and permanence in the labour market, even if this was to be achieved through flexible or non-standard forms of employment (Piasna *et al.* 2019).

In consequence, employment policy and labour regulation in the EU were increasingly characterised by the transfer of risks and responsibilities from employers to the workforce, including in the management of working time (see e.g. Piasna 2018). Such policies, which redefined basic power relations between employers and workers, gave employing organisations greater scope for determining terms and conditions of employment. They also created a favourable climate for employers in which they were able firmly to resist any regulation encroaching on their need for a flexible and highly adaptable workforce.

With some signs of recovery in employment levels and the entry into office of the Juncker Commission in 2014, social issues made a positive return to the EU policy discourse. Perhaps the strongest statement came with the European Pillar of Social Rights (EPSR), proclaimed in November 2017. The Pillar announced the revision of some of the EU's legislative acts in the area of working conditions, and made promises both to address the challenges related to atypical forms of employment and ensure fair and good working conditions. Most importantly, however, the Pillar effectively paved the way for the inclusion of zero-hours contracts in the EU policy-

making process by explicitly pointing to such arrangements as a high-risk category of atypical work that required action at EU level.

Against this background, the following section summarises the most recent developments in EU law by examining the proposals and negotiations around the revision of two EU directives—on working time and on contracts of employment, which are the areas of regulation most relevant and directly applicable for variable work schedules.

Regulating working time

Regulating working time at EU level has been a contentious issue from the start. When the first European Directive on Working Time (93/104/EC) was adopted in 1993, the choice for the legal basis was between working conditions and health and safety. The former would allow for a broader scope of issues related to working time organisation to be covered by regulation but, due to disagreement between the member states, and in particular the UK Conservative government's likely veto, a health and safety legal basis was chosen. The regulation established upper limits on weekly working hours and prescribed minimum daily and weekly rest periods and annual holidays as well as a rest break during working hours. There was little, if any, attention to short or variable working hours or workers' independence and control over their own working schedules. Moreover, the enforcement was relatively weak, with a widespread use of voluntary opt-out clauses.

The reliance on a health and safety legal foundation also considerably limited the scope for the introduction of new provisions into working time regulation. The proposals from workers' representatives at EU level to address the problem of precarious work, irregular hours and working time under-employment—with zero-hours contracts as a prime example—were resisted by the European employers' organisations which claimed it exceeded the provision of minimum standards for health and safety reasons. Thus, the suggestions of trade unions, among others, to oblige employers to give notice to workers about the scheduling of their working hours sufficiently in advance to allow them to arrange their private life (e.g. ETUC 2011) were consistently opposed. Faced with mounting case law in the Court of Justice of the European Union and disagreements in the consultation process, the Commission opted in 2017 to issue an Interpretative Communication on the Directive instead of a revision. This was not binding on the EU member states and neither did it create any new rules or provisions.

Regulating employment contracts

In EU employment policy, issues relating to non-standard forms of work have, so far, been mainly addressed through a trio of atypical work directives (on part-time work, fixed-term work and temporary agency work) and the Working Time Directive. However, until recently there was no piece of legislation at EU level that would be directly applicable to variable schedules and zero-hours contracts and they were not covered by, nor mentioned in, any of the directives dedicated to protecting atypical workers. Therefore, it was certainly a breakthrough when, in 2017, zero-hours contracts appeared explicitly in the proposal for a revision of one of the older

directives on working conditions, the so-called Written Statement Directive dating back to 1991. The revision of this directive was long overdue and the launch of the European Pillar of Social Rights in 2017, with its mission to deliver new and more effective rights in the area of fair working conditions, offered a convenient vehicle for carrying this process forward.

In view of the diagnosis that EU labour markets are faced with a growth of atypical and casual employment, with zero-hours contracts, on-demand and platform work as exemplary evidence, the Commission asserted that the existing regulation on employment contracts (i.e. the Written Statement Directive) was no longer sufficient to cope with new labour market challenges or effective in doing so. The provisions of the existing directive were mainly focused on the employer's obligation to inform employees of the conditions applicable to their contract or employment relationship. This was deemed too narrow in scope and not sufficiently enforced at country level. Indeed, the provision of information on conditions of employment falls far short of any concrete actions to improve those conditions.

Two points from the attempt to revise the directive are particularly relevant here. The first was the extension of its scope to include new and casual forms of employment, such as on-call contractors, zero-hours contracts, voucher-based workers and platform workers. The original explicitly excluded from its scope people working less than eight hours per week and those whose employment relationship is for less than one month or is of a casual or specific nature.

The second point of the revision was more radical and consisted of an introduction of a minimum floor of rights to ensure fair working conditions for all workers. The proposal for new minimum rights included a right to limits on flexible work arrangements and to enhanced rights on the predictability of work. It included a right to a minimum advance notice before a new assignment or a new period of work, a right to define with the employer reference days and hours in which working hours may vary (although without setting any limits on the reference period) and a right to minimum guaranteed hours set at the average level of the hours worked during a prior period. Part of the new rights was also the prohibition of exclusivity clauses preventing workers from working elsewhere on contracts that are not themselves full-time employment relationships.

Thus, the revised directive can be summarised as aiming to ensure that each worker received information about their working conditions in writing and benefited from a set of minimum rights to reduce precariousness. However, it did not go as far as to break with the commitment to flexibility, because reducing precariousness for workers was to be achieved 'without obstructing the development of new forms of work' (European Commission 2017b: 3).

With all these changes and new rights, the revision of the Written Statement Directive in fact evolved towards a proposal essentially for a new directive, called the Directive on Transparent and Predictable Working Conditions in the European Union (European Commission 2017a). This was proposed by the European Commission in December 2017 and it was approved, with some changes, by the European Parliament in April 2019.

The European social partners

In the consultations process launched by the European Commission in 2017 on the revision of the Written Statement Directive, workers' and employers' organisations presented clearly contrasting views. While trade unions, in general, were in favour of the proposed changes, advocating even more thorough solutions in line with the Commission's proposal, employers' organisations opposed virtually all parts of it and delayed entering into negotiations. What both sides of the social partners' negotiation table seemed to agree on was that the proposal went much further in promoting the interests of workers than any of the Commission's proposals in more recent years.

Employers' voice

With regards to the consultation process itself, the Confederation of European Business (BusinessEurope), representing private sector employers of all sizes at European level, was fully opposed on the grounds that it went much beyond the scope of the initially-planned revision. The revision had been initiated within the Commission's Regulatory Fitness and Performance (REFIT) programme which was aimed at making EU legislation simpler and less costly, among others by removing unnecessary administrative and legal burdens. Thus, extending the existing provisions and adding new ones was seen as contrary to the REFIT principles.

Moreover, employers' organisations were generally in favour of avoiding any regulation at EU level, leaving adaptations of the legal framework to law and collective agreements at national or even company level instead. When it came to the content of the proposal, the amount of information to be provided to workers about their working conditions, in written format and under a requirement to do so at the start of an assignment and not two months later, were heavily criticised as costly and burdensome for companies.

The most contested issue, however, was the proposal for minimum rights for workers, which was described as 'unacceptable for business' (BusinessEurope 2017). In the words of the director general of BusinessEurope, '[t]he Commission's proposal [...] should not be misused to introduce through the back door new social rights, which will undermine growth and employment' (quoted after BusinessEurope 2017: 1).

Thus the narrative from the employers' organisations greatly resembled that of the European Commission after the 2008 crisis in arguing that employment protection, in at least some EU countries, had harmful economic and labour market effects (see discussion in Piasna and Myant 2017).

Workers' voice

Trade union responses differed markedly from those expressed by employers' representatives. In general, the European Trade Union Confederation (ETUC), the major trade union organisation and the only social partner representing workers at European level, welcomed the Commission's proposal for revising the directive as a much-needed step in the right direction, even if weaker than

expected on the grounds that it did not address the worst forms of precariousness and did not foresee a prohibition on the use of zero-hours type contracts (ETUC 2017).

Workers' representatives emphasised the need for the provision of a new set of minimum rights and for the largest possible scope of the directive so that all workers were covered, including those on casual and short-hour contracts. The ETUC insisted on a need for more effective solutions to secure a higher number of guaranteed paid hours and less variable work schedules and to address abusive forms of flexibility. The ETUC advocated that employers should give information about working hours with advanced notice periods established by the social partners, with the aim of ensuring as much predictability for workers as possible (ETUC 2018). In situations where workers are given notice of work, and they turned up as requested but the employer fails to provide them with all or part of the announced work, then workers should be paid for all the hours set out in the notice.

Workers' representatives also emphasised the need to set minimum guaranteed hours, while avoiding this being set at zero, with the average actual hours worked becoming the guaranteed hours for the worker after three months. All the hours worked above the guaranteed minimum should be paid at a higher rate. Such a provision would deter employers from understating the number of guaranteed hours and encourage a realistic estimation of the actual duration of working time.

Workers' representatives also called for more precise specification of the requirement to inform workers about their work schedule and the reference hours within which the worker may be required to work. In the Commission's proposal and in the revised directive, the reference period had no *de facto* limits and it would thus be possible for an employer, should it choose to do so, to stretch the reference hours over seven days a week or 24 hours a day. Furthermore, the ETUC advocated the deletion of certain exemptions in order also to include in the scope of the directive people working eight hours per week or less and those in small and medium enterprises.

Conclusions: granting some protection but not reducing the variability

There has been very little space in the course of the past decade for regulating variable work schedules and zero-hours type work at EU level. On the one hand, the regulation of working time had been restricted to a health and safety legal basis, which gave little scope for provisions going beyond the setting of maximum limits on the number of working hours and minimum limits for rest periods. The issues related to minimum working hours and their greater predictability, or establishing minimum guaranteed pay for workers on very variable schedules, were repeatedly contested as hindering competitiveness and going beyond the EU's remit.

The launch of the European Pillar of Social Rights in 2017 was certainly a positive sign for the return of attention at EU level to social issues. This proved to be not only rhetoric; the sheer number of initiatives in the legislative process one year after the launch of the Pillar shows that the commitment to deliver on social issues

had moved to specific actions. One of these was the revision of the Written Statement Directive, the EU-level legislation most directly applicable to irregular work schedules, combining the regulation of working time with employment protection. When implemented, the right under the new Directive on Transparent Working Conditions to a predictable work schedule will complement the protections against discrimination on the basis of the type of employment relationship which had been created by the earlier directives on part-time work, fixed-term contracts and temporary agency work.

It is certainly a progressive step, yet it replicates some of the paradoxes of current EU employment policy. It juggles a high level of protection for workers with greater flexibility for employers; and the greater predictability of work with no barriers to the development of new forms of work. Thus, the revised directive does not contain a ban on zero-hours contracts, but instead looks for solutions to provide a modicum of protection to workers and, at least to some extent, to increase the predictability of their work yet without really acting on the issue of the variability of hours. Meanwhile, the intensified demands for increased labour market flexibility also accentuate the problem of workers in precarious positions who are rarely able to avail themselves of their formal rights and thus access the protections promised by existing EU employment regulations.

References

BusinessEurope (2017) Written statement directive: yes to modernisation, no to new burdens on companies, Press Release, 21.12.2017, Brussels, BusinessEurope. https://www.busesseurope.eu/sites/buseur/files/media/press_releases/2017-12-21_written_statement_directive_press_release.pdf

ETUC (2011) The working time directive: limitation of working hours and greater influence of workers for the benefit of healthier working lives, ETUC Resolution, 8-9 March 2011, Brussels, ETUC. https://www.etuc.org/sites/default/files/Resolution-on-The-WTD-Limitation-of-working-hours-and-greater-influence-of-workers-for-the-benefit-of-healthier-working-livesEN_2__2.pdf

ETUC (2017) Directive on transparent and predictable working conditions: a first major step forward but weaker than expected, ETUC Press Release, 21.12.2017, Brussels, ETUC. <https://www.etuc.org/en/pressrelease/directive-transparent-and-predictable-working-conditions-first-major-step-forward>

ETUC (2018) ETUC position on the draft transparent and predictable working conditions directive. Adopted at the Executive Committee meeting of 7-8 March 2018, Brussels, ETUC. https://www.etuc.org/sites/default/files/document/files/etuc_position_on_the_draft_transparent_and_predictable_working_conditions_directive_updated.pdf

European Commission (2017a) Proposal for a Directive of the European Parliament and of the Council on transparent and predictable working conditions in the European Union, COM(2017) 797 final, Brussels, European Commission.

European Commission (2017b) Second phase consultation of social partners under article 154 TFEU on a possible revision of the Written Statement Directive (Directive 91/533/EEC) in the framework of the European Pillar of Social Rights, C(2017) 6121 final, Consultation Document, Brussels, European Commission.

Piasna A. (2018) Scheduled to work hard: The relationship between non-standard working hours and work intensity among European workers (2005–2015), *Human Resource Management Journal* 28(1), 167–181.

Piasna A. (2019) The space for regulation beyond borders? The role of the EU in regulating zero hours work, in O'Sullivan M. et al. (eds) *Zero hours and on-call work in Anglo-Saxon countries*, Singapore, Springer, 179–194.

Piasna A. and Myant M. (eds.) (2017) *Myths of employment deregulation: how it neither creates jobs nor reduces labour market segmentation*, Brussels, ETUI.

Piasna A., Burchell B. and Sehnbruch K. (2019) Job quality in European employment policy: one step forward, two steps back?, *Transfer. European Review of Labour and Research*, March 6, 2019. DOI: 10.1177/1024258919832213

All links were checked on 18 June 2019.

ETUI publications are published to elicit comment and to encourage debate. The views expressed are those of the author(s) alone and do not necessarily represent the views of the ETUI nor those of the members of its general assembly.

The *ETUI Policy Brief* series is edited jointly by Jan Drahokoupil, Philippe Pochet, Aída Ponce Del Castillo, Kurt Vandaele and Sigurt Vitols.

The editor responsible for this issue is Jan Drahokoupil, jdrahokoupil@etui.org

This electronic publication, as well as previous issues of the *ETUI Policy Briefs*, is available at www.etui.org/publications. You may find further information on the ETUI at www.etui.org.

© ETUI aisbl, Brussels, July 2019

All rights reserved. ISSN 2031-8782



The ETUI is financially supported by the European Union.

The European Union is not responsible for any use made of the information contained in this publication.