



Centre for
**Strategy & Evaluation
Services**

STUDY TO SUPPORT IMPACT ASSESSMENT ON THE REVIEW OF THE WRITTEN STATEMENT DIRECTIVE

DIRECTIVE 91/533/EEC – LOT2

FINAL REPORT

18th December 2017

EXECUTIVE SUMMARY

1.1. About the study

This study supports the Commission's Impact Assessment on the review of the Written Statement Directive (Directive 91/553/EEC). The study was implemented by PPMI, as the consortium partner leading the overall study, together with the Centre for Strategy and Evaluation Services (CSES) as the co-leader of the research and reporting. The study relied on evidence gathered through review of relevant national and European literature and data, interviews with national stakeholders in all MS as well as European stakeholders, a survey of employers in five MS¹, and an expert panel.

1.2. What is the problem?

In the intervening period since the adoption of the Written Statement Directive in the early 1990s, the work landscape has changed due to the growing flexibility of the labour market, demographic changes in the working population and digitalisation. This led to growth in non-standard and atypical forms of employment, which in turn contributed to a rise in precarious working conditions associated with such employment. A recent evaluation² has found a number of issues hampering full effectiveness of the Directive, which were confirmed by our study:

- **The Directive does not cover all workers in the EU** as it allows exemptions for employment of less than 8 hours a week or with a total duration not exceeding one month; as well as the employment relationships of a casual/specific nature. In addition, it does not provide a definition of 'a paid employee', creating a 'grey' area between self-employment and subordinate employer-employee arrangements. There is also a lack of clarity in 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 by the Directive or not. Not knowing the basic information about their working conditions makes such employees more susceptible to exploitation by their employers.
- **Those workers who do receive a written statement can receive it too late due to the current two-month deadline** requirement for its provision. This increases the likelihood of undeclared work, abuse of workers' rights, and a risk to never receive a written statement if employees are only hired for short term assignments.
- Some workers who are already covered by the Directive are **unable to gain redress or sanctions that would stop their abuse**. Employees feel that the lack of a written statement alone is not enough to start proceedings, the proceedings themselves are often too slow and expensive, and lastly, many employees are afraid their employment may be terminated due to worsened relations with the employer.
- **The information included in the written statement sometimes may be inefficient**. A high number of lawsuits related to the termination of the contracts shows that workers might lack comprehensive information about the applicable national law. Most migrant or low skilled workers lack information about the social security system to which the employer is

¹ Germany, Italy, Poland, Slovakia, and the UK.

² REFIT Evaluation of the 'Written Statement Directive' (Directive 91/533/EEC), SWD(2017) 205 final, of 26.04.2017.

contributing. This leads to poor social protection of such workers. Finally, the most pressing issue, as indicated by the national experts, is the lack of information about precise working time.

In addition, our research has found:

- **The current Directive does not correspond to the needs of atypical employees**, with casual workers being the most vulnerable and in need of protection. The information requirements that are stated in the Directive can no longer guarantee basic rights in some types of employment that have emerged or grown since 1991: knowing an average number of likely working hours, having a reference period of hours between which they could be asked to work, and receiving a minimum notice before the start of work. Work unpredictability and insecurity leads to unstable and low income as well as a lack of social protection, poor health, and a worse work-life balance. Poor working conditions are amplified by some casual workers having exclusivity clauses in their contracts. Having no right to request a more standard form of employment in the event of relevant job openings traps casual workers in poor working conditions.
- **All these problems create negative socio-economic effects.** Casual and atypical work is characterised by poor social protection, little or no access to benefits, little job security, no predictability, less job satisfaction, lower wages and worse health than other employees. Furthermore, as the extent to which atypical forms of employment are actually covered by the scope of the Directive varies greatly between countries. This leads to the fragmentation in the labour market across the EU, lower level of transparency and barriers to the free movement of labour in the EU.

1.3. How would the problem evolve?

The problems driving precarious working conditions are likely to continue under the assumption of no EU level intervention. This means that the abuse of workers' rights is also likely to continue in the future. In addition, the non-standard forms of employment are likely to continue to grow, although it is difficult to say with certainty, as it will depend on the degree of flexibility and regulation of the labour market. Thus, it could be also assumed that the likely future growth in new and atypical forms of employment would have an upward effect on the incidence of workers' rights abuse. In addition, it is possible that new and atypical forms of employment associated with precariousness might spread geographically. This would mean that without an introduction of minimal safeguards, the MS newly introducing such forms would experience the associated workers' rights abuse. This provides an additional argument for improving poor working conditions of casual and atypical workers now, so that MS newly adopting such employment forms would set good working conditions from the start.

1.4. Objectives

The general objective of revising the Directive would be to "improve and harmonise living and working conditions, in line with Article 151 of the Treaty". The specific objectives relate to protecting workers' rights and creating greater transparency on the labour market. The operational objectives relate to: a) the employee's right to essential information at the outset, when changes occur and in advance of being required to work in another country, and b) ensuring basic rights in employment contracts or relationships.

1.5. Policy options

The follow options, which are not mutually exclusive, were considered.

Options	Proposed revision
1	Extending the scope of the Directive by: <ul style="list-style-type: none"> • removing exclusions: employees working less than 8 hours per week, employees with contracts of less than one month's duration and certain types of casual worker; • including a definition of 'employee', so that more workers are brought into scope
2	Strengthening the information package by: <ul style="list-style-type: none"> • informing about the duration and conditions of the probation period, if any; • informing about the social security system to which the employer is contributing; • providing comprehensive information on the procedure applicable in case of termination of contract (beyond the mere mention of the notice period); • informing about precise arrangements for setting working time (and not only 'the length of the employee's normal working day or week') including the possibility of extra hours, if any.
3	Strengthening the means of address and sanctions by: <ul style="list-style-type: none"> • requiring Member States to make sure that a 'competent authority' can find or impose a solution in case a worker does not receive a written statement • requiring Member States to set up a formal injunction system to the employer, possibly accompanied by a possibility of lump sum • establishing favourable presumptions for the employees as regards their working conditions in case of (unlawful) absence of written statements
4	Shortening the 2-month deadline to 1 month, 15 days, 1 st day or before contract is formed
5	Providing certain basic rights in employment: <ul style="list-style-type: none"> • for employment relationships where working time is very flexible, a right to reference hours in which working hours may vary • for employment relationships where working time is very flexible, a right to a minimum advance notice before a new assignment or a new period of work • for casual work, prohibition of exclusivity clauses • for all employment relationships, right to request a new form of employment (and the corresponding employer's obligation to reply) • for all employment relationships (except very specific situations), right to a maximum duration of probation where a probation period is foreseen.

1.6. Impacts of the options

Option 1 (extended scope): A revision of the Directive would provide new rights to a written statement for 2.4m-3.2m workers who are currently excluded: employees working less than one month, employees working less than eight hours, some casual workers, some domestic workers, some platform workers and some voucher-based workers. Provision of written statements for these workers would provide better understanding of their working conditions and their rights at work, improved protection against possible infringement of their rights by the provision of essential information, fewer conflicts and (court) disputes between employers and employees, better integration of workers in other countries where they have less knowledge of the general conditions that apply in the labour market, and better access to social security protection, since employees with short-term contracts can rely on the written statement to prove their employment can claim their social security benefits.

For employers, the provision of written statements would clarify the main points of the employment relationship, thus ensuring there is no ambiguity in the agreement made. However, net additional benefits to employers will be modest since employers are free to provide written statements in the absence of any legal requirement and more than 80% already do so. The average cost of producing each written statement would be between €17.10 and €128.70. Across EU-28, the total one-off cost

of providing written statements for staff that would be newly-covered by the Directive is estimated to be €114m-€152m. However, since more than 80% of employers already provide statements for employees not covered by the Directive, the administrative burden in practice can be estimated at between €25.1m-€36.5m for the remaining 20% of employers.

It is unlikely that the extension of the Directive to more workers will cause many employers to replace workers newly covered by the Directive with other workers not covered by the Directive. As noted above, more than 80% of employers already provide written statements for employees currently excluded. It is reasonable to assume that those employers will not adjust their workforce in light of this revision to the Directive. An extension of the scope of the Directive to more workers could be expected to facilitate the shift of undeclared work into the formal economy. This may be because employers choose to formalise arrangements that are currently informal or because workers feel empowered to demand a formal contract or because labour inspectorates are better supported in their efforts to detect undeclared work.

Option 2 (strengthened information package): assuming that Option 1 is also adopted, 46.3m more employees would benefit from the right to information about probation periods, 93.9m from the right to information about social security systems, 153.4m from the right to information about the procedure applicable in case of termination of contract: and 145.2m from the right to information about working time. Employers would benefit from ensuring there is no ambiguity in the agreement made and offering legal certainty in case of any dispute. The net additional benefits to employers will be modest since some already include such information in written statements either through choice or in response to national legal requirements.

Option 3 (strengthened means of address and sanctions): would mean that each country would have a competent body which is more easily accessible than a labour court. If an employee addressed a complaint to that body, it would look into the complaint and could require the employer to supply the missing information, with the possibility to impose possible sanctions on the employer if this is not done. This way, there is less debate between the employee and employer directly as would be the case before a judge. More employees would seek redress, who were previously unable to start proceedings before a court. Overall, a higher rate of compliance amongst employers is likely to increase the proportion of workers benefitting from written statements. Evidence from MS that already have a formal injunction system with a lump sum fine suggests that this requirement would increase compliance of employers due to the fear of being fined. Moreover, a formal injunction system in law would show employees that the lack of a written statement alone is a legal basis to seek redress and they do not need additional violations in order to start a procedure. Where MS have already introduced favourable presumptions for employees in cases of (unlawful) absence of written statements, this also tends to raise the level of compliance by employers. Similarly, improving access to dispute resolution mechanisms would increase opportunities to seek redress for employees as well as increased compliance by employers.

Option 4 (shorter deadline): 22 Member States have set shorter deadlines than the two months required by the Directive. Of these, eight have a 1 month deadline, one has a 15-day deadline, three require the statement to be provided on the first day of employment and eight require it to be provided before the employment contract is formed. Of employers responding to the survey, the overwhelming majority (95%) already provide written statements for their employees within one month of the individual starting work. Excluding those that responded “Don’t know”, this rises almost to 100%.

Some 49m employees (26% of the EU-28 workforce) would benefit from a new legal right to a 1-month deadline and 112m (60% of the workforce) from a deadline of the 1st day or before. In practice, employees would only benefit as and when they start a new job. Assuming a staff turnover rate of 10-20% p.a., some 4.9m-9.8m would benefit each year from a 1-month deadline and 11.2m-22.3m from a deadline of the 1st day or before. A reduction in the deadline is essential to avoid a risk of legal uncertainty in the case that the Directive is extended to employees with a contract duration of less than one month. At the limit, if a deadline of the 1st day of employment or earlier is set, a total of 1.6m employees with contract duration of one month or less would be covered by the creation of this new right at EU level regardless of the current deadline set at national level, the duration of their contract or the current practice of their employer.

Since employers are already free to provide a written statement earlier than the deadline set in national legislation, the additional direct benefit for employers would be relatively modest, since most employers will already have captured any benefits. The additional costs to employers from shortening the deadline to one month would be negligible because 22 Member States have already reduced the deadline to one month or less, nearly all employers responding to the survey reported that they already provide written statements within one month, even in the UK (where the deadline is two months and the REFIT study found that shorter timeframes were not considered by employers to be particularly burdensome).

Option 5 (basic rights for casual workers): provision of the right to reference hours during which working hours may vary would benefit around 6.5m-8.0m casual workers who might otherwise be expected to work at any time.

The right to a minimum advance notice period would benefit around 5.3m-6.7m casual workers who might otherwise be expected to be immediately available.

Prohibiting exclusivity clauses would prevent situations where the casual worker is not offered work by his/her main employer but is not entitled to work for another employer when not needed. This prohibition would particularly benefit an estimated 444,000-888,000 on-call workers who currently face such restrictions. Of these around 167,000-334,000 can never take on work with another employer, whilst the rest can do so only under certain conditions. It is estimated that around 6% of such workers (about 182,000) would seek a second job if allowed. Those workers might work a median 7 hours per week in a second job, equivalent to an additional 66m hours p.a. across the EU. They would enjoy increased earnings of around €710m p.a., leading to increased tax revenues of €92m p.a.. Secondary employers would experience increased revenues of around €84m p.a., whilst primary employers would suffer reorganisation costs of just over €14m p.a. due to staff being unavailable for around 7.6m hours p.a..

The right to a request a new form of employment would be relevant for all employees, but particularly for casual workers (who might want more stable employment), fixed-term workers (who might want a permanent job) or part-time workers (or might want more hours or a full-time contract). This new right would cover all 186m employees across EU-28. Taking into the current situation in each country, around 55m employees would benefit from a new right at EU level. The evidence suggests that many employees would like to request a new form of employment: 53% of fixed-term workers would prefer a permanent contract and more than two-thirds of employees who work on temporary contracts do so involuntarily. At the same time, the majority of employers (73%) responding to the survey reported that they already reply in writing to employee requests for a new form of employment. Aside from the administrative cost involved in responding to requests, employers would experience no costs, as they would not have to agree to requests that disadvantage

the business. Where this right facilitates a move into permanent employment, it would have the potential to improve productivity and increase tax revenues. At the same time, the right to request a new form of employment would be just one of many factors determining the movement of temporary workers into permanent employment.

Providing the right to a maximum probation period of 6 months would benefit around 3.2m-6.5m workers starting new jobs each year. A maximum duration of 3 months would benefit around 19m-37m each year. Whilst those workers would benefit from the new right, in practice the median length of probation period is no more than 3 months, including in the UK which currently does not set a legal maximum duration.

1.7. Overall impacts

A revision of the Directive featuring all the above options would provide the benefits and costs highlighted in the tables below.

I. Overview of Benefits (total for all provisions) – Preferred Option	
Description	Amount
Direct benefits	
Higher number of workers entitled to written statements	Some 2-3m more workers have a right to a written statement
Workers getting more comprehensive information in the written statements	5-31 million workers per year
Written statements issued on the 1 st day of employment	8-16 million workers per year
Workers getting reference hours and receiving advance notice before an assignment	4-6 million workers
Workers freed from exclusivity clauses	6-7 million casual and voucher-based workers
Workers getting the right to request another form of employment	52 million (some 25% expected to use the right in practice)
Workers getting the right to a max. duration of a probation period	3-6 million workers per year
Workers getting better access to redress	All workers whose rights are not respected.
Increased legal certainty for employers	16% of employers
Indirect benefits	
Additional tax revenues from workers enabled to get a second job with another employer	46-185m EUR p.a.
Additional tax revenues from a 1-3% shift of undeclared work into the formal economy	8.2m-24.7m EUR p.a.
Reduction in social security payments	Unquantified but related to the expected additional 33m-133m extra hours workers per year by workers freed from exclusivity clauses
Reduction in social security payments, due to undeclared workers entering the formal economy	4m-24m EUR p.a. (assuming that reductions equal about 10-20% of the value of undeclared work brought into the formal economy)
Increased productivity, retention, loyalty etc.	16-20% of employers
Reduced unfair competition	Benefits for some 80-84% of employers who already provide written statements to all workers
Improved availability of workforce for secondary employers	91,000-363,000 workers available for extra work following ban on the exclusivity clauses

I. Overview of Benefits (total for all provisions) – Preferred Option	
Description	Amount
Additional revenues for secondary employers as result of the above	42-167m EUR
Improved detection of undeclared work	unquantified
Improved health and work-life balance of workers	unquantified
Workers enabled to get a second job with another employer	355-1,424m EUR p.a. increase in gross annual earnings for those workers
Undeclared work brought into the formal economy	39.9m-119.7m EUR p.a.

II. Overview of costs – Preferred option							
		Workers		Businesses		Administrations	
		One-off	Recurrent	One-off	Recurrent	One-off	Recurrent
Extended scope	Direct costs	None	None	825.5m EUR ^{3,4} + 114-152m EUR ⁵	11-30m EUR ⁶	€57,000	None
	Indirect costs	None ⁷	None ⁸	None	Limited ⁹	None	None
Extended information package	Direct costs	None	None	Included in 1.	Included in 1.	14,000-29,000 EUR	None
	Indirect costs	None	None	None	Negligible ¹⁰	None	None
Shortened deadline	Direct costs	None	None	Included in 1.	Limited ¹¹	Limited	None
	Indirect costs	None	None	None.	None.	None	None
Rights to predictability¹²	Direct costs	None	None	Included in 1.	147m-245m EUR	Limited	None
	Indirect costs	None	None	Depending on employers' choices ¹³	(Depending on employers' choices)	None	None
Prohibition of exclusivity	Direct costs	None	None	Included in 1.	7-27m EUR	Limited	None
	Indirect costs	None	None	None	None	None	None

³ Familiarisation (including e.g. adaptation of written statements to new information package).

⁴ This total amount represents the average cost per company (53 EUR for an SME and 39 EUR for a larger company) multiplied by the number of all companies in the EU. It is likely an overestimation as mostly companies needing to issue new written statements will need to invest in familiarising with the new legislation.

⁵ Cost per written statement: 18-153 EUR for SMEs and 10-45 EUR for larger companies.

⁶ As above.

⁷ Very limited possibility for some workers to become unemployed.

⁸ Social security and/or pension contributions for some workers who were undeclared or bogus self-employed.

⁹ Costs could be related to the need to replace workers covered by the directive with others, not covered (or self-employed). It is however unlikely that many employers would do that, just because of the requirements to provide a written statement.

¹⁰ As established through interviews with stakeholders.

¹¹ 12 MS already comply; REFIT study shows no major differences in how burdensome employers consider the timeframe to be, regardless of whether it precedes the employment (BG, PL), is set at one month (DE, FR, IT, SE) or at two months (UK).

¹² Reference hours, minimum advance notice and minimum hours.

¹³ Costs will depend on the business models and strategic management decisions.

II. Overview of costs – Preferred option							
Right to request another form of employment	Direct costs	None	None	Included in 1.	20-258m EUR ¹⁴	Limited	None
	Indirect costs	None	None	None. ¹⁵	None.	None	None
Maximum duration of probation	Direct costs	None	None	Included in 1.	Limited ¹⁶	Limited	None
	Indirect costs	None	None	None	None	None	None
Strengthening means of redress, sanctions and access to dispute resolution	Direct costs	None	None	Included in 1.	None. ¹⁷	Depending on MS decisions ¹⁸	Depending on MS decisions ¹⁹
	Indirect costs	None	None	None	None	None	Possible ²⁰

¹⁴ Unit cost the same as for issuing a new written statement. The range reflects the lower and upper bound of a cost for a single written statement. Assuming 25% of employees submit such a request every year.

¹⁵ The provision does not oblige employers to accept the request.

¹⁶ The new right would only have an effect in Cyprus, Ireland and the UK – and also in those MS in practice, based on legal precedents, there is already a maximum duration of probation in place.

¹⁷ No new costs for compliant employers.

¹⁸ The proposed measures leave to Member State the choice of institutional setting for establishing the new procedures. When existing institutions are used, costs should be limited.

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²⁰ Possible increase in enforcement-related costs due to a higher number of cases.