



Brussels, 26.4.2017
C(2017) 2611 final

CONSULTATION DOCUMENT

of 26.4.2017

First 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

{SWD(2017) 205}

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1. INTRODUCTION

The purpose of this document is to consult the Social Partners, in accordance with Article 154(2) TFEU, to obtain their views on the possible direction of European Union action concerning a revision of the Written Statement Directive in the framework of the European Pillar of Social Rights.

In his State of the Union Address¹, on 9 September 2015, President Jean-Claude Juncker announced his ambition to establish a **European Pillar of Social Rights** (also referred to as 'the Pillar')². Ensuring that our labour legislation maintains its relevance and effect in 21st century labour markets, where globalisation and digitalisation are changing the forms of employment and bringing in new work arrangements, is central to delivering on the Pillar.

As the extensive public consultation on the Pillar revealed³, there is a growing challenge to define and apply appropriate rights for many workers⁴ in new and non-standard forms of employment relationships with a view to avoiding unfair practices and ensuring that workers' rights are safeguarded.

The need to ensure that workers and employers have clarity on their contractual relationship is at the core of the Commission's proposal for the European Pillar of Social Rights. The consultation confirmed the importance of providing this protection for all workers, irrespective of the type of contract, and including those in atypical and new forms of work.

Legal uncertainty also entails disadvantages and, in particular, litigation costs for employers. Sound working conditions moreover contribute to a committed, involved and healthy workforce and can foster productivity and competitiveness of individual companies and the EU economy as a whole. Better information obligations also help public authorities in the fight against undeclared work.

¹ President of the European Commission Jean-Claude Juncker declared that *'We have to step up the work for a fair and truly pan-European labour market (...). As part of these efforts, I will want to develop a European Pillar of Social Rights, which takes account of the changing realities of Europe's societies and the world of work (...). The European Pillar of Social Rights should complement what we have already jointly achieved when it comes to the protection of workers in the EU'*. At the following State of the Union, on 14 September 2016, President Juncker confirmed: *'We have to work urgently on the European Pillar of Social Rights. And we will do so with energy and enthusiasm. Europe is not social enough. We must change that'*.

² The principles and rights making up the Pillar are adopted simultaneously with this Consultation Document, which is intended to contribute to their achievement.

³ See launching Communication COM (2016)127, Report on the Pillar consultation process SWD(2017) 206 and Communication on the Pillar COM(2017) 250.

⁴ In the present Consultation Document, the terms 'worker' and 'employee', where not referred to in a specific context or in a citation, are used as synonyms and have the meaning predominantly used at EU level: *'any person who for a certain period of time performs services for and under the direction of another person in return for which he receives remuneration'*. The issue of national approaches as regards who is to be considered as an employee for the purpose of the Written Statement Directive is discussed below under section 3.2.a.

The Pillar explicitly addresses the challenges related to new forms of employment and adequate working conditions in atypical forms of employment.

Principle 5 ‘**Secure and adaptable employment**’ states that *'a. Regardless of the type and duration of the employment relationship, workers have the right to fair and equal treatment regarding working conditions, access to social protection and training. The transition towards open-ended forms of employment shall be fostered. b. In accordance with legislation and collective agreements, the necessary flexibility for employers to adapt swiftly to changes in the economic context shall be ensured. c. Innovative forms of work that ensure quality working conditions shall be fostered. Entrepreneurship and self-employment shall be encouraged. Occupational mobility shall be facilitated. d. Employment relationships that lead to precarious working conditions shall be prevented, including by prohibiting abuse of atypical contracts. Any probation period should be of reasonable duration.'*

Principle 7 ‘**Information about employment conditions and protection in case of dismissals**’ provides that *'a. Workers have the right to be informed in writing at the start of employment about their rights and obligations resulting from the employment relationship, including on probation period. b. Prior to any dismissal, workers have the right to be informed of the reasons and be granted a reasonable period of notice. They have the right to access to effective and impartial dispute resolution and, in case of unjustified dismissal, a right to redress, including adequate compensation.'*

Against this background, **this document focuses on two important and linked challenges, which in Commission's view can be both addressed by a revision of the Written Statement Directive (Directive 91/533/EEC).**

The *first challenge* consists of **ensuring all workers get adequate information about their working conditions in a timely manner and written form.** It also involves improving the effectiveness of the Directive as a follow-up to the REFIT evaluation, whose result is published simultaneously with this Consultation Document⁵. Many workers are not sufficiently aware of or do not possess a confirmation of some of their basic rights, such as holiday pay, duration of the probation period, or applicable conditions when posted abroad. This concern is raised in the framework of the European Pillar of Social Rights and is also clearly reflected in the REFIT evaluation the Commission has recently completed.

The *second challenge* consists of **achieving upward convergence towards equal access to a number of important rights for all workers. This is in particular important for precarious employment relationships. In the context of segmented and quickly evolving labour markets, not every worker has the same basic rights. In casual work arrangements for instance, flexibility in work organisation is sometimes set at a level which is not sustainable for workers or which fails to guarantee a fair equilibrium between the rights and obligations of the contracting parties. This is leading to an increasing labour market polarisation and to an increasing so-called ‘precariat’⁶ of workers on temporary or unconventional contracts who are in a vulnerable position without access to adequate protection.**

⁵ SWD(2017) 205

⁶ Employment and Social Developments in Europe (ESDE), 2016, p. 99.

Both challenges can and should be addressed without obstructing the development of new forms of work. The latter offers opportunities for flexible working arrangements and integration in the labour market of people who might have otherwise been excluded. If a set of minimum fair working conditions were to be ensured across the EU and across all forms of contracts, this would set a framework within which new forms of work could develop, whilst offering fair protection to workers, a clear reference framework for national legislators and courts and a more level playing field for business within the internal market, limiting incentives for regulatory arbitrage.

In order to meet these challenges, **the Commission believes that a revision of the Written Statement Directive (Directive 91/533/EEC) is needed.** This Directive is in principle the common minimum standard for all EU workers in terms of information provided to them as part of their employment relationship and so has a direct incidence on employment contracts. On the basis of a revised Directive, it would be possible not only to clarify its scope of application, but also to define core labour standards for all workers. The overall objective is to make the Directive more effective and relevant in view of the current trends on labour markets.

2. THE WRITTEN STATEMENT DIRECTIVE TODAY

Directive 91/533/EEC on an employer's obligation to inform employees of the conditions applicable to the contract or employment relationship – the so-called "Written Statement Directive" – was adopted on 14 October 1991.

The Directive gives employees **the right to be notified in writing of the essential aspects of their employment relationship when it starts or within a limited time thereafter** (two months maximum). It also defines additional information that must be provided before departure to employees who are required to work abroad.

The Directive has two principal objectives:⁷

- **improved protection of employees against possible infringements of their rights.** Having information about his/her own rights in writing is, indeed, a prerequisite to enable an employee to enforce them.

- **greater transparency on the labour market** by ensuring easy identification of the working conditions applicable to a specific category of employees (e.g. the general working conditions of employees in the health sector or in the construction sector in a particular EU area). Improved transparency is useful not only for employees but also for public authorities (in their efforts to reduce undeclared work), for employers, and potential investors who may need legal certainty concerning working conditions.

⁷ In its Recitals it is spelled out that '*Whereas the development, in the Member States, of new forms of work has led to an increase in the number of types of employment relationship; Whereas, faced with this development, certain Member States have considered it necessary to subject employment relationships to formal requirements; whereas these provisions are designed to provide employees with improved protection against possible infringements of their rights and to create greater transparency on the labour market*'.

Member States may decide not to apply the Directive to employees having a contract or employment relationship with a total duration not exceeding one month and/or with a working week not exceeding eight hours; or of a casual and/or specific nature provided, in these cases, that its non-application is justified by objective considerations.

Article 2 sets out the principle that employers are obliged to notify employees of the essential aspects of their employment relationship and defines these essential elements as (at least):

- (a) the identities of the parties;*
- (b) the place of work; where there is no fixed or main place of work, the principle that the employee is employed at various places and the registered place of business or, where appropriate, the domicile of the employer;*
- (c) (i) the title, grade, nature or category of the work for which the employee is employed; or*
 - (ii) a brief specification or description of the work;*
- (d) the date of commencement of the contract or employment relationship;*
- (e) in the case of a temporary contract or employment relationship, the expected duration thereof;*
- (f) the amount of paid leave to which the employee is entitled or, where this cannot be indicated when the information is given, the procedures for allocating and determining such leave;*
- (g) the length of the periods of notice to be observed by the employer and the employee should their contract or employment relationship be terminated or, where this cannot be indicated when the information is given, the method for determining such periods of notice;*
- (h) the initial basic amount, the other component elements and the frequency of payment of the remuneration to which the employee is entitled;*
- (i) the length of the employee's normal working day or week;*
- (j) where appropriate;*
 - the collective agreements governing the employee's conditions of work;*
 - or*
 - in the case of collective agreements concluded outside the business by special joint bodies or institutions, the name of the competent body or joint institution within which the agreements were concluded.*

This list is not exhaustive: all the essential aspects of the employment relationship should in principle be notified, not solely those listed in the Directive. In practice however, this list constitutes the **standard package of information** required.

The written statement must be provided to the employee not later than two months after the commencement of employment. Modifications to any of the elements in Article 2 must be notified within one month.

As such, **the Directive only secures provision of information**. It does not harmonise the forms of employment nor does it intend to attach an evidential value to the information provided⁸.

⁸ Nevertheless, regarding the evidential value, the EU Court ruled that 'written statements' enjoy the same presumption as to their correctness as would attach, in domestic law, to similar documents drawn up by the employer and communicated to the employee, see Case C-253/96, *Kampelmann*, 4 December 1997.

3. CHALLENGE 1: BETTER INFORMATION ON WORKING CONDITIONS

3.1. IDENTIFICATION OF THE FIRST CHALLENGE

The necessity of improving the information provided individually to workers was raised in the framework of the European Pillar of Social Rights and particularly highlighted by the REFIT evaluation of the Directive (see annexed Staff Working Document) undertaken by the Commission. The key findings on compliance, effectiveness, efficiency and EU-added value of the Directive are summarised as follows:

Compliance with the Directive in Member States and across sectors is satisfactory overall. On national legislation, the evaluation identified some minor/medium transposition gaps and inaccuracies. The main issues on implementation are associated with the ‘grey’ area between self-employment and subordinate employer-employee arrangements, especially in the case of bogus self-employment.

The Directive is considered to be **relevant** by all stakeholders, in particular public authorities and both sides of industry among social partners. While its obligations are modest – relying exclusively on provision of information – the Written Statement Directive is seen as an important piece of EU law, putting into practice basic rules relating to the definition of the employment relationship. The evaluation also highlighted the Directive’s relevance in a modern labour market where the use of new and atypical forms of employment is growing⁹.

The major messages of the evaluation relate to **effectiveness**¹⁰. There is strong evidence that the Directive has been effective in reaching its objectives (i.e. protection of workers and greater transparency on the labour market) to a significant extent. Nevertheless, the evaluation has identified several factors hampering full effectiveness:

- In particular, the scope of application of the Directive falls short of covering all workers in the EU who are in need of information. It allows exemptions and gives Member States latitude to define whom they consider as ‘a paid employee’.
- There is also a significant lack of clarity in practice as to whether some categories of workers (e.g. domestic workers) or some new forms of employment (e.g. on-call work or ICT-based mobile work) are covered or not.
- In addition, the enforcement of the Directive could be improved by rethinking the means of redress and sanctions in cases of non-compliance (the possibility for the employee to claim damage compensation where the written statement was not received is not often used in practice).
- Furthermore, the two- month deadline after the commencement of employment during which employers are not obliged to provide their employees with any information was highlighted by stakeholders as an aspect of the Directive that does not support the objective of increasing transparency and which may in fact increase the potential for undeclared work or abuse of employee rights.

Regarding **efficiency**, the transposition of the Directive does not appear to have increased costs for companies to a significant extent. In general, the compliance costs are assessed by

⁹ SWD(2017)205, Evaluation of the ‘Written Statement Directive’ (Directive 91/533/EEC), Chapter 5.2.

¹⁰ SWD(2017)205, Evaluation of the ‘Written Statement Directive’ (Directive 91/533/EEC), Chapter 5.3.

surveyed employers as neither high nor low, so can be assumed therefore to be at an appropriate level. The assessment of the administrative burden caused by the Directive did not reveal any significant differences related to the enterprise's size. The share of SMEs stating that they would still comply with the obligations even in the absence of minimum requirements was slightly higher than the average and for micro enterprises it was only slightly lower than the average. No particular aspects of the obligations stood out as particularly onerous or complicated to comply with¹¹.

The Directive globally satisfies the test of **coherence**. On internal coherence, the evaluation showed that there is some discrepancy between the stated goal of the legislation in its preamble i.e. the requirement that every employee must be provided with a written statement except in limited cases, and the operational scope of the Directive, which actually allows more than just limited exceptions. On external coherence, the Directive fits well within EU policies and legislation. There is scope for further convergence with the rules covering posted workers, temporary agency workers and trainees¹².

Finally, the Directive brings clear **EU added value**. Having minimum standards at EU level on information to employees is essential as it increases certainty for both employers and employees and prevents a detrimental race to the bottom between Member States in working conditions. The Directive brings particular added value in Member States where labour contracts (all or only some forms) can be concluded orally. The Directive also increases predictability for businesses and facilitates the mobility of workers within the internal market¹³.

3.2. IMPROVING THE EFFECTIVENESS OF THE WRITTEN STATEMENT DIRECTIVE

The Commission would like to consult the social partners on a possible revision of the Written Statement Directive in order to improve its effectiveness.

In order to improve the effectiveness of the Directive, the Commission sees four broad areas in which EU action could be taken to respond to the findings of the evaluation. They are not exclusive and could be cumulated. They are envisaged as actions of a legislative nature¹⁴ and must be read in conjunction with the principle 7.a. of the of the European Pillar of Social Rights according to which *'workers have the right to be informed in writing at the start of employment about their rights and obligations resulting from the employment relationship, including on probation period.'*

Increasing the transparency of working conditions can be an effective way of empowering individuals and increasing bargaining power when entering an employment relationship. Transparency of working conditions, benefit levels and wages has a positive effect on worker satisfaction and turnover.

There are also clear advantages for employers: transparency, increased trust, reciprocity, effort and productivity, favouring long-term relationships. Without limiting management prerogatives, better information avoids uncertainty and litigation. Extensive data has shown that more involvement of workers is likely to lead to better performance and well-being¹⁵.

¹¹ SWD(2017)205, Evaluation of the 'Written Statement Directive' (Directive 91/533/EEC), Chapter 5.4

¹² SWD(2017)205, Evaluation of the 'Written Statement Directive' (Directive 91/533/EEC), Chapter 5.5

¹³ SWD(2017)205, Evaluation of the 'Written Statement Directive' (Directive 91/533/EEC), Chapter 5.6

¹⁴ Non-legislative actions – such as interpretative guidelines or promotion of best practices – may also be considered as regards the same topics.

Awareness of mutual rights and obligations contributes to smart, sustainable and inclusive growth.

a) Scope of application of the Directive

The evaluation has found that not all workers are covered in practice by the Directive. For instance, in some Member States, workers under employment relationships of less than one month are not covered, nor are workers under zero-hours contracts or on-call contracts as well as voucher-based workers and ICT-based mobile workers. In addition, the concept of 'worker' varies among countries, leading to differences in the coverage of the Directive (regarding, for instance, public servants).

The evaluation established that there exists a core group of protected persons (typically working under standard open-ended contracts or long-term contracts), while a wide divergence in practice and/or uncertainty in coverage was observed for many other categories of workers. Since the adoption of the Directive, the range of non-standard employment relationships has widened, increasingly involving labour market intermediaries.

As the provision of written statements is evaluated as a low burden and low cost tool with positive impact on workers' protection, it is therefore worth considering broadening or clarifying the personal scope of the Directive.

First, a common definition of worker or employee¹⁶ for the purpose of the application of the Directive could be explored to align it with the trend of Court's case-law. Indeed, currently Article 1 of the Directive seems to leave Member States free to apply their own definition of who is an employee¹⁷, while case-law of the EU Court generally tends to refer to the EU definition of worker developed within the field of free movement of workers¹⁸. According to the latter, a 'worker' means any person who for a certain period of time performs services for and under the direction of another person in return for which s/he receives remuneration. The revision could therefore be an opportunity to clarify, in the Written Statement Directive, for the purpose of its application, the concept of worker.

Second, the provisions of the Directive could be amended to make clear whether it applies to some new and atypical forms of employment whose prevalence is increasing, such as on-call workers, voucher-based workers and ICT-based mobile workers. Similar clarifications could be made in relation to trainees/apprentices, persons employed for household work in private households or other vulnerable workers. This would also be a direct response to the recent call of the European Parliament on the Commission 'to broaden the Written Statement Directive (91/533/EEC) to cover all forms of employment and employment relationships'¹⁹.

¹⁵ See for instance Eurofound (2015), Third European Company Survey – Overview report: Workplace practices – Patterns, performance and well-being, Publications Office of the European Union, Luxembourg.

¹⁶ See footnote n°4 above.

¹⁷ According to Article 1 of the Directive, it applies to every paid employee 'having a contract or employment relationship defined by the law in force in a Member State and/or governed by the law in force in a Member State'.

¹⁸ See recent case C-216/15, *Ruhrlandklinik*, 17 November 2016. This judgment indicates that, whatever the references made to national definitions in the text of the Directive 2008/104/EC (Temporary Agency Work) and even in the absence of explicit reference to an EU definition, the concept of worker developed in the field of free movement of workers is applicable. This concept is based on the pursuit of effective and genuine activities. Activities which are regarded as purely marginal and ancillary are excluded.

¹⁹ European Parliament resolution of 19 January 2017 on a European Pillar of Social Rights .

Third, consideration could also be given to the removal or simplification of the exclusion provisions under Article 1(2) of the Directive, under which Member States may exclude people working less than 8 hours a week or whose employment relationship will last less than one month or is of a casual and/or specific nature.

b) Extend the 'information package'

Principle 7.a. of the European Pillar of Social Rights specifically mentions information about probation periods. A way of implementing this principle would be to add information on the probation period, if any, to the 'information package' prescribed by the Directive. Similarly, an obligation could be introduced to inform the employee of the social security system s/he contributes to together with his employer and on the training entitlements under the work contract.

In addition, if it is confirmed under heading (a) that the Directive applies to some new and atypical forms of employment, some items in the list of information to be provided would need to be adapted.

For instance, should a revised Directive confirm that on-call work (whatever the national system) is covered by the obligation of information, it would be necessary also to modify – for this form of work – the legal requirement to notify employees of 'the length of the employee's normal working day or week' (Article 2 (2) (i)). While an employer cannot notify in advance working time schedule in an on-call employment relationship, s/he could confirm in writing the duration of the advance notice the employee should benefit from before a new assignment²⁰.

In order to facilitate compliance by employers, particularly smaller enterprises or households, Member States could be required to develop and make available on-line standard 'Written Statement Models'²¹ or templates for employment contracts that would meet the requirements of the Directive.

c) Redress and sanctions

The means of redress and sanctions could be modified in order to improve compliance with the Directive and, thus, its effectiveness. Evidence suggests that systems based on financial compensation granted to employees who prove they have suffered damage are less effective than systems where, in addition, sanctions (such as lump sums) can be imposed on the employer for failure to issue the written statement. A further option would be to establish favourable presumptions for employees as regards their working conditions in the absence of written statements. Both options could contribute to fighting undeclared work.

d) Reduce the two-month notification deadline

The evaluation addressed the suggestion from the High Level Group on Administrative Burdens to prolong the 2-month deadline by which the employee must be notified²². The

²⁰ Please note that notification of working time is a different issue than limitations to working time regulated by Directive 2003/88/EC.

²¹ See for instance template provided by the UK government on <https://www.gov.uk/government/publications/employment-particulars-written-statement-form>

²² This High Level Group, chaired by Mr Edmund Stoiber, was set up in late 2007 to advise the Commission on the Action Programme for reducing administrative burdens for businesses in the EU. Its main task is to provide

outcome is rather the opposite: no stakeholder argued for an extension of the deadline (on the contrary, several advocated its shortening) and 22 Member States already impose a stricter deadline in their transposition of the Directive.

Furthermore, the evaluation demonstrated that the provision of information at the commencement of the employment relationship at the latest would contribute to both improving employee protection and to combating undeclared work. It could also reinforce protection for workers who move between short-term jobs without ever receiving a written statement on their rights.

Digital tools enhance the possibilities for employers to inform workers in writing about their essential working conditions in a timely manner, including in employment relationships on digital platforms and other forms of ICT-mediated work, which are often of very short duration.

4. CHALLENGE 2: DEFINING MINIMUM FLOORS OF WORKERS' RIGHTS

4.1. IDENTIFICATION OF THE SECOND CHALLENGE

While not all atypical employment is precarious and the Commission does not wish to stifle innovation and job creation on the labour market, submitting partially or totally new or atypical forms of employment relationships to the obligation of information of the Written Statement Directive would be already a significant step towards improving worker protection and towards more common standards in the internal market. Nevertheless, information provided to workers may not be sufficient in itself to address the precariousness of workers' rights under some atypical forms of work and the need to achieve upwards convergence in access to key rights for all workers, irrespective of the type of contract.

Atypical forms of employment, such as casual work, pose challenges which can be addressed through a revised Written Statement Directive. Eurofound defines it as '*a type of work where the employment is not stable and continuous and the employer is not obliged to regularly provide the worker with work, but has the flexibility of calling them in on demand*'²³. Casual work covers on-call work²⁴ (such as zero-hours contracts) and intermittent work²⁵.

advice on administrative burden reduction measures. See Fifth opinion of the High Level Group on Stakeholders' suggestions of 12 November 2009, see http://ec.europa.eu/smart-regulation/refit/admin_burden/docs/enterprise/files/hlg20091112_offline_opinion_fifth_batch_en.pdf

²³ Eurofound (2015), *New forms of employment*, Publications Office of the European Union, Luxembourg, p.46. See also the important research undertaken by the European Labour Law Network that dedicated its 2014 annual seminar to 'New Forms of Work' and its 2015 annual seminar to 'Digitalisation and Labour Law'.

²⁴ Eurofound (2015), *New forms...*, p. 46: "On-call work involves a continuous employment relationship maintained between an employer and an employee, but the employer does not continuously provide work for the employee. Rather, the employer has the option of calling the employee in as and when needed. There are employment contracts that indicate the minimum and maximum number of working hours, as well as so-called 'zero-hours contracts' that specify no minimum number of working hours, and the employer is not obliged to ever call in the worker. This employment form has emerged or been of increasing importance over the last decade in Ireland, Italy, the Netherlands, Sweden and the UK". Please note that the issue of the qualification of on-call time as working time is a separate issue dealt with in the context of the Directive 2003/88/EC on working time. In the latter, on-call time refers to any period where the worker is not required to carry out normal work with the usual continuity, but has to be ready to work if called upon to do so.

²⁵ Eurofound (2015), *New forms...*, p. 46: "Intermittent work involves an employer approaching workers on a regular or irregular basis to conduct a specific task, often related to an individual project or seasonally occurring jobs. The employment is characterised by a fixed-term period, which either involves fulfilling a task or

Eurofound concludes that, among the new employment forms it analysed, '*casual work is the one which raises most concerns about working conditions. It is characterised by low levels of job and income security, poor social protection, little access to HR measures and, in many cases, dull or repetitive work. The high degree of flexibility might be valued by some workers, who benefit from an improved work–life balance, but may be too much for the majority of the casual workers, who would prefer more continuity*'²⁶.

The challenges however are not specifically linked to casual work. In its 6th Working Conditions Survey, Eurofound distinguishes five job quality profiles on the EU labour market, among which the so-called 'under pressure' jobs and the 'poor quality' jobs²⁷. Those two categories amount to 32% of the EU workforce which might be affected in their health, income security or work-life balance.

Some EU Directives already deal with specific atypical forms of employment. This is the case for part-time work (Directive 97/81/EC), fixed-term work (Directive 99/70/EC) and temporary agency work (Directive 2008/104/EC). Nevertheless, the consultation on the European Pillar of Social Rights showed that there is increasing evidence that this acquis is not sufficient.

While it is impossible for the EU legislator to anticipate all contractual forms, a response which at the same time offers protection and fosters innovation would be to set minimum floors of rights relating to working conditions across all types of contracts.

The Commission wishes therefore to open a debate on the possibility to establish minimum contractual rights for anyone in an employment relationship.

In the framework of the open public consultation on the European Pillar of Social Rights, the issue of employment contracts was raised by many respondents. In its *Resolution of 19 January 2017 on A European Pillar of Social Rights*, the European Parliament draws attention to the issue of quality and fair working conditions, highlighting that demand for labour is becoming more fluid and diversified, which can bring benefits for productivity and work-life balance, but that atypical employment often involves prolonged economic insecurity and precariousness. The Parliament calls for a framework directive on decent working conditions to include relevant minimum standards to be ensured in more precarious forms of employment, in particular:

completing a specific number of days' work. This employment form was found in Belgium, Croatia, France, Hungary, Italy, Romania, Slovakia and Slovenia".

²⁶ Eurofound (2015), *New forms...*, p. 138. This is further supported by European Commission (2015) *An ever closer Union among the peoples of Europe? Rising inequalities in the EU and their social, economic and political impacts*.

²⁷ Eurofound (2016), *Sixth European Working Conditions Survey – Overview report*, Publications Office of the European Union, Luxembourg, pp. 132 and s. .

- a) fair working conditions for internships, traineeships and apprenticeships;
- b) for work intermediated by digital platforms, a clear distinction – for the purpose of EU law and without prejudice to national law – between those genuinely self-employed and those in an employment relationship, taking into account the case-law of the EU Court of Justice to determine an employment relationship;
- c) limits regarding on-demand work: zero-hour contracts should only be allowed under certain conditions and certain core working hours guaranteed to all workers²⁸.

The same Resolution calls on the Commission to broaden the Written Statement Directive to cover all forms of employment and employment relationships.

By opening a debate on upward convergence in workers' rights, the Commission is aiming at a form of legislation that will be sufficiently flexible to be future proof, not attached to one form of employment or to another, but providing a set of minimum fair working conditions that apply to any labour contract without constraining unduly the freedom of employers to innovate in terms of work organisation and employment relationships. This can be done by broadening the objectives of the Written Statement Directive.

If well designed, such minimum conditions are compatible with increased growth and jobs. They can reinforce legal certainty and predictability for employers and avoid incentives for regulatory arbitrage. Minimum conditions set at EU level will enhance the convergence of national regulatory frameworks, making it easier for employers with workers in more than one Member State to understand and comply with those national frameworks. Indeed, the Commission has concluded that heterogeneity of regulatory approaches in Europe can hamper the development of new business models and new forms of work, in particular in the digital/collaborative economy²⁹. Without limiting employers' ability to innovate, basic protection for workers can increase loyalty, motivation and productivity.

4.2 BROADENING THE OBJECTIVES OF THE WRITTEN STATEMENT DIRECTIVE

The Commission would like to consult the Social Partners on a possible broadening of the objectives of the Written Statement Directive.

The Commission observes that many stakeholders' comments in the public consultation on the proposed European Pillar of Social Rights, the related Resolution of the European Parliament, and inputs from Eurofound, highlight the challenges for effective worker protection across the growing diversity of employment relationships.

Today, the obligations deriving from the Written Statement Directive relate solely to information rather than standards governing the content of the contractual relations between employer and worker.

However, the Directive could be revised in order to introduce a normative aspect regarding labour relationships. Such a revision would imply not only changing the content of the

²⁸ European Parliament resolution of 19 January 2017 on a European Pillar of Social Rights, para 5.

²⁹ See in this regard Commission's Communication: 'A European agenda for the collaborative economy', COM (2016)356.

Directive but also adapting its title and objectives in consequence. This Directive is a suitable vehicle for incorporating this set of minimum rights, since it confers rights on every individual worker.

This would imply complementing the obligation to provide a defined set of information about the employment relationship with basic rights that should be present in the employment relationship and certain unfair practices that are to be avoided. This method would help to prevent abuses for example in casual work but more generally would provide a template containing the minimum standards that are needed to ensure fair working conditions under any employment contract.

At this stage, the Commission has identified the following rights that could be attached to any employment relationship: right to a maximum duration of probation where a probation period is foreseen, right to reference hours in which working hours may vary under very flexible contracts to allow some predictability of working time, right to a contract with a minimum of hours set at the average level of hours worked during a preceding period of a certain duration for very flexible contracts³⁰, right to request a new form of employment (and employer's obligation to reply), right to training, right to a reasonable notice period in case of dismissal/early termination of contract, right to adequate redress in case of unfair dismissal or unlawful termination of contract and, finally, right to access to effective and impartial dispute resolution in case of dismissal and unfair treatment³¹.

³⁰ Example: an on-call worker has worked in average 25 hours/ week during a period of six months or one year; he/she is entitled at the end of this period to a genuine part-time contract at the level of 25 hours/ week.

³¹ Which is generally seen as an effective incentive for investors and for hiring, see Employment and Social Developments in Europe (2015), Chapter 1.2.

5. AIM OF THE CONSULTATION

Under Article 154(2) TFEU, before submitting proposals in the Social Policy field, the Commission must consult management and labour on the possible direction of Union action.

The Commission will examine the views expressed and will then decide whether there is a case for EU action. If the Commission, following responses to this consultation, concludes that a 2nd stage consultation is needed, it will provide an analytical document on the consequences of the current situation and the likely impacts of potential EU action.

In such case the Commission will launch a second-phase consultation of the social partners at EU level. That phase will cover the content of any proposal for action, in accordance with Article 154(3) TFEU.

The questions on which the Commission consults the social partners in particular are:

- 1) Do you consider that the Commission has correctly and sufficiently identified the issues and the possible areas for further EU action?
- 2) Do you think that the Commission should engage into legislative work in one or several of the identified possible areas for further EU action?
- 3) Would you consider initiating a dialogue under Article 155 TFEU on any of the issues identified in this consultation?
