



# Report

## Expert Group

Transposition of Directive (EU) 2019/1152 on  
transparent and predictable working conditions in  
the European Union

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## Introduction

Directive (EU) 2019/1152 of the European Parliament and of the Council of 20 June 2019 on transparent and predictable working conditions in the European Union, hereinafter “the Directive”, is a direct follow-up to the proclamation of the European Pillar of Social Rights. It aims at improving working conditions by promoting more transparent and predictable employment while ensuring labour market adaptability. It repeals Directive 91/533 EEC on an employer's obligation to inform employees of the conditions applicable to the contract or employment relationship and provides instead for more complete information on the essential aspects of the conditions of work, to be received by the worker in writing at the beginning of the employment relationship. It also includes a new chapter on minimum requirements relating to working conditions providing completely new material rights for the workers in the European Union.

As for other Directives in the field of labour law, the Commission set up an Expert Group composed of national experts representing the Governments of the twenty-seven Member States, the three EEA-EFTA countries and the EFTA Surveillance Authority in order to provide Member States with technical assistance and with a forum for discussing and facilitating the transposition of the Directive. The European Social Partners participated in the work of the group as observers.

The Expert Group had an informal status, and the role of the Commission services has been limited to providing it with logistical support and helping to develop its ideas. While aiming at improving the implementation of the Directive through an exchange of views and favouring a better common understanding of the process by providing the Member States and EEA/EFTA countries with technical assistance in the implementation process of the Directive, the Commission has not sought to interfere with the transposition process at national level in any way, nor to intervene in the right of interpretation of the Court of Justice, or other courts concerned. The same applies to the experts in the Expert Group who, in their countries, are responsible, as the case may be, for producing draft legislation or monitoring discussions between the social partners as part of collective agreement-based transposition.

The Expert Group worked on the basis of the working documents presented by the Commission services. Nine meetings were held between November 2019 and June 2021, during which the main issues arising from the implementation of the Directive were extensively discussed. This report is the result of those discussions.

The report aims at supporting the legislative work leading to the transposition of the Directive in the Member States and EEA/EFTA countries. It is by no means binding and is not to be considered as representing the official position of Government participating in the Expert Group nor of the Commission nor of the European Social Partners.<sup>1</sup> The report does not in any way exonerate Member States from the responsibility of ensuring the correct transposition and application of the Directive, as it does not exempt the Commission from its obligation to monitor that work.

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<sup>1</sup> Where a position has been formally adopted by the Commission as an institution, the text refers to ‘the Commission’, and where the text contains the views of DG EMPL officials, the text refers to ‘the Commission services’. The views of ‘the Commission services’ are not binding on the institution.

## Chapter 1 on General provisions: Purpose, subject matter and scope

### 1.1. Purpose of the Directive (Article 1(1))

*Article 1(1): The purpose of this Directive is to improve working conditions by promoting more transparent and predictable employment while ensuring labour market adaptability.*

*Recital 1: Article 31 of the Charter of Fundamental Rights of the European Union provides that every worker has the right to working conditions which respect his or her health, safety and dignity, to limitation of maximum working hours, to daily and weekly rest periods and to an annual period of paid leave.*

#### 1.1.1. Issues

The Directive pursues a clear-cut social policy objective, which has to be interpreted together with the relevant provisions of the Charter of Fundamental Rights of the European Union (Charter) and the European Pillar of Social Rights (EPSR). Article 31 of the Charter provides that every worker has the right to working conditions which respect his or her health, safety and dignity, to a limitation of maximum working hours, to daily and weekly rest periods and to an annual period of paid leave.

Principle No 5 of the EPSR states that, 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, and that the transition towards open-ended forms of employment is to be fostered; that, in accordance with legislation and collective agreements, the necessary flexibility for employers to adapt swiftly to changes in the economic context is to be ensured; that innovative forms of work that ensure quality working conditions are to be fostered, that entrepreneurship and self-employment are to be encouraged and that occupational mobility is to be facilitated; and that employment relationships that lead to precarious working conditions are to be prevented, including by prohibiting abuse of atypical contracts, and that any probationary period is to be of a reasonable duration.

Principle No 7 of the EPSR states that 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 any probationary period; that prior to any dismissal they are entitled to be informed of the reasons and given a reasonable period of notice; and that they have the right to access to effective and impartial dispute resolution and, in the case of unjustified dismissal, a right to redress, including adequate compensation.

### 1.2. Personal scope of the Directive (Article 1(2))

*Article 1(2): This Directive lays down minimum rights that apply to every worker in the Union who has an employment contract or employment relationship as defined by the law, collective agreements or practice in force in each Member State with consideration to the case-law of the Court of Justice.*

*Recital 8: In its case law, the Court of Justice of the European Union (Court of Justice) has established criteria for determining the status of a worker (5). The interpretation of the Court of Justice of those criteria should be taken into account in the implementation of this*

*Directive. Provided that they fulfil those criteria, domestic workers, on-demand workers, intermittent workers, voucher based-workers, platform workers, trainees and apprentices could fall within the scope of this Directive. Genuinely self-employed persons should not fall within the scope of this Directive since they do not fulfil those criteria. The abuse of the status of self-employed persons, as defined in national law, either at national level or in cross-border situations, is a form of falsely declared work that is frequently associated with undeclared work. Bogus self-employment occurs when a person is declared to be self-employed while fulfilling the conditions characteristic of an employment relationship, in order to avoid certain legal or fiscal obligations. Such persons should fall within the scope of this Directive. The determination of the existence of an employment relationship should be guided by the facts relating to the actual performance of the work and not by the parties' description of the relationship.*

### 1.2.1. Issues

The Directive's personal scope of application refers to the national concept of worker with consideration to the case-law of the Court of Justice of the European Union (CJEU). This provision must be read together with Recital 8 that stipulates that the CJEU in its case-law, "has established criteria for determining the status of a worker. The interpretation of the CJEU of those criteria should be taken into account in the implementation of this Directive. [...]"

Footnote 5, attached to Recital 8, highlights some of the most important rulings of the CJEU on the notion of worker: "Judgments of the Court of Justice of 3 July 1986, *Deborah Lawrie-Blum v Land Baden-Württemberg*, C-66/85, ECLI:EU:C:1986:284; 14 October 2010, *Union Syndicale Solidaires Isère v Premier ministre and Others*, C-428/09, ECLI:EU:C:2010:612; 9 July 2015, *Ender Balkaya v Kiesel Abbruch- und Recycling Technik GmbH*, C-229/14, ECLI:EU:C:2015:455; 4 December 2014, *FNV Kunsten Informatie en Media v Staat der Nederlanden*, C-413/13, ECLI:EU:C:2014:2411; and 17 November 2016, *Betriebsrat der Ruhrlandklinik gGmbH v Ruhrlandklinik gGmbH*, C-216/15, ECLI:EU:C:2016:883."

The Commission services recalled that, in its proposal for a directive on transparent and predictable working conditions (COM (2017) 797 final), the Commission had proposed to codify the CJEU notion with the main aim of providing legal certainty. Indeed, it was considered necessary to define the notion of worker in view of the findings of the REFIT (Regulatory Fitness and Performance Programme of the Commission) evaluation that the scope of application of the Written Statement Directive varies among Member States depending on their concepts of 'employee', 'employment relationship' and 'employment contract',<sup>2</sup> and risks excluding growing numbers of workers in non-standard forms of employment, such as domestic workers, on-demand workers, intermittent workers, voucher-based workers and platform workers.

However, this was the most contentious provision of the Commission proposal, with the positions of the co-legislators at odds during the negotiations. Whereas the rapporteur of the European Parliament supported the Commission proposal, the Council could not accept the definition of worker in Article 1(2), nor in Recital 8. During the trilogue negotiations, the initial reference in Recital 8 (former Recital 7) to the uniform implementation of the personal scope of the Directive was deleted. The wording eventually retained in Article 1(2) refers to national definitions with a reference to the case-law of the CJEU which needs to be taken into consideration by Member States when transposing the directive into their national systems. This compromise text in Article 1(2)

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<sup>2</sup> SWD(2017)205 final, pages 21, 25 and footnote 50.

closely mirrors that reached the Work-life Balance Directive<sup>3</sup>. As of the date of writing [June 2021], it is possible to identify two tendencies in the CJEU case-law regarding the personal scope of EU directives in the field of labour law: those directives which refer to employment relationships as defined in national law or to persons protected under national employment law, where the Court has tended to apply the concept of *effet utile* (effectiveness); and those with no such references, where the Court has tended to apply an autonomous EU concept of worker deriving from its case-law. In the light of recent case-law, it is not possible to state unequivocally at this point how the Court might approach the personal scope of the Directive. It should be noted that the formulation in Article 1, referring both to national definitions of employment relationships and to the Court's case-law, is novel and so it is not yet clear how the Court would address it.

(a) Case-law of the CJEU on the practical effectiveness of EU law (*effet utile*)

Some EU labour directives, such as the Fixed-Term Work Directive<sup>4</sup> and the Part-Time Work Directive<sup>5</sup>, apply to “employees/workers” and grant leeway to Member States in terms of defining these concepts in accordance with their national law and practice. It is settled case-law that where Member States are empowered themselves to define the concept of “worker” their definitions must not call into question Member States’ obligation to respect the effectiveness of the directive and the general principles of European Union law. Member States may not apply rules which are liable to jeopardise the achievement of the objectives pursued by a directive and, therefore, deprive it of its effectiveness.

Such jurisprudence declares inadmissible the exclusion of working persons from transposing legislation on the ground that they cannot be qualified as workers under national law although their working conditions are similar to those of workers under national law.

Case C-393/10, *O’Brien*, (on the application of the Part-time Work Directive) concerned a holder of a judicial office who was working part-time and was remunerated on a daily fee-paid basis. According to national legislation, this person had to be qualified as an ‘office holder’ and not as a worker. In its judgment, the CJEU confirmed that it is in principle for Member States to define the notion of worker. However, the discretion granted to the Member States in order to define the concept is not unlimited. Member States may not apply rules which are liable to jeopardise the achievement of the objectives pursued by the directive and, therefore, deprive it of its effectiveness. Therefore, a Member State cannot remove at will certain categories of persons from the protection offered by that directive.<sup>6</sup>

*“It follows from paragraphs 34 to 38 of the present judgment and, in particular, from the need to safeguard the effectiveness of the principle of equal treatment enshrined in that framework agreement, that such an exclusion may be permitted, if it is not to be regarded as arbitrary, only if the nature of the employment relationship concerned is substantially*

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<sup>3</sup> Directive (EU) 2019/1158 of the European Parliament and of the Council of 20 June 2019 on work-life balance for parents and carers and repealing Council Directive 2010/18/EU

<sup>4</sup> Council Directive 1999/70/EC of 28 June 1999 concerning the framework agreement on fixed-term work concluded by ETUC, UNICE and CEEP

<sup>5</sup> Council Directive 97/81/EC of 15 December 1997 concerning the Framework Agreement on part-time work concluded by UNICE, CEEP and the ETUC

<sup>6</sup> Case C-393/10, *O’Brien*, para 36.

*different from the relationship between employers and their employees which fall within the category of ‘workers’ under national law”.*<sup>7</sup>

This view was further developed by the CJEU in the recent Case C-658/18, *UX*, concerning a *giudice di pace* (magistrate) under Italian law. The CJEU found that, while the Fixed-Term Work Directive leaves Member States free to define the terms ‘employment contract’ or ‘employment relationship’ in accordance with national law and practice, the discretion granted to the Member States in order to define such concepts is nevertheless not unlimited. Such terms may be defined in accordance with national law and practices on condition that they respect the effectiveness of that directive and the general principles of EU law. The mere fact that a professional activity, the exercise of which leads to a material advantage, may be classified as ‘honorary’ under national law is irrelevant. Otherwise, in reserving to Member States the ability to remove at will certain categories of persons from the protection afforded by the Fixed-Term Work Directive, the effectiveness of those instruments would be in jeopardy, as would their uniform application in the Member States.

On the other hand, some directives, such as the Temporary Agency Work Directive<sup>8</sup> and the Transfers of Undertakings Directive<sup>9</sup>, define “worker/employee” ‘as any person who, in the Member State concerned, is protected as a worker/employee under national employment law.

In Case C-416/16, *Piscarreta Ricardo*, the Court was asked whether a person who was not actually performing his duties because his employment contract was suspended is covered by the concept of ‘employee’ within the meaning of Article 2(1)(d) of the Transfers of Undertakings Directive. The Court held that such person is covered by the concept of ‘employee’ within the meaning of that directive in so far as he is protected as an employee under the national law.

In Case C-216/15, *Betriebsrat der Ruhrlandklinik*, the Court held that Article 3(1)(a) of the Temporary Agency Work Directive, which states that, for the purposes of the directive, ‘worker’ means any person who, in the Member State concerned, is protected as a worker under national employment law, in conjunction with Article 3(2) of that Directive, could not be interpreted as a waiver on the part of the EU legislature of its power itself to determine the scope of that concept for the purposes of that Directive, and accordingly the scope *rationae personae* of that Directive. According to the Court, the EU legislature did not leave it to the Member States to define that concept unilaterally, but specified itself the contours thereof in Article 3(1)(a) of Directive 2008/104 and specified in addition the contours of the definition of ‘temporary agency worker’ in Article 3(1)(c) of that Directive.<sup>10</sup>

*“In accordance with the settled case-law of the Court, the essential feature of an employment relationship is that, for a certain period of time, a person performs services for and under the direction of another person, in return for which he receives remuneration, the legal characterisation under national law and the form of that relationship, as well as the nature of the legal relationship between those two persons, not being decisive in that regard (see, to that effect, judgment of 11 November 2010, Danosa, C-232/09, EU:C:2010:674, paragraphs 39 and 40 and the case-law cited)”.*<sup>11</sup>

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<sup>7</sup> Ibid. para 42.

<sup>8</sup> Directive 2008/104/EC of the European Parliament and of the Council of 19 November 2008 on temporary agency work

<sup>9</sup> Council Directive 2001/23/EC of 12 March 2001 on the approximation of the laws of the Member States relating to the safeguarding of employees’ rights in the event of transfers of undertakings, businesses or parts of undertakings or businesses

<sup>10</sup> Case C-216/15, *Betriebsrat der Ruhrlandklinik*, para 25, 26 and 32.

<sup>11</sup> Ibid. para 27.



*“[...] for the purposes of interpreting that directive, that concept covers any person who has an employment relationship in the sense set out in paragraph 27 of this judgment and who is protected, in the Member State concerned, by virtue of the work that person carries out”.<sup>12</sup>*

According to the CJEU, *“neither the legal characterisation, under national law, of the relationship between the person in question and the temporary-work agency, nor the nature of their legal relationships, nor the form of that relationship, is decisive for the purposes of characterising that person as a ‘worker’ within the meaning of Directive 2008/104. Accordingly, in particular, contrary to what Ruhrlandklinik contends in its observations, a person, such as Ms K., cannot be excluded from the concept of ‘worker’ within the meaning of that Directive, and thus from the scope of that Directive, on the sole ground that she does not have a contract of employment with the temporary-work agency and that she therefore does not have the status of worker under German law”* (para 29). *“That conclusion cannot be called into question by the fact that, under Article 3(2) of Directive 2008/104, that directive is to be without prejudice to national law as regards the definition of worker”.<sup>13</sup>*

*“To restrict the concept of worker as referred to in Directive 2008/104 to persons falling within the scope of that concept under national law is liable to jeopardise the attainment of the objectives pursued and, therefore, to undermine the effectiveness of that directive by inordinately and unjustifiably restricting the scope of that directive”.<sup>14</sup>*

Although the CJEU uses a different line of argumentation, the *Betriebsrat der Ruhrlandklinik* judgement nevertheless leads to a similar result as the other rulings mentioned above. The cases *UX* and *O’Brien* focussed on the fact that persons were arbitrarily excluded because of the legal qualification under national law, although they were comparable to workers under national law. A similar result is obtained in the *Betriebsrat der Ruhrlandklinik* ruling by referring to the qualification as a worker under Union law, and protection under national law. In the end, what matters is that persons who, from the point of view of Union law, are comparable to workers under the national concept are arbitrarily excluded because of national specificities.

In the case-law of the CJEU it is still open which differences between groups of working persons could have a justifying effect for excluding a particular group from the scope of protection, and for which directives. In the Cases *O’Brien* and *UX*, the CJEU, while holding that it is for the referring court, taking account of all the relevant factors relating to the concerned person and to the economic activity he carries on, to classify that person’s professional status under the relevant directive, considered it probable that there were not sufficient differences.

Therefore, Member States must refrain from applying rules which would jeopardise the achievement of the Directive’s objectives and in essence, deprive it of its effectiveness. Member States may not remove at will certain categories of persons from the protection that the Directive offers, if the nature of the employment relationship concerned is not substantially different from the relationship between employers and their employees which fall within the category of ‘workers’ under national law.

## (b) Case-law of the CJEU on the EU concept of worker

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<sup>12</sup> Ibid. para 33.

<sup>13</sup> Ibid. para 30.

<sup>14</sup> Ibid. para 36.

Given the novel hybrid formulation in Article 1 on the personal scope of Directive (EU) 2019/1152, referring both to national definitions of employment relationships and to the Court's case-law, and given that the Court has considered the autonomous definition of worker with regards to the personal scope of a Directive referring to national definition, according to the Commission services, some considerations on the autonomous EU concept of worker should be made. The Court uses an autonomous EU concept of worker mainly as regards personal scope of those Directives which do not refer to the national definition of employment relationships, such as the Working Time Directive<sup>15</sup>. The EU Treaties do not define who is a worker. The autonomous EU concept of a worker derives from the case-law of the CJEU, originally interpreting Article 45 TFEU on the freedom of movement of workers and then extended to Article 153 TFEU on social policy. However, the CJEU regularly points out that "*there is no single definition of worker in European Union law: it varies according to the area in which the definition is to be applied (Case C-85/96 Martínez Sala [1998] ECR I-2691, paragraph 31, and Case C-256/01 Allonby [2004] ECR I-873, paragraph 63)*".<sup>16</sup> The EU concept of worker has three basic and constant elements: the provision of labour, remuneration, and subordination. Therefore, the essential feature of an employment relationship is that a person performs services for and under the direction of another person in return for which they receive remuneration.<sup>17</sup>

The first element of the EU autonomous concept of worker requires the performed service to be effective and genuine, not marginal or ancillary.<sup>18</sup> In investigating whether a specific case involves effective and genuine employment, the national court must base itself on objective criteria and make a comprehensive assessment of all the circumstances of the case that have to do with the activities and the employment relationship concerned.<sup>19</sup> Therefore, the *sui generis* nature of the employment relationship under national law<sup>20</sup> or the form of that relationship<sup>21</sup> cannot have any impact on whether or not the concerned person is a worker. Moreover, factors such as short duration of work,<sup>22</sup> discontinuity of work,<sup>23</sup> low productivity<sup>24</sup> or limited hours<sup>25</sup> are irrelevant unless they indicate that the performed activities are marginal and ancillary, which can only follow after an overall assessment of the employment relationship in question<sup>26</sup>.

The second criterion of the EU concept of worker; i.e. remuneration, is interpreted by the CJEU in a broad way. The Court has never held that an employment relationship does not exist solely on the grounds of remuneration. Remuneration is a flexible concept that can encompass a monetary element as well as payment in kind<sup>27</sup> or even a *quid pro quo*<sup>28</sup>.

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<sup>15</sup> Directive 2003/88/EC of the European Parliament and of the Council of 4 November 2003 concerning certain aspects of the organisation of working time

<sup>16</sup> Case C-393/10, *O'Brien*, para 30.

<sup>17</sup> Case 66/85, *Lawrie-Blum*, para 17.

<sup>18</sup> Case 53/81, *Levin*, para 17.

<sup>19</sup> Case C-413/01, *Ninni-Orasche*, para 27.

<sup>20</sup> Case C-188/00, *Kurz*, para 32, Case C-658/18, *UX*, para 96.

<sup>21</sup> Case C-216/15, *Betriebsrat der Ruhrländklinik*, para 29.

<sup>22</sup> Case C-413/01, *Ninni-Orasche*, para 32.

<sup>23</sup> Case C-357/89, *Raulin*, para 14.

<sup>24</sup> Case 344/87, *Bettray*, paras 15-16.

<sup>25</sup> Case C-46/12, *L.N.*, para 41.

<sup>26</sup> Case C-14/09, *Genc*, para 26.

<sup>27</sup> Case 196/87, *Steymann*, para 12.

<sup>28</sup> Case C-294/06, *Payir and Others*, para 49.

Moreover, remuneration does not have to be paid directly by the contractual partner,<sup>29</sup> it can have different origins and its amount is irrelevant, even if it is limited,<sup>30</sup> falls below the minimum means of subsistence level,<sup>31</sup> is lower than guaranteed minimum wage<sup>32</sup> or is calculated collectively based on a determined share basis<sup>33</sup>. Overall, work performed in return for any kind of remuneration can constitute economic activity regardless of whether that work is done for the purpose of achieving a profit.<sup>34</sup> The mere fact that the duties of a magistrate are classified as 'honorary' by the national legislation does not mean that the financial benefits that a magistrate receives must be regarded as not representing remuneration.<sup>35</sup>

The third criterion concerns subordination that requires the services to be performed for and under the direction of another person. Establishing the relationship of subordination must be based on objective criteria that distinguish the employment relationship by reference to the rights and duties of the concerned persons<sup>36</sup> pursuant to all the factors and circumstances characterising the relationship between the parties<sup>37</sup>. The following factors are relevant for classification under the EU autonomous concept of worker: power of management over an individual, the element of supervision, possibility of sanctioning an individual for not fulfilling the employer's directions and necessity to approve their decisions before they could be exercised, freedom for a person to choose their own time and place of work;<sup>38</sup> carrying out instructions and observing rules;<sup>39</sup> not sharing of the commercial risks of the business and freedom not to engage own assistants;<sup>40</sup> work and pay conditions governed by collective labour agreements;<sup>41</sup> nature of all the contractual obligations applied to the person providing services;<sup>42</sup> or incorporation into the undertaking by forming an economic unit within it.<sup>43</sup>

In its recent order in Case C-692/19, *Yodel Delivery Network Ltd*, the CJEU held that "*Directive 2003/88 must be interpreted as precluding a person engaged by his putative employer under a services agreement which stipulates that he is a self-employed independent contractor from being classified as a 'worker' for the purposes of that directive, where that person is afforded discretion: to use subcontractors or substitutes to perform the service which he has undertaken to provide; to accept or not accept the various tasks offered by his putative employer, or unilaterally set the maximum number of those tasks; to provide his services to any third party, including direct competitors of the putative employer, and to fix his own hours of 'work' within certain parameters and to tailor*

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<sup>29</sup> Case C-229/14, *Balkaya*, para 51.

<sup>30</sup> Case 344/87, *Bettray*, para 15.

<sup>31</sup> Case C-317/93, *Nolte*, para 19.

<sup>32</sup> Case C-316/13, *Fenoll*, para 33.

<sup>33</sup> Case C-3/87, *Agegate*, para 36.

<sup>34</sup> Case 66/85, *Lawrie-Blum*, para 20.

<sup>35</sup> Case C-658/18, *UX*, para 100.

<sup>36</sup> Case 344/87, *Bettray*, para 12.

<sup>37</sup> Case C-232/09, *Danosa*, para 46.

<sup>38</sup> Case C-270/13, *Haralambidis*, paras 30-33.

<sup>39</sup> Case 66/85, *Lawrie-Blum*, para 18.

<sup>40</sup> Case C-3/87, *Agegate*, para 36.

<sup>41</sup> Case C-22/98, *Becu and Others*, para 25.

<sup>42</sup> Case C-94/07, *Raccanelli*, para 35.

<sup>43</sup> Case C-22/98, *Becu and Others*, para 26.



*his time to suit his personal convenience rather than solely the interests of the putative employer, provided that, first, the independence of that person does not appear to be fictitious and, second, it is not possible to establish the existence of a relationship of subordination between that person and his putative employer. However, it is for the referring court, taking account of all the relevant factors relating to that person and to the economic activity he carries on, to classify that person's professional status under Directive 2003/88'.<sup>44</sup>*

(c) Bogus/false self-employment

Under EU law the status of worker is not affected by the fact that a person has been “*hired as a self-employed person under national law, for tax, administrative or organisational reasons, as long as that person acts under the direction of his employer as regards, in particular, his freedom to choose the time, place and content of his work, does not share in the employer's commercial risks and, for the duration of that relationship, forms an integral part of that employer's undertaking, so forming an economic unit with that undertaking*”.<sup>45</sup> Therefore, a service provider can lose his status of an independent trader, and hence of an undertaking, if he does not determine independently his own conduct on the market, but is entirely dependent on his principal, because he does not bear any of the financial or commercial risks arising out of the latter's activity and operates as an auxiliary within the principal's undertaking.<sup>46</sup>

The reference to bogus self-employment in Recital 8 of Directive (EU) 2019/1152 is taken from Decision (EU) 2016/344 of the European Parliament and of the Council of 9 March 2016 on establishing a European Platform to enhance cooperation in tackling undeclared work, Recital 8.

### Interim conclusion

In light of the foregoing, the wording of Article 1(2) of the Directive on transparent and predictable working conditions “with consideration to the case-law of the Court of Justice” does not limit the freedom of Member States to define the concept of ‘worker’ at national level but mainly seeks to avoid a situation where Member States exclude at their discretion certain categories of persons from the benefit of the protection intended by the Directive, even though the relationship between those persons and their contractual partners is not substantially different to the relationship between persons having the status of worker under national law and their employer.

This interpretation of the wording “with consideration to the case-law of the Court of Justice” aims to preserve the national definitions of worker while ensuring that the relevant jurisprudence of the Court is observed. The wording also has the advantage of taking into account any developments in the case-law of the CJEU concerning this issue.

The Court has indeed taken a functional approach and looks at the underlying relationship between the worker and the person/organisation receiving his or her work which means that if the definition of worker/employee in national law is too narrow (e.g. case *Betriebsrat der Ruhrlandklinik* concerning the worker status of the nurses of the German Red Cross),

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<sup>44</sup> Case C-692/19, *Yodel Delivery Network Ltd*, para 45.

<sup>45</sup> Case C-413/13, *FNV Kunsten*, para 36.

<sup>46</sup> *Ibid.* para 33.

it is not necessary to revise the definition of worker in the labour code but to provide for such categories to be covered by the personal scope of the Directive. The solution found in Germany was to amend the Red Cross law to provide that the nurses have the protection of EU law without revising the definition of worker. This solution is a feasible way to tackle the personal scope of the Directive, making use of a functional approach and not a formal redefinition in national law.

## Discussion

Three Member State experts considered that footnote 5 of Recital 8 fits with the Commission's original proposal (i.e. codification of the CJEU definition of worker) but not with the final wording of Article 1(2), which refers to the national definition, because some of the CJEU cases listed in the footnote (i.e. 66/85, *Lawrie-Blum*, C-428/09, *Union Syndicale Solidaires Isère*) concern EU directives which do not refer to the national definitions of worker. The experts argued that the Court's consideration of personal scope in relation to such directives limits itself to the notion of *effet utile* and does not refer to the autonomous EU concept of worker deriving from 66/85, *Lawrie-Blum*. The explicit reference to national law in Article 1(2) would make no sense if the autonomous EU concept of worker were applicable here. The experts recalled that if recitals do not fit with the enacting part of a directive, the enacting part prevails according to the jurisdiction of the CJEU.

The Commission services considered that though the case-law listed in the footnote refers to a variety of legal situations, its relevance cannot be excluded in the context of this Directive, all the more since it is explicitly listed in the footnote in the text adopted by the legislator. The analysis of the jurisprudence of the CJEU in the Commission services' view shows that the Court applies different lines of argument to different factual situations. It is not possible at this point in time to assess with certainty into which direction the jurisdiction of the CJEU will develop and, in particular, whether the Court when eventually delivering a ruling on the Directive would refer or not to the autonomous EU concept of worker.

A Member State expert requested clarification on whether a person who does not qualify as a worker under national law but fulfils the criteria of CJEU needs to be covered by the protection of the Directive – and if that was the case – questioned the usefulness of the reference to national definitions of workers. The Commission services, referring to the *Betriebsrat der Ruhrlandklinik* judgment, explained that persons not considered as workers under national law, might indeed fall within the scope of the Directive having regard to the principle of effectiveness, depending on the individual case. One needs to assess the individual categories in the light of the effectiveness of the Directive. While Member States are not obliged to change their national definitions of worker, when transposing the Directive they need to screen the relevant categories of workers, in particular, “third-category” workers, domestic workers, platform workers, on-demand workers, voucher workers, intermittent workers, trainees and apprentices and decide, taking into consideration the case-law of the CJEU, whether those categories of workers need to be covered by the protection of the Directive. The REFIT report could be used by Member States as an initial indication tool for each Member State to check which categories of workers might not be covered by the relevant national legislation transposing the Written Statement Directive. ETUC stated that social partners should be involved in such screening and analysis.

Another Member State expert enquired what the notion of trainees or apprentices is under EU law. The Commission services clarified that, as regards the Directive, those trainees or apprentices that have an employment relationship should be covered by the Directive but those under genuine educational programs without such a relationship would not. As

to the latter, a case by case analysis is to be made as to whether those trainees or apprentices have to be included according to the abovementioned principle.

### 1.3. Minimum hours threshold (Article 1(3))

*Article 1(3): Member States may decide not to apply the obligations in this Directive to workers who have an employment relationship in which their predetermined and actual working time is equal to or less than an average of three hours per week in a reference period of four consecutive weeks. Time worked with all employers forming or belonging to the same enterprise, group or entity shall count towards that three-hour average.*

*Recital 11: In view of the increasing number of workers excluded from the scope of Directive 91/533/EEC on the basis of exclusions made by Member States under Article 1 of that directive, it is necessary to replace those exclusions with a possibility for Member States not to apply the provisions of this Directive to an employment relationship with predetermined and actual working hours that amount to an average of three hours per week or less in a reference period of four consecutive weeks. The calculation of those hours should include all time actually worked for an employer, such as overtime or work supplementary to that guaranteed or anticipated in the employment contract or employment relationship. From the moment when a worker crosses that threshold, the provisions of this Directive apply to him or her, regardless of the number of working hours that the worker works subsequently or the number of working hours provided for in the employment contract.*

#### 1.3.1. Issues

Article 1(3) has to be read in conjunction with Recital 11 which specifies that “[...] The calculation of those hours should include all time actually worked for an employer, such as overtime or work supplementary to that guaranteed or anticipated in the employment contract or employment relationship. From the moment when a worker crosses that threshold, the provisions of this Directive apply to him or her, regardless of the number of working hours that the worker works subsequently or the number of working hours provided for in the employment contract.” Therefore, in the understanding of the Commission services, the hours counted towards the threshold are either those in the employment contract, or the really worked ones, whichever is the higher. Once a worker reaches the threshold, according to Recital 11, he or she should benefit from the protection of the Directive for the duration of the employment relationship, even if the number of actual worked hours subsequently falls below the threshold.

### 1.4. Zero-hours contracts exception (Article 1(4))

*Article 1(4): Paragraph 3 shall not apply to an employment relationship where no guaranteed amount of paid work is predetermined before the employment starts.*

*Recital 12: Workers who have no guaranteed working time, including those on zero-hour and some on-demand contracts, are in a particularly vulnerable situation. Therefore, the provisions of this Directive should apply to them regardless of the number of hours they actually work.*

### 1.4.1. Issues

Article 1(4) forms a straightforward provision which needs to be read in conjunction with Recital 12 that stipulates that “[w]orkers who have no guaranteed working time, including those on zero-hour and some on-demand contracts, are in a particularly vulnerable situation. Therefore, the provisions of this Directive should apply to them regardless of the number of hours they actually work.” In other words, the possibility to exempt marginal employment relationships under Article 1(3) does not apply to employment relationships without any guaranteed hours. According to Article 20 and Recital 47, the implementation of this Directive cannot be used to reduce existing rights set out in Union or national law in this field, nor can it constitute valid grounds for reducing the general level of protection afforded to workers in the field covered by this Directive; in particular, it should not serve as grounds for the introduction of zero-hour contracts or similar types of employment contracts.

## 1.5. Delegation of employers’ obligations to third parties (Article 1(5))

*Article 1(5): Member States may determine which persons are responsible for the execution of the obligations for employers laid down by this Directive as long as all those obligations are fulfilled. They may also decide that all or part of those obligations are to be assigned to a natural or legal person who is not party to the employment relationship. This paragraph is without prejudice to Directive 2008/104/EC of the European Parliament and of the Council.*

*Recital 13: Several different natural or legal persons or other entities may in practice assume the functions and responsibilities of an employer. Member States should remain free to determine more precisely the persons who are considered to be wholly or partly responsible for the execution of the obligations that this Directive lays down for employers, as long as all those obligations are fulfilled. Member States should also be able to decide that some or all of those obligations are to be assigned to a natural or legal person who is not party to the employment relationship.*

### 1.5.1. Issues

As indicated in Recital 13 several different natural or legal persons or other entities may in practice assume the functions and responsibilities of an employer (for example in triangular relationships, for instance a user undertaking providing the direction for the work of temporary agency workers assigned to them by the agency, the latter being the employer; or when the employers outsource their HR duties to third parties such as payroll companies).

## 1.6. Exceptions (Articles 1(6)–(8))

*Article 1(6): Member States may provide, on objective grounds, that the provisions laid down in Chapter III are not to apply to civil servants, public emergency services, the armed forces, police authorities, judges, prosecutors, investigators or other law enforcement services.*

*Recital 9: It should be possible for Member States to provide, where justified on objective grounds, for certain provisions of this Directive not to apply to certain categories of civil servants, public emergency services, the armed forces, police authorities, judges, prosecutors, investigators or other law enforcement services, given the specific nature of the duties that they are called on to perform or of their employment conditions.*

### 1.6.1. Issues

#### (a) In general on exceptions

Recital 1 of the Directive refers to Article 31 of the Charter of Fundamental Rights of the European Union, which provides that every worker has the right to working conditions which respect his or her health, safety and dignity, to limitation of maximum working hours, to daily and weekly rest periods and to an annual period of paid leave. Article 52(1) of the Charter states the following: “Any limitation on the exercise of the rights and freedoms recognised by this Charter must be provided for by law and respect the essence of those rights and freedoms. Subject to the principle of proportionality, limitations may be made only if they are necessary and genuinely meet objectives of general interest recognised by the Union or the need to protect the rights and freedoms of others.”

Recitals 2 and 3 refer to principles No 5 and 7 of the European Pillar of Social Rights, the former stating, *inter alia*, that regardless of the type and duration of the employment relationship, workers have the right to fair and equal treatment regarding working conditions.

These principles must be kept in mind when assessing any exceptions from the Directive.

Furthermore, case-law from other fields of labour law may also provide useful indications. By analogy, for instance, in Case C-428/09, *Union Syndicale Solidaires Isère*, concerning the Working Time Directive,<sup>47</sup> the Court holds the following “As exceptions to the [EU] system for the organisation of working time [...], those derogations must be interpreted in such a way that their scope is limited to what is strictly necessary in order to safeguard the interests which those derogations enable to be protected”.<sup>48</sup>

This principle should be the starting point when applying the exemptions.

In this respect, it should be recalled that Article 21(4) of the Directive provides that Member States shall, in accordance with their national law and practice, take adequate measures to ensure the effective involvement of the social partners and to promote and enhance social dialogue with a view to implementing this Directive.

According to the statement tabled by the Commission to the Resolution of the European Parliament and to the minutes of EPSCO Council-meeting adopting the Directive, the Commission undertakes to pay particular attention, in its report on the review of the Directive, to the application of Article 1 by Member States.

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<sup>47</sup> Directive 2003/88/EC of the European Parliament and of the Council of 4 November 2003 concerning certain aspects of the organisation of working time, OJ L 299, 18.11.2003, p. 9.

<sup>48</sup> Case C-428/09, *Union Syndicale Solidaires Isère*, para 40.



(b) Article 1(6)

Article 1(6) gives the Member States the possibility, on objective grounds, to exempt civil servants and a catalogue of (other) specific groups of workers from the provisions laid down in Chapter III. The provision must be read in conjunction with Recital 9, which states that “[i]t should be possible for Member States to provide, where justified on objective grounds, for certain provisions of this Directive not to apply to certain categories of civil servants, public emergency services, the armed forces, police authorities, judges, prosecutors, investigators or other law enforcement services, given the specific nature of the duties that they are called on to perform or of their employment conditions.” This is a permissive disposition which gives the Member States the opportunity to apply it if so they wish.

Several elements can be drawn from this wording: 1) it is required that any exemption is justified on *objective grounds*; 2) the material scope of the exemption is limited to *certain provisions* (within Chapter III), 3) the personal scope of the exemption is limited to (certain) *civil servants* and the other *categories indicated*, 4) it is of no relevance whether the public emergency service is publicly or privately owned, 5) the justification on objective grounds must be linked either to *the specific nature of the duties that they are called on to perform or their employment conditions* (or both).

(c) Specific derogations

Some of the articles in Chapter III have specific derogations. In keeping with the principle of interpreting any derogations restrictively, there should be no reason to make use of the general possibility to exempt civil servants under Article 1(6) if the desired result can be achieved by making use of the specific derogation in question. For instance, should a Member State want to apply longer probation periods for their civil servants than the main rule stipulated in Article 8(1), due to their special protected status, the first place to start would be the derogation laid down in Article 8(3), rather than Article 1(6).

However, one Member State expert was of the opinion that if the general exemption of Article 1(6) applies, there is no scope for recourse to Chapter III.

(d) “Certain provisions”

Recital 9 refers to the possibility to exempt, amongst others, civil servants from “certain provisions of this Directive”. This indicates that the Member States, should they want to make use of the possibility to derogate, must assess the justification on objective grounds for each provision in Chapter III. A blanket exemption from Chapter III, without assessing each individual provision, would be contrary to the Directive. It also follows, logically, that such an approach would be more difficult to qualify as “objectively justified” and could risk going “beyond what is necessary to obtain the objective”, for instance if the exemption from every provision is not necessary. Moreover, such a method would not be in keeping with the principle of interpreting derogations restrictively.

(e) Civil servants

There is no EU definition of the term “civil servant”. EU law is neutral with respect to the internal organisation of Member States, something that is usually known as the principle

of 'organisational and procedural autonomy of the Member States'. An example of this can be found in Regulation (EC) No 883/2004, where the term is defined as follows: "civil servant" means a person considered to be such or treated as such by the Member State to which the administration employing him/her is subject". Consequently, the term "civil servant" is for the Member States to define in national law.

(f) Public emergency services

No all-encompassing EU definition of "public emergency services" exists. Again, this term will be for the Member States to define in accordance with national law and practice. However, Directive (EU) 2018/1972 and Commission Delegated Regulation (EU) No 305/2013 (Articles 2(39) and 2(a) respectively) contain the following definition that may serve as a source of inspiration:

"emergency service" means a service, recognised as such by the Member State, that provides immediate and rapid assistance in situations where there is, in particular, a direct risk to life or limb, to individual or public health or safety, to private or public property, or to the environment, in accordance with national law/[legislation]."<sup>49</sup>

In the Commission services' view, the term "public" is aimed at clarifying that such services serve the public, and not its organisation or ownership. Consequently, the possibility to make use of the exceptions should be the same, regardless of the organisation of those services as public or privately run.

(g) The armed forces, police authorities, judges, prosecutors, investigators or other law enforcement services

Once more, no EU definitions of these terms exist in the field of labour law, and it will be for the Member States to define them in accordance with national law and practice.

(h) Objective grounds

Recital 9 reads as follows:

"It should be possible for Member States to provide, where justified on objective grounds, for certain provisions of this Directive not to apply to certain categories of civil servants, public emergency services, the armed forces, police authorities, judges, prosecutors, investigators or other law enforcement services, given the specific nature of the duties that they are called on to perform or of their employment conditions."

The Recital provides guidance on the assessment of objective grounds by pointing out two elements in particular as part of the justification of this provision: the specific nature of the duties that the workers in question are called on to perform and/or of their employment conditions. This indicates that the assessment of objective grounds should be focused on these two items, meaning whether the tasks of the workers at hand or their specific employment conditions may objectively justify their exemption from certain provisions.

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<sup>49</sup> The Directive uses the wording "national law", whereas the Regulation uses "national legislation".

In Article 9(2) of the Directive, as examples of objective grounds, reference is made to health and safety, the protection of business confidentiality, the integrity of the public service or the avoidance of conflicts of interests. Although the elements referred to here are explicitly linked to Article 9(2), and without suggesting that they are exhaustive in any way, they may serve as examples of considerations the legislator have found capable of constituting “objective grounds” more generally.

Further, inspiration for the assessment of justification on objective grounds can also be found in case-law of the Court. In Case C-410/18, *Aubriet*, paragraph 29, which relates to freedom of movement for workers under Article 45 TFEU and the non-discrimination principle in accordance with Article 7 of Regulation (EU) No 492/2011,<sup>50</sup> the CJEU offers clarification as regards the related term “objectively justified”, where it holds that:

*“In order to be justified, [indirect discrimination] must be appropriate for securing the attainment of a legitimate objective and must not go beyond what is necessary to attain that objective.”*<sup>51</sup>

Inspiration can also be drawn from case-law concerning Clause 4(1) annexed to the Fixed Term Directive and the principle of non-discrimination. In Case C-619/17, *Porrás*, the Court holds that according to its settled case-law, the principle of non-discrimination, of which Clause 4(1) of the framework agreement is a specific expression, requires that comparable situations should not be treated differently and different situations should not be treated alike, unless such treatment is *objectively justified*.<sup>52</sup>

Further, the Court clarifies that the concept of ‘objective grounds’, within the meaning of Clause 4(1) of the framework agreement on fixed-term work, rules out a difference in treatment between fixed-term workers and permanent workers being justified on the basis that the different treatment is provided for by a general or abstract measure, such as a law or a collective agreement.<sup>53</sup> In other words, the fact that differential treatment would be laid down by law or a collective agreement is not sufficient for it to be justified on objective grounds. This principle must apply equally to Article 1(6) of the Directive.

Moreover, the Court holds that the unequal treatment found to exist must be justified by:

- the presence of precise and specific factors, characterising the employment condition to which it relates;
- the specific context in which it occurs; and
- on the basis of objective and transparent criteria;

in order to ensure that that unequal treatment in fact:

- responds to a genuine need;
- is appropriate for the purpose of attaining the objective pursued; and
- is necessary for that purpose.<sup>54</sup>

In addition, the general principle of equal treatment applies: Comparable situations must not be treated differently and different situations must not be treated in the same way unless such treatment is objectively justified.<sup>55</sup>

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<sup>50</sup> Regulation (EU) No 492/2011 of the European Parliament and of the Council of 5 April 2011 on freedom of movement for workers within the Union (OJ 2011 L 141, p. 1)

<sup>51</sup> Case C-410/18, *Aubriet*, para 29.

<sup>52</sup> Case C-619/17, *Porrás*, para 60. See also Case C-619/17, *Montero Mateos*, para 49.

<sup>53</sup> Case C-619/17, *Porrás*, para 67.

<sup>54</sup> *Ibid.* para 68.



Exchanges in the Expert Group raised the issue of the way the Member States should notify the Commission of any exemptions applied, or more precisely, whether all exemptions must be explicitly laid down in the implementing law, or whether it would be sufficient to notify the Commission of any already existing exemptions and the respective justifications.

The Commission services replied that if the national law already provides for longer probation periods, that law does not need to be modified as long as the exemption can be objectively justified. In other words, it is not necessary to spell out the justifications in the implementing law, but the justifications must be notified to the Commission.

The notion of civil servant and how far that term can be extended resurfaced in the discussions, with reference to for instance central public administration or even local authorities, workers employed in the public health system etc. It was also highlighted that sometimes there are two groups of workers performing the same tasks in public administration, but with different statuses.

On this issue, the Commission services reiterated that there is no EU definition of civil servant, and therefore it is to be defined in national law. They also stressed that there is no requirement under the Directive to change the definition of civil servant. However, the Commission services underscored that the justification on objective grounds must be fulfilled. Further, the Commission services explained that the co-legislator intended a narrow exemption, and that it was not the aim to exclude any worker employed by the public.

The ETUC expressed opposition to these exemptions, however, should Member States decide to make use of the exemptions in Article 1, the ETUC considers that the “objective grounds” and modalities should be subject to consultation with the relevant trade unions, in line with Article 21(4) of the Directive.

## 1.7. Natural persons in households acting as employers (Article 1(7))

*Article 1(7): Member States may decide not to apply the obligations set out in Articles 12 and 13 and in point (a) of Article 15(1) to natural persons in households acting as employers where work is performed for those households.*

*Recital 14: Member States should be able to establish specific rules to exclude individuals acting as employers for domestic workers in the household from the requirements laid down in this Directive, with regard to the following matters: to consider and respond to requests for different types of employment, to provide mandatory training that is free of cost, and to provide for redress mechanisms that are based on favourable presumptions in the case of information that is missing from the documentation that is to be provided to the worker under this Directive.*

### 1.7.1. Issues

Article 1(7) gives Member States the opportunity not to apply certain obligations to natural persons in households acting as employers where work is performed for those

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<sup>55</sup> Case C-477/14, *Pillbox*, para 35.

households. This means that workers employed by such employers may not invoke the rights laid down in those provisions, if the Member State in question has made use of the derogation. Typically, this provision could apply to households having employed a domestic worker. It is only when a natural person belonging to a household acts as an employer – and work is performed for *that* household – that the derogation is applicable. The derogation encompasses Articles 12, 13 and 15(1) point (a) only.

The Commission services explained that the rationale behind the provision is that where Member States determine that individuals acting as employers are not in a position to fulfil the obligations referred to, they should not be compelled to do so. For instance, Article 15(1) on favourable presumptions could affect a household disproportionately, if, by failing to provide the correct information on time, it was presumed that a part time domestic worker suddenly has the right to a full-time post. Another example could be that in the majority of cases, it may be presumed that households will not have more predictable or secure working conditions to offer.

## 1.8. Seafarers and sea fishermen (Article 1(8))

*Article 1(8): Chapter II of this Directive applies to seafarers and sea fishermen without prejudice to Directives 2009/13/EC and Directive (EU) 2017/159, respectively. The obligations set out in points (m) and (o) of Article 4(2), and Articles 7, 9, 10 and 12 shall not apply to seafarers or sea fishermen.*

*Recital 10: The requirements laid down in this Directive with regard to the following matters should not apply to seafarers or sea fishermen, given the specificities of their employment conditions: parallel employment where incompatible with the work performed on board ships or fishing vessels, minimum predictability of work, the sending of workers to another Member State or to a third country, transition to another form of employment, and providing information on the identity of the social security institutions receiving the social contributions. For the purposes of this Directive, seafarers and sea fishermen as defined, respectively, in Council Directives 2009/13/EC (6) and (EU) 2017/159 (7) should be considered to be working in the Union when they work on board ships or fishing vessels registered in a Member State or flying the flag of a Member State.*

### 1.8.1. Issues

Directive 2009/13/EC implementing the Social Partner Agreement on the Maritime Labour Convention, 2006, and amending Directive 1999/63/EC and Directive (EU) 2017/159 implementing the Social Partners' Agreement on the Work in Fishing Convention contain specific provisions on seafarers' employment agreements and fishermen's work agreements. Paragraph 8 of Article 1 of Directive (EU) 2019/1152 clarifies that Chapter II will apply without prejudice to those directives. Essentially this means that as regards seafarers and sea fishermen, if there is a conflict between Chapter II of the Directive and Directive 2009/13/EC or Directive (EU) 2017/159 respectively – then the two latter shall prevail. For the purpose of defining seafarers and sea fishermen, Recital 10 of the Directive refers to the two above-mentioned directives and specifies that seafarers and sea fishermen should be considered to be working in the Union when they work on board ships or fishing vessels registered in a Member State or flying the flag of a Member State.

Further, Article 1(8) stipulates that the obligations set out in points (m) and (o) of Article 4(2), and Articles 7, 9, 10 and 12 shall not apply to seafarers or sea fishermen. These points refer to: parallel employment where incompatible with the work performed on board ships or fishing vessels, minimum predictability of work, the sending of workers to another

Member State or to a third country, transition to another form of employment, and providing information on the identity of the social security institutions receiving the social contributions.

Moreover, as this is a minimum standards Directive, Member States are free to provide a higher level of protection, i.e. apply the above-mentioned provisions also to seafarers and sea fishermen.

The ETUC stated that it is unclear why maritime workers are excluded from a number of rights provided for by the Directive. Maritime workers are generally in a vulnerable situation and would greatly benefit from receiving minimum information and material rights on predictability. Many maritime workers have difficulties in identifying their social security coverage, and in ensuring its adequacy. Therefore, information on that aspect is particularly important for them. The ETUC called for social dialogue to be held at national level with a view to cover seafarers and sea fishermen.

The Commission services confirmed that this exclusion was introduced by the EU legislator during the inter-institutional negotiations. The Directive sets minimum standards and indeed Member States can be more protective and cover seafarers and sea fishermen. However, they are not obliged to do so.

## 2.1. Definitions (Article 2)

*Article 2: For the purposes of this Directive, the following definitions apply:*

*(a) 'work schedule' means the schedule determining the hours and days on which performance of work starts and ends;*

*(b) 'reference hours and days' means time slots in specified days during which work can take place at the request of the employer;*

*(c) 'work pattern' means the form of organisation of the working time and its distribution according to a certain pattern determined by the employer.*

### 2.1.1. Issues

Article 2 provides definitions that apply for the purposes of the Directive. The term “work schedule” applies to the information obligation in Article 4(2)(m)(i), whereas “reference hours and days” applies to the information obligation in Article 4(2)(m)(ii) and to the material right in Article 10(1)(a). The term “work pattern” applies to the information obligation in Article 4(2)(l) and (m) and to the material right in Article 10(1). “Work pattern” refers to working time organisation and distribution determined by the employer. Working time organisation and distribution determined solely by the worker does not come under this notion.

A Member State expert requested clarification on the relation between the definition of “work schedule” in Article 2(a) and “work pattern” in Article 2(c). The Commission services explained that the term “work pattern” was introduced upon a request of one Member State during the negotiations in the Council. The Commission services understand “work pattern” as the wider concept relating to how the work is organised (e.g. shift work, on demand work, etc.), while “work schedule” refers to the hours and days when the work takes place.

## 3.1. Provision of information (Article 3)

*Article 3: The employer shall provide each worker with the information required pursuant to this Directive in writing. The information shall be provided and transmitted on paper or, provided that the information is accessible to the worker, that it can be stored and printed, and that the employer retains proof of transmission or receipt, in electronic form.*

### 3.1.1. Issues

Article 3 states that the information must be provided in writing, which is already the situation under the Written Statement Directive. According to the article, each worker shall be provided with the information, i.e. the worker has to receive the information individually. The new Directive provides for the possibility to transmit the information in electronic form if three cumulative criteria are met: (1) the information is accessible to the worker, (2) it can be stored and printed, and (3) that the employer retains proof of information or receipt. “Accessible to the worker” means that the worker must actually have unrestricted access to the information. For instance, keeping an electronic document on a server with restricted access controlled by the employer would not meet that condition. Further, if a worker does not have access to the electronic tools used to transmit the information, this would rule out the use of these electronic means. “That it can be stored and printed” means that the information must be formatted in such a way as to enable it to be stored and printed by the worker. There is, of course, no requirement that the employer actually prints it. The obligation of keeping proof of transmission or receipt allows for choosing one or the other method (or both). The Directive does not set up a requirement to provide the information in electronic form. These criteria only apply if the employer chooses to transmit the information electronically. If the information is transmitted on paper the situation is the same as in the Written Statement Directive, namely that the employer is not required to retain proof of transmission, though it might be in his or her interest to do so as the burden of proof will be on the employer to show that he or she has fulfilled their obligation (e.g. during an inspection).

A Member State expert asked if electronic information has to be provided in a certified form or if a regular e-mail is sufficient. The Commission services replied that there is no requirement to send the information in a certified form. A sent e-mail should be sufficient as long as the e-mail can be retained by the employer. The sent item would be the proof of transmission. Other means for transmitting the information electronically than e-mail are also possible.

## Chapter II on Information about the employment relationship

### 4.1. Obligation to provide information (Article 4(1))

*Article 4(1): Member States shall ensure that employers are required to inform workers of the essential aspects of the employment relationship.*

### 4.1.1. Issues

The wording of Article 4(1) has been simplified compared to the corresponding provision in the Written Statement Directive, but the meaning remains unchanged. Throughout the Directive, the concept of “employee” has been replaced by “worker”. As the term “employment relationship” covers also employment contracts, a reference to employment contracts in the article was considered to be redundant and was thus deleted.

## 4.2. The content of the information (Article 4(2))

*Article 4(2): The information referred to in paragraph 1 shall include at least the following:*

*Recital 15: Directive 91/533/EEC introduced a list of essential aspects of the employment contract or employment relationship of which workers are to be informed in writing. It is necessary to adapt that list, which Member States can enlarge, in order to take account of developments in the labour market, in particular the growth of non-standard forms of employment.*

### 4.2.1. Issues

Article 4(2) contains a list of the aspects of the employment relationship about which the employers are required to provide written information to the worker. This list is not exhaustive. In certain circumstances other information may be deemed essential.<sup>56</sup>

## 4.3. The identities of the parties (Article 4(2)(a))

*Article 4(2)(a): the identities of the parties to the employment relationship;*

### 4.3.1. Issues

Compared to the corresponding provision in the Written Statement Directive “to the employment relationship” has been added. This is a clarification and the meaning remains the same. The provision should be understood as a requirement to provide enough information in order to identify the parties to the employment relationship precisely. E.g. name and place of residence of the parties may be sufficient as long as the parties can be identified based on that information.

## 4.4. The place of work (Article 4(2)(b))

*Article 4(2)(b): the place of work; where there is no fixed or main place of work, the principle that the worker is employed at various places or is free to determine his or her*

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<sup>56</sup> Case C-350/99, *Lange*.

*place of work, and the registered place of business or, where appropriate, the domicile of the employer;*

*Recital 16: Where the worker has no fixed or main place of work, he or she should receive information about arrangements, if any, for travel between the workplaces.*

#### 4.4.1. Issues

“Or is free to determine his or her place of work” has been added compared to the corresponding provision in the Written Statement Directive. The addition is a modernization of the drafting of the Directive to take account of employment relationships where there is no fixed workplace and the worker chooses where to work. The term “fixed” refers to situations where the worker has one single workplace. The term “main” refers to situations where the worker has one primary workplace but also has to perform work at a different place(s) than the primary workplace, e.g. to perform tasks on site.

A Member State expert enquired whether, if there is no determined place of work, it means that the worker must be informed that he or she is free to determine his or her place of work? What types of work (with regard to the freedom to determine the place of work) are covered? The Commission services replied that indeed the employer should inform the worker, if there is no determined place of work, that the employee may determine the place of work. Examples exist in online or platform work (e.g. clickwork) and it can also be increasingly seen with telework, provided, of course, that the work is performed within an employment relationship as referred to in Article 1(2).

A Member State expert commented, in relation to Article 4(2)(b), that, in terms of good implementation, one could consider that the address of one of the parties under (b) is part of their identity under (a). The Commission services agreed that, if the place of work and address are provided under point (a), such information does not have to be provided again under point (b).

### 4.5. The work for which the worker is employed (Article 4(2)(c))

*Article 4(2)(c): either:*

- (i) the title, grade, nature or category of work for which the worker is employed or*
- (ii) a brief specification or description of the work;*

#### 4.5.1. Issues

“Either” has been added compared to the corresponding provision in the Written Statement Directive. This is to clarify that the two provisions (i) and (ii) are alternatives and not cumulative.



## 4.6. When the employment relationship begins (Article 4(2)(d))

*Article 4(2)(d): the date of commencement of the employment relationship;*

### 4.6.1. Issues

The corresponding provision in the Written Statement Directive reads “[...] contract or employment relationship”. As explained above, in relation to Article 4(1), the concept “employment relationship” is a broader one and the term “contract” was thus deleted in order to remove a redundancy in drafting.

## 4.7. Fixed-term employment relationships (Article 4(2)(e))

*Article 4(2)(e): in the case of a fixed-term employment relationship, the end date or the expected duration thereof;*

### 4.7.1. Issues

Compared to the corresponding provision in the Written Statement Directive the terminology has been updated by replacing “temporary contract or” with “fixed-term”, but the meaning remains the same.

## 4.8. Temporary agency workers (Article 4(2)(f))

*Article 4(2)(f): in the case of temporary agency workers, the identity of the user undertakings, when and as soon as known;*

### 4.8.1. Issues

This provision is new. “When and as soon as known” in point (f) entails an ongoing obligation that applies to changes of assignment of the temporary agency worker during the entire employment relationship, not just at the start.

## 4.9. Probationary periods (Article 4(2)(g))

*Article 4(2)(g): the duration and conditions of the probationary period, if any;*

### 4.9.1. Issues

This provision is new compared to the Written Statement Directive and requires that if there is a probation period applicable to the employment relationship, the worker should

be informed about its duration and conditions. Such conditions could for example be the period of notice in case the employer or worker wish to end the employment relationship before the end of the probationary period, or at what time the employer at the latest should inform the worker if the employer intends to end the employment relationship when the probationary period ends or the conditions under which the probationary period may be prolonged.

The duration of the probationary period is governed by Article 8.

According to Article 4(3), the information referred to in paragraph 2(g) may, where appropriate, be given in the form of a reference to the laws, regulations and administrative or statutory provisions or collective agreements governing those points.

The Directive does not define “probationary period”. This is therefore left to national law and/or practice.

## 4.10. Training entitlements (Article 4(2)(h))

*Article 4(2)(h): the training entitlement provided by the employer, if any;*

*Recital: 17: It should be possible for information on the training entitlement provided by the employer to take the form of information that includes the number of training days, if any, to which the worker is entitled per year, and information about the employer’s general training policy.*

### 4.10.1. Issues

Point (h) is new compared to the Written Statement Directive and applies to cases where the employer provides a training entitlement. Recital 17 clarifies that it should be possible to include information on “the number of training days, if any, to which the worker is entitled to per year, and information about the employer’s general training policy.” This should also include information on training which the employers are legally obliged to offer according to Article 13. However, the information to be provided under point (h) is broader and more general.

According to Article 4(3), the information referred to in paragraph 2(h) may, where appropriate, be given in the form of a reference to the laws, regulations and administrative or statutory provisions or collective agreements governing those points.

ETUC considered that under Article 4(2)(h) information should be provided also about existing entitlements to training opportunities under vocational training funds. ETUC explained that these funds exist in 14 Member States and are particularly relevant in the construction sector and in sectors featuring a large share of SMEs. The funds provide mandatory and optional training also in the area of health and safety.

## 4.11. Paid leave (Article 4(2)(i))

*Article 4(2)(i): the amount of paid leave to which the worker is entitled or, where this cannot be indicated when the information is given, the procedures for allocating and determining such leave;*



*Recital: 19 Information on working time should be consistent with Directive 2003/88/EC of the European Parliament and of the Council, and should include information on breaks, daily and weekly rest periods and the amount of paid leave, thereby ensuring the protection of the safety and health of workers.*

#### 4.11.1. Issues

This provision has undergone a minor technical update compared to the corresponding provision in the Written Statement Directive (“employee” has been replaced by “worker”). Recital 19 refers to the provisions of the Working Time Directive 2003/88/EC and is relevant for point (i), in respect of paid annual leave. “The procedures for allocating and determining such leave” refers to the situations where the amount of paid leave cannot be determined at the time the information is given. In such case, the employer shall provide information on how this leave is allocated and determined (for example, the criteria or principles used to calculate and fix the entitlement to such leaves).

According to Article 4(3), the information referred to in paragraph 2(i) may, where appropriate, be given in the form of a reference to the laws, regulations and administrative or statutory provisions or collective agreements governing those points.

A Member State expert enquired if Article 4(2)(i) is limited to leave that is paid by the employer, since it would be very difficult for employers to inform about leave that is not paid by them. BusinessEurope reminded that it follows from Article 4(1) that the information obligations concern the employment relationship. The Commission services agreed with the interpretation that the provision only covers leave paid by the employer as part of the employment relationship. The most obvious example of such leave, of course, is paid annual leave, but also other types of leave entitlements paid by the employer (including via a sectoral fund or similar arrangement) would be covered.

### 4.12. Termination of an employment relationship (Article 4(2)(j))

*Article 4(2)(j): the procedure to be observed by the employer and the worker, including the formal requirements and the notice periods, where their employment relationship is terminated or, where the length of the notice periods cannot be indicated when the information is given, the method for determining such notice periods;*

*Recital: 18: It should be possible for information on the procedure to be observed by the employer and the worker if their employment relationship is terminated to include the deadline for bringing an action contesting dismissal.*

#### 4.12.1. Issues

Article 4(2)(j) expands the corresponding article in the Written Statement Directive by including information about the dismissal procedure as well as the notice periods to be observed. “Formal requirements” could for instance be an obligation to provide the notice of termination in writing, if it exists under national law. The requirement is not limited to any specific grounds for termination and, therefore, covers all terminations of the employment relationship. As pointed out in Recital 18, this information could include the deadline for bringing an action contesting a dismissal.

According to Article 4(3), the information referred to in paragraph 2(j) may, where appropriate, be given in the form of a reference to the laws, regulations and administrative or statutory provisions or collective agreements governing those points.

ETUC commented that the provision in sub-letter (j) on termination of the employment relationship needs to be given a broad interpretation as it relates to the whole procedure.

### 4.13. Remuneration (Article 4(2)(k))

*Article 4(2)(k): the remuneration, including the initial basic amount, any other component elements, if applicable, indicated separately, and the frequency and method of payment of the remuneration to which the worker is entitled;*

*Recital 20: Information on remuneration to be provided should include all elements of the remuneration indicated separately, including, if applicable, contributions in cash or kind, overtime payments, bonuses and other entitlements, directly or indirectly received by the worker in respect of his or her work. The provision of such information should be without prejudice to the freedom for employers to provide for additional elements of remuneration such as one-off payments. The fact that elements of remuneration due by law or collective agreement have not been included in that information should not constitute a reason for not providing them to the worker.*

#### 4.13.1. Issues

Article 4(2)(k) expands the corresponding article in the Written Statement Directive. “If applicable” refers to “any other component elements”. According to Recital 20 the information on remuneration “should include all elements of the remuneration indicated separately, including, if applicable, contributions in cash or kind, overtime payments, bonuses and other entitlements, directly or indirectly received by the worker in respect of his or her work.”

According to Article 4(3), the information referred to in paragraph 2(k) may, where appropriate, be given in the form of a reference to the laws, regulations and administrative or statutory provisions or collective agreements governing those points.

A Member State expert enquired how the “initial basic amount” should be interpreted in case of zero-hour contracts and if it would be enough for the employer to merely state that this information cannot be given in such cases, or if the employer should provide information on the hourly wage. The Commission services replied that information on the hourly wage should be given in these cases.

### 4.14. The length of the standard working day or week and overtime (Article 4(2)(l))

*Article 4(2)(l): if the work pattern is entirely or mostly predictable, the length of the worker’s standard working day or week and any arrangements for overtime and its remuneration and, where applicable, any arrangements for shift changes;*

#### 4.14.1. Issues

The term “predictable” was introduced during discussion in the Council. The Commission’s original proposal COM(2017)797 used the terms “variable / not variable”. In order to clarify that work organised in shifts falls, in principle, within point (l) and not (m),<sup>57</sup> this was changed during the negotiations. The reference to shift changes in point (l) further clarifies that shift work is, in principle, to be considered under this point. Compared to the corresponding provision in the Written Statement Directive, point (l) also clarifies that the information obligation covers arrangements for overtime work. Note that the reference to “remuneration” applies to remuneration for overtime, not for shift changes.

The concept of “work pattern” in Article 4(2)(l) refers to the term defined in Article 2(c): “the form of organisation of the working time and its distribution according to a certain pattern determined by the employer”. That implies that where the worker him or herself freely determines the distribution working time, without being constrained by the employer, this provision does not apply.

According to Article 4(3), the information referred to in paragraph 2(l) may, where appropriate, be given in the form of a reference to the laws, regulations and administrative or statutory provisions or collective agreements governing those points.

A Member State expert enquired whether every working pattern without a work schedule, e.g. on-demand work, should be considered unpredictable and how situations where the work schedule can change at short notice should be considered. The Commission services replied that on-demand work certainly falls within “unpredictable” and that all relevant circumstances will need to be considered in situations where the work schedule can change at short notice. Today it is rare that a work pattern is entirely predictable. The key issue is whether it is mostly predictable or not. If the bulk of the working time is fixed in advance, point (l) applies and if the bulk is not fixed in advance, point (m) applies.

#### 4.15. Unpredictable work patterns (Article 4(2)(m))

*Article 4(2)(m): if the work pattern is entirely or mostly unpredictable, the employer shall inform the worker of:*

*(i) the principle that the work schedule is variable, the number of guaranteed paid hours and the remuneration for work performed in addition to those guaranteed hours;*

*(ii) the reference hours and days within which the worker may be required to work;*

*(iii) the minimum notice period to which the worker is entitled before the start of a work assignment and, where applicable, the deadline for cancellation referred to in Article 10(3);*

*Recital 19: Information on working time should be consistent with Directive 2003/88/EC of the European Parliament and of the Council, and should include information on breaks, daily and weekly rest periods and the amount of paid leave, thereby ensuring the protection of the safety and health of workers.*

*Recital 21: If it is not possible to indicate a fixed work schedule because of the nature of the employment, such as in the case of an on-demand contract, employers should inform*

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<sup>57</sup> On the grounds that while shift work takes places at different times of the day, it is generally predictable.

*workers how their working time is to be established, including the time slots in which they may be called to work and the minimum notice period that they are to receive before the start of a work assignment.*

#### 4.15.1. Issues

Article 4(2)(m) is entirely new, and covers the increasing number of workers without standard working days or weeks who previously risked being outside scope of the Written Statement Directive. Recital 21 clarifies that if it is not possible to have a fixed work schedule because of the nature of the employment (e.g. on-demand work), the employer should inform workers how their working time is established.

Point (m)(ii) refers to the right set out in Article 10(1)(a), that the worker covered by this provision may not be required to work unless the work takes place within predetermined reference hours and days, and the worker is informed within a reasonable notice period. Recital 21 corresponds to this point, referring to the obligation for the employer to inform about “time slots in which [workers] may be called to work”.

“Minimum notice period” in point (m)(iii) refers to the “reasonable notice period” stated in Article 10(1)(b), and referred to in Recital 21. “The deadline” referred to in the second part of point (m)(iii) refers to the “reasonable deadline” stated in Article 10(3), after which a worker must be entitled to compensation for a cancelled work assignment. Note that the “reasonable deadline” does not necessarily have to be of the same length as the “reasonable notice period”.

In situations where the number of guaranteed paid hours in an employment relationship is zero, the Directive applies. In accordance with Article 1(4), zero-hour contracts and on-demand contracts are within the scope of the Directive. Even if the amount of work a worker under such a contract performs is below the threshold stated in Article 1(3), he or she cannot be excluded from the scope of the Directive if their work pattern is mostly or entirely unpredictable.

The concept of “work pattern” in Article 4(2)(m) refers to the term defined in Article 2(c): “the form of organisation of the working time and its distribution according to a certain pattern determined by the employer”. That implies that where the worker him or herself freely determines the distribution of working time, without being constrained by the employer, this provision does not apply.

A Member State expert enquired in relation to Article 4(2)(m) on unpredictable work patterns, whether the Commission services could identify principles of work organisation and subordination established by the CJEU jurisprudence to identify atypical workers. The Commission services replied that there is little specific jurisprudence on this issue, but the *Yodel* case can serve as a starting point. The case concerned the Working Time Directive (2003/88/EC), and so did not concern a directive with reference to national definitions of employment relationship, but the ruling remains a useful reference for the question of distinguishing between genuinely self-employed and workers. In its ruling the CJEU referred to criteria, such as: does that person have discretion to use subcontractors or substitutes; does he or she have discretion to refuse the task; can he or she provide service to other parties at the same time, can he or she fix his or her working hours?<sup>58</sup>

An EEA/EFTA observer asked whether on-demand work where the worker is not under an obligation to accept a work assignment, and where each work assignment is carried out under a separate employment contract, would fall under point (l), (m) or neither. The

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<sup>58</sup> Case C-692/19, *Yodel*.

Commission services replied, a priori, that such a type of work pattern would seem unpredictable, and consequently would fall under point (m). In line with the final sentence of Recital 8, a functional approach should be taken in order to avoid circumvention of the protection of on-demand workers, for instance by declaring such workers to be self-employed.

## 4.16. Collective agreements (Article 4(2)(n))

*Article 4(2)(n): any collective agreements governing the worker's conditions of work or in the case of collective agreements concluded outside the business by special joint bodies or institutions, the name of such bodies or institutions within which the agreements were concluded;*

### 4.16.1. Issues

Article 4(2)(n) has undergone technical clarifications compared to the corresponding provision in the Written Statement Directive.

A Member State expert enquired if the full text of a company-level collective agreement has to be provided or if it is sufficient to provide information on the title and date of the relevant collective agreement. The Commission services replied that there is no legal obligation to provide the full text of collective agreements. A reference to the relevant collective agreement would be sufficient, as long as it is precise enough to enable the worker to identify it, and that the collective agreement is accessible to the worker. However, although not a legal obligation, when it comes to company-level collective agreements, it seems hard to understand why it would be difficult for the employer to provide the full text.

Another Member State expert drew attention to the relation between Article 4(2) and Article 5(1). In the latter, it is stated that the information “shall be provided individually to the worker in the form of one or more documents”. The expert enquired if this also applies to point (n), whether collective agreements should be provided by the employer in the form of a document. The Commission services replied, as concluded earlier, that the worker should be individually informed about the existence of collective agreements to which he/she is subject to, but the employer did not have to transmit their content. The Commission services referred, in this context, to Article 153(2)(b) TFEU, which provides that directives shall avoid imposing administrative, financial and legal constraints on SMEs. Therefore, in interpreting Articles 4(2)(n) and 4(3), the legal basis of the Directive, Article 153 TFEU, and namely the second sentence of Article 153(2)(b), should be considered.

ETUC expressed that a reference seems to be sufficient regarding agreements concluded outside the company but it would be logical and in the interest of all parties to provide company collective agreements in full text.



## 4.17. The identity of social security institutions (Article 4(2)(o))

*Article 4(2)(o): where it is the responsibility of the employer, the identity of the social security institutions receiving the social contributions attached to the employment relationship and any protection relating to social security provided by the employer.*

*Recital 22: Information on social security systems should include information on the identity of the social security institutions receiving the social security contributions, where relevant, with regard to sickness, maternity, paternity and parental benefits, benefits for accidents at work and occupational diseases, and old-age, invalidity, survivors', unemployment, pre-retirement and family benefits. Employers should not be required to provide that information where the worker chooses the social security institution. Information on the social security protection provided by the employer should include, where relevant, the fact of coverage by supplementary pension schemes within the meaning of Directive 2014/50/EU of the European Parliament and of the Council (9) and Council Directive 98/49/EC (10).*

### 4.17.1. Issues

Article 4(2)(o) is new and Recital 22 sets out in more detail the type of social security schemes concerned. Namely, “[...] where relevant, with regard to sickness, maternity, paternity and parental benefits, benefits for accidents at work and occupational diseases, and old-age, invalidity, survivors', unemployment, pre-retirement and family benefits.” The Recital also clarifies that information on social security protection should include, where relevant, the fact of coverage by supplementary pension schemes within the meaning of Directive 2014/50/EU on minimum requirements for enhancing worker mobility between Member States by improving the acquisition and preservation of supplementary pension rights and Council Directive 98/49/EC on safeguarding the supplementary pension rights of employed and self-employed persons moving within the Community. Furthermore, the Recital clarifies that, when the choice of the social security institution is made by the worker, and not the employer, the employer is not obliged to supply that information as part of the written statement. However, it should be noted that the information obligation is limited to social contributions attached to the employment relationship, and under the responsibility of the employer, cf. the wording of point (o).

According to Article 4(3), the information referred to in paragraph 2(o) may, where appropriate, be given in the form of a reference to the laws, regulations and administrative or statutory provisions or collective agreements governing those points.

## 4.18. Information in form of reference (Article 4(3))

*Article 4(3): The information referred to in paragraph 2(g) to (l) and (o) may, where appropriate, be given in the form of a reference to the laws, regulations and administrative or statutory provisions or collective agreements governing those points.*

### 4.18.1. Issues

Article 4(3) is similar to the corresponding provision in the Written Statement Directive. The former provision stipulates that, where appropriate, the information obligations referred to in paragraph 2(g) to (l) and (o) may be fulfilled by reference to the laws, regulations and administrative or statutory provisions or collective agreements governing those points, rather than directly.

A Member State expert enquired about the relation between Article 4(2)(n) and Article 4(3). The Commission services replied that there is a link between these articles. Any collective agreement referred to in Article 4(3) must also be included under information related to 4(2)(n), otherwise they would not be relevant because they would not be governing the employment relationship. However, Article 4(3) has a different purpose and relates to information listed in 4(2)(g) to (l) and (o). Where the relevant information in relation to these points can be found in laws, regulations, statutory or administrative provisions or collective agreements, it can be provided by way of reference to these instruments and does not have to be provided in substance in the information package.

ETUC drew attention to the qualifier “where appropriate” and stated that this implied the references must be available and accessible to workers.

## 5.1. Timing and means of information (Article 5(1))

*Article 5(1): Where not previously provided, the information referred to in points (a) to (e), (g), (k), (l) and (m) of Article 4(2) shall be provided individually to the worker in the form of one or more documents during a period starting on the first working day and ending no later than the seventh calendar day. The other information referred to in Article 4(2) shall be provided individually to the worker in the form of a document within one month of the first working day.*

*Recital 23: Workers should have the right to be informed about their rights and obligations resulting from the employment relationship in writing at the start of employment. The basic information should therefore reach them as soon as possible and at the latest within a calendar week from their first working day. The remaining information should reach them within one month from their first working day. The first working day should be understood to be the actual start of performance of work by the worker in the employment relationship. Member States should aim to have the relevant information on the employment relationship provided by the employers before the end of the initially agreed duration of the contract.*

*Recital 24: In light of the increasing use of digital communication tools, information that is to be provided in writing under this Directive can be provided by electronic means.*

### 5.1.1. Issues

The Article essentially divides the information package into two parts, which could be referred to as “basic information” (points (a) to (e), (g), (k), (l) and (m) of Article 4(2)) and “supplementary information” (the remaining points in Article 4(2)), with different deadlines. “[A] period starting on the first working day and ending no later than the seventh calendar day” should, in conjunction with Recital 23, be read as a strong encouragement to provide the basic information as soon as possible, and under no circumstances later than the

seventh calendar day. This is a significant reduction in the deadline compared to the Written Statement Directive's two months.

According to Recital 23 "the first working day" should be understood to be the actual start of the performance of work by the worker in the employment relationship. This means that if a worker has his or her first working day on a Sunday, the deadline lapses on Saturday of the following week. The same Recital also states that "Member States should aim to have the relevant information on the employment relationship provided by the employers before the end of the initially agreed duration of the contract." Furthermore, "within one month" should be understood as a calendar month, i.e. the period from a particular date in one month to the same date in the next month. This would mean that if the first working day is, for example, 5 June, the deadline would lapse 4 July, or, if the first working day is 31 January, the deadline would lapse 28 February (29 February in a leap year).

The wording "individually to the worker" in Article 5(1) means that it is an individual right, which in turn means that for instance a published notice at the workplace setting out general terms and conditions of employment is not sufficient.

Furthermore, the information must be provided in the form of "one or more documents". The Commission services finds that there is no significance in the reference to "documents" in the plural in the first sentence of Article 5(1) and "document" in the singular in its second sentence. Both requirements may be fulfilled through the production of one or more written communications in documentary form.

In paragraph 27 of the adopted Council conclusions on improving working conditions of seasonal and other mobile workers, the Council invites Member States to "provide seasonal and other mobile workers relevant information, if necessary with support of ELA, regarding their rights and obligations as well as information regarding the authorities assisting seasonal and other mobile workers in the respective Member State in all the areas mentioned above, in their own language, especially if it is an official EU language, or a language they understand or may reasonably be presumed to understand and in a clear and transparent manner."<sup>59</sup> Furthermore, in the Commission's Guidelines on seasonal workers in the EU in the context of the Covid-19 outbreak, the Commission "invites Member States to require employers to provide this information to seasonal workers, in a language they understand, irrespective of their duration of employment."<sup>60</sup> The Council conclusions and the Commission's Guidelines do not entail an obligation but the Commission services encourage the Member States to reflect these documents in the transposition of the Directive.

ETUC stressed that as regards precarious workers, if the workers do not get the information on the first day, then it is difficult to enforce their rights afterwards. In the organisation's opinion, it must be emphasized how important the earliest possible information is and what are the benefits for providing the information on the first day, for instance transparency and legal certainty. ETUC argued that the seven-day period does not give right to withhold the information if the information is available. If the employer has the information ready, it should be provided to the worker at the earliest opportunity. The Commission services drew attention to the final sentence of Recital 23, which highlights the importance of ensuring that workers with very short employment relationships receive the information before the end of that relationship, even if this is before the normal deadline set by the Member State for provision of information.

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<sup>59</sup> 11726/2/20 REV 2 Improving the working and living conditions of seasonal and other mobile workers. The document is available [online](#).

<sup>60</sup> Communication from the Commission - Guidelines on seasonal workers in the EU in the context of the covid-19 outbreak, C(2020) 4813 final. The document is available [online](#).



BusinessEurope emphasized that there are in fact situations in which the information cannot be provided on the first day. Consequently, one may encourage provision of the information as soon as possible, but the ultimate deadline agreed by the co-legislator is within seven days.

## 5.2. Timing and means of information, cont. (Article 5(2))

*Article 5(2): Member States may develop templates and models for the documents referred to in paragraph 1 and put them at the disposal of worker and employer including by making them available on a single official national website or by other suitable means.*

*Recital 25: In order to help employers to provide timely information, Member States should be able to provide templates at national level including relevant and sufficiently comprehensive information on the legal framework applicable. Those templates could be further developed at sectoral or local level, by national authorities and the social partners. The Commission will support Member States in developing templates and models and make them widely available, as appropriate.*

### 5.2.1. Issues

Article 5(2) is a may-clause and does not contain a legal obligation. However, it is an invitation to Member States that can serve as a way to reduce burdens on employers, particularly SMEs. Recital 25 invites Member States to provide templates at national level, including relevant and sufficiently comprehensive information on the legal framework applicable. These templates could be developed further at sectoral or local level, by national authorities and/or by social partners. Furthermore, the Recital states that the Commission will help Member States in developing templates and models and make them widely available. The Commission will make publicly available any existing or proposed templates that Member States share with it for this purpose.

## 5.3. Timing and means of information, cont. (Article 5(3))

*Article 5(3): Member States shall ensure that the information on the laws, regulations and administrative or statutory provisions or universally applicable collective agreements governing the legal framework applicable which are to be communicated by employers is made generally available free of charge in a clear, transparent, comprehensive and easily accessible way at a distance and by electronic means, including through existing online portals.*

### 5.3.1. Issues

Only collective agreements that are universally applicable fall within scope of this provision. Furthermore, what needs to be made generally available, is information on the laws, regulations and administrative or statutory provisions or universally applicable collective agreements “governing the legal framework applicable which are to be communicated by employers”. This means that the obligation concerns the legal

framework that is relevant to the information requirements under the Directive. Member States need to make sure that the content of the agreements, as well as laws, regulations and administrative or statutory provisions, is available free of charge, in an accessible and transparent way.

A Member State expert enquired about the term ‘universally applicable collective agreements’ and whether these include national and sectoral collective agreements, or only national collective agreements. The Commission services stated that, when this term was introduced in the Council, the underlying concern was to ensure that Member States were not obliged to ensure the availability of collective agreements to which they did not have access. This concern builds on the premise that the authorities, in keeping with respecting the autonomy of the social partners, as enshrined in the Treaties, can only be expected to have access to collective agreements that have had their application extended by public intervention, for instance by law.

When it comes to the issue of whether the notion “universally applicable collective agreements” includes both national and sectoral collective agreements, the Commission services noted that there is no general definition of this term in EU law. However, the notion is used in the context of posting of workers. In Article 3(8) first sub-paragraph of Directive 96/71 on Posting of Workers, the term is defined as follows:

“Collective agreements or arbitration awards which have been declared universally applicable’ means collective agreements or arbitration awards which must be observed by all undertakings in the geographical area and in the profession or industry concerned.”<sup>61</sup>

Based on this definition, the wording “universally applicable collective agreements” referred to in Article 5(3) could be understood to be both national and sectoral collective agreements that have had their application extended, beyond the contracting parties, to apply to all undertakings, either nationally or within a certain sector, profession or geographical area. It would be a prerequisite that the extension took place through public intervention by law or otherwise.

Upon a request from a Member State expert, the Commission services clarified that although the Member States have an obligation under Article 5(3) to make available the relevant legal texts and universally applicable collective agreements, they are not required to make an analysis or commentary on them.

ETUC stated that workers often have difficulties in understanding and interpreting information provided to them through links to national legislation. It referred, as a good practice, to the EFBWW’s website for posted workers with information on national labour law regimes (per Member State) divided by topics and with contact information on trade unions (<https://www.constructionworkers.eu/en>). Some national websites for posted workers also allow reaching information by searching for topics and sector. A good example in this respect is the Belgian website: [posting Belgium](#). ETUC encouraged Member States to put in place similar arrangements for this Directive.

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<sup>61</sup> For the purposes of Directive 96/71, the Court has clarified in Case C-815/18 that the question of whether a collective agreement has been declared universally applicable must be assessed by reference to the applicable national law, see paras. 69-72

## 6.1. Modification of the employment relationship (Article 6(1))

*Article 6(1): Member States shall ensure that any change in the aspects of the employment relationship referred to in Article 4(2) and any change to the additional information for workers sent to another Member State or to a third country referred to in Article 7 shall be provided in the form of a document by the employer to the worker at the earliest opportunity and at the latest on the day on which it takes effect.*

### 6.1.1. Issues

Article 6 applies to the information supplied both under the list of essential aspects of the employment relationship in Article 4 and under the information for workers sent abroad under Article 7. The employer must notify the worker of “any change” to the working conditions referred to in Article 4(2) and Article 7 in writing at the earliest opportunity, and at the latest on the day on which it takes effect. This is a significant reduction in the deadline compared to the Written Statement Directive’s one month. Changes must be notified in writing through a “document”. This term signifies the form of written information set out in Article 3, i.e. the same format as for the provision of the original information, which is modified under Article 6.

A Member State expert enquired about the relation between Article 4(2)(f), on the identity of the user undertaking in case of temporary agency workers, and Article 6. The Commission services replied that the workers obviously need to know the identity of the user undertaking. Article 4(2)(f) is a more specific provision and thus supersedes Article 6. The obligation ‘when and as soon as known’ applies in case of temporary agency workers in relation to their assignment with a user undertaking. In that context, Article 6 seems redundant.

## 6.2. Modification of the employment relationship, cont. (Article 6(2))

*Article 6(2): The document referred to in paragraph 1 shall not apply to changes that merely reflect a change in the laws, regulations and administrative or statutory provisions or collective agreements cited in the documents referred to in Article 5(1), and, where relevant, in Article 7.*

### 6.2.1. Issues

Article 6(2) states that when information is provided by reference to laws, regulations or collective agreements, and these are amended, there is no obligation to notify the worker as described in Article 6(1).

Article 6(2) refers to Article 5(1), which in turn refers to the whole “catalogue” of information to be provided. Moreover, Article 4(3) limits the information that can be given by reference to the information mentioned in Article 4(2) (g) to (l) and (o). However, while respecting these limitations, there could still be citations of laws, regulations etc. under the other information points. Therefore, Article 6(2) clarifies that mere changes in laws, regulations, etc. cited do not trigger the notification obligation.

This limitation of the obligation to notify changes, which exists in the Written Statement Directive Article 5(2), was included to avoid a situation where employers would have to monitor closely changes in law or collective agreements to fulfil their information obligations, which could constitute a considerable administrative burden.

## 7.1. Additional information for workers sent to another Member State or to a third country (Article 7(1))

*Article 7(1): Member States shall ensure that, where a worker is required to work in a Member State or third country other than the Member State in which he or she habitually works, the employer shall provide the documents referred to in Article 5(1) before the worker's departure and the documents shall include at least the following additional information:*

- (a) the country or countries in which the work abroad is to be performed and its anticipated duration;*
- (b) the currency to be used for the payment of remuneration;*
- (c) where applicable, the benefits in cash or kind relating to the work assignments;*
- (d) information as to whether repatriation is provided for, and if so, the conditions governing the worker's repatriation.*

*Recital 26: Workers sent abroad should receive additional information specific to their situation. For successive work assignments in several Member States or third countries, it should be possible for the information for several assignments to be collated before the first departure and subsequently modified in the case of any changes. Workers who qualify as posted workers under Directive 96/71/EC of the European Parliament and of the Council should also be notified of the single official national website developed by the host Member State where they are able to find the relevant information on the working conditions applying to their situation. Unless Member States provide otherwise, those obligations apply if the duration of the work period abroad is longer than four consecutive weeks.*

### 7.1.1. Issues

The wording of this provision represents a change compared to the formulation used in Article 4(1) of the Written Statement Directive: "Where an employee is required to work in a country or countries other than the Member State whose law and/or practice governs the contract or employment relationship [...]." The focus of Article 7 in the new Directive is on the Member State in which the worker habitually works, rather than the applicable law under private international law.<sup>62</sup> In most situations, the wording of the Written Statement Directive and the new Directive would have the same result. However, given the reference to the Member State whose law governs the contract or employment relationship, under certain circumstances, the consequences could be different. For instance, the parties may have chosen German law, even though the work is habitually carried out in France. If a worker under those conditions were sent temporarily to Germany, the information

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<sup>62</sup> Regulation (EC) No 593/2008 (Rome I) allows parties to choose the law applicable to a labour contract. As such, the law applicable to a labour contract does not give indication to the 'habitual workplace'.

obligation would not be triggered under the Written Statement Directive, whereas it would be under the new Directive.

Article 7(1) point (a) is largely identical to the provision in the Written Statement Directive, but “country” and “anticipated” is added. Point (b) is identical, whereas point (c) is essentially identical. Here “appropriate” is replaced by “applicable”, with the effect that if benefits in cash or in kind are paid – it is now undoubtedly mandatory to provide information about that. Point (d) is largely identical, but information on whether repatriation is provided for is now compulsory.

## 7.2. Additional information for workers sent to another Member State or to a third country, cont. (Article 7(2))

*Article 7(2): Member States shall ensure that a posted worker covered by Directive 96/71/EC shall in addition be notified of:*

*(a) the remuneration to which the worker is entitled in accordance with the applicable law of the host Member State;*

*(b) where applicable, any allowances specific to posting and any arrangements for reimbursing expenditure on travel, board and lodging;*

*(c) the link to the single official national website developed by the host Member State pursuant to Article 5(2) of Directive 2014/67/EU of the European Parliament and of the Council (15).*

### 7.2.1. Issues

Article 7(1) applies to all workers sent abroad, either to another Member State or a third country, whatever their status, and Article 7(2) applies, in addition, to workers posted to another Member State under the terms of Directive 96/71 on Posting of Workers. If the duration of the stay abroad is less than four consecutive weeks, by default, the information obligation under paragraphs 1 and 2 is not applicable, cf. paragraph 4. “[I]n addition” means that the workers have to receive information under all these provisions. Typically, this would be done in separate steps. Information under Article 4(2) is to be provided at the beginning of the employment relationship; information under Articles 7(1) and (2) is to be provided if/when the worker is posted abroad.

Regarding Article 7(2)(a), the term “remuneration” includes “all the constituent elements of remuneration rendered mandatory by national law [...] or by collective agreements which [...] have been declared universally applicable” cf. Article 3(1) second sub paragraph of Directive 96/71 as amended by Directive 2018/957/EU.

There are specific rules for temporary agency workers, as the employer (the temporary agency) must guarantee posted temporary agency workers the terms and conditions of employment which apply pursuant to Article 5 of Directive 2008/104/EC on temporary agency work, cf. the new Article 3(1)(b) of Directive 96/71 as amended. This includes company level collective agreements at the user undertaking (although they are not universally applicable), unless the host Member State applies one or several of the alternatives to this rule provided for in that Directive. Member States may also require that, in addition to the provisions of Article 5 of Directive 2008/104/EC, posted temporary



agency workers benefit from any more favourable terms and conditions that apply to temporary agency workers at national level, cf. Article 3(9) of Directive 96/71 as amended.

Regarding Article 7(2)(b), “Allowances specific to posting” could be “flat rate”, sometimes paid without a requirement of documentation. “Expenditure on travel, board and lodging” typically relates to concrete costs and would often require documentation. There could be some overlap between Article 7(1)(c) and 7(2)(b), but the latter provision elaborates and clarifies that posted workers are entitled to information about any particular allowances related to posting and any schemes for reimbursement of costs related to travel, board and lodging.

Regarding Article 7(2)(c), under Article 5(2) of Directive 2014/67/EU (Posting Enforcement Directive) host Member States have the obligation to create, and maintain up to date, a single national website containing the information on the terms and conditions of employment applicable to workers posted to their territory.

A Member State expert enquired about the wording of Article 7(2): “Member States shall ensure that a posted worker [...] shall be notified of [...]” and whether this implies that the information shall be provided to the worker through the website by the Member State or if it shall be provided by the employer. The Commission services replied that Article 7(2), which provides for additional obligations, should be read as a supplement to Article 7(1) that states that the employer shall provide the documents. Member States are not in a position to provide such information, so the obligation lies with the employer.

A Member State expert asked whether an interpretation of Article 7(2) according to which this provision should be implemented in such a way that Member States impose an information obligation on employers who post workers *from* their territory, and not on employers who post workers *to* their territory, is correct. The Commission services confirmed that they see this provision as an extension of Article 7(1), in which the wording refers to “before the worker’s departure”, which means that the obligation is not on receiving (host) Member States.

### 7.3. Additional information for workers sent to another Member State or to a third country, cont. (Article 7(3))

*Article 7(3): The information referred to in point (b) of paragraph 1 and point (a) of paragraph 2 may, where appropriate, be given in the form of a reference to specific provisions of laws, regulations and administrative or statutory acts or collective agreements governing that information.*

#### 7.3.1. Issues

Point (b) of paragraph 1 refers to the currency to be used and point (a) of paragraph 2 refers to the remuneration in accordance with the applicable law of the host Member State. This paragraph is parallel to Article 4(3).

The ETUC delegation highlighted the reference to “specific provisions” in Article 7(3) and considered that a general link to a national website would not be sufficient.



## 7.4. Additional information for workers sent to another Member State or to a third country, cont. (Article 7(4))

*Article 7(4): Unless Member States provide otherwise, paragraphs 1 and 2 shall not apply if the duration of each work period outside the Member State in which the worker habitually works is four consecutive weeks or less.*

### 7.4.1. Issues

Article 7(4) stipulates a qualification period but provides the Member States with the option to reduce the length of that period, or not apply one at all. This means that, by default, paragraphs 1 and 2 only apply if the duration of each work period outside the Member State in which the worker habitually works exceeds four consecutive weeks. As there is no mention of a reference period, presumably there is no accumulation of work periods, which the wording “each work period” also supports. However, if a worker works very frequently and over longer periods in another Member State, at some point the question will arise in which Member State the worker habitually works.

If the planned duration of the stay abroad was less than four weeks, but is subsequently extended beyond this period, in the Commission services’ view, the obligations under Article 7 start to apply as soon as the assignment is prolonged, meaning when it is communicated to the worker. If there is no such communication, the obligations start applying, at the very latest, when the four-week period expires.

ETUC drew attention to the exception set out in Article 7(4) and asked for guidance on how this provision should be interpreted. Since it is often the case that posted workers visit their home country at weekends, ETUC asked for confirmation that the entire duration of the working arrangement should be taken into account and that the worker does not have to be physically present in the host Member State all the time to qualify for the period of four consecutive weeks set out in Article 7(4).

ETUC suggested that the work period set out in paragraph 4 should correspond to the posting period stated in the prior notification declaration.<sup>63</sup>

The Commission services replied that it is for the Court to take a final view on what “work period” means. However, the Commission services did not consider it to be likely that the work period would be considered interrupted if the worker returns to the home country on weekends. It was a reasonable assumption that “work period” refers to the time for which the worker is sent to work abroad and that short trips back to the home country for personal reasons do not interrupt that period. Furthermore, since paragraph 4 applies to all workers sent abroad, not only in the capacity of posted workers, it would not be sufficient to tie the “work period” to the posting period. The Commission services also recalled that Member States can always transpose more favourable provisions, so the four-week period can be shorter or not applied at all. This Article also applies if the initial shorter period is extended beyond four weeks.

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<sup>63</sup> Directive 2014/67/EU Article 9(1)(a).

## Chapter III on Minimum Requirements Relating to Working Conditions

Chapter III introduces, in Articles 8 to 13, a set of new material rights to ensure more predictable and transparent working conditions. The new rights apply to all workers, particularly addressing insufficient protection for workers in less secure jobs, while limiting burdens on employers and maintaining labour market adaptability.<sup>64</sup>

### 8.1. Maximum duration of any probationary period (Article 8(1))

*Article 8(1): Member States shall ensure that, where an employment relationship is subject to a probationary period as defined in national law or practice, that period shall not exceed six months.*

*Recital 27: Probationary periods allow the parties to the employment relationship to verify that the workers and the positions for which they were engaged are compatible while providing workers with accompanying support. An entry into the labour market or a transition to a new position should not be subject to prolonged insecurity. As established in the European Pillar of Social Rights, probationary periods should therefore be of a reasonable duration.*

*Recital 28: A substantial number of Member States have established a general maximum duration of probation of between three and six months, which should be considered to be reasonable. Exceptionally, it should be possible for probationary periods to last longer than six months, where justified by the nature of the employment, such as for managerial or executive positions or public service posts, or where in the interests of the worker, such as in the context of specific measures promoting permanent employment, in particular for young workers. It should also be possible for probationary periods to be extended correspondingly in cases where the worker has been absent from work during the probationary period, for instance because of sickness or leave, to enable the employer to assess the suitability of the worker for the task in question. In the case of fixed-term employment relationships of less than 12 months, Member States should ensure that the length of the probationary period is adequate and proportionate to the expected duration of the contract and the nature of the work. Where provided for in national law or practice, workers should be able to accrue employment rights during the probationary period.*

#### 8.1.1. Issues

Article 8 states that, where an employment relationship is subject to a probationary period, that period shall not exceed six months. The Directive does not provide for any definition of probationary period, rather the provision refers to the definition used in national law or practice. Accordingly, it is up to the Member States to provide this definition. In Recital 27 the objectives of a probationary period are described as allowing “the parties to the employment relationship to verify that the workers and the positions for which they were engaged are compatible while providing workers with accompanying support. An entry into the labour market or a transition to a new position should not be subject to prolonged

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<sup>64</sup> Member States may provide, on objective grounds, that these provisions do not apply to civil servants, public emergency services, the armed forces, police authorities, judges, prosecutors, investigators or other law enforcement services (see section 1.6-1.8 for a discussion on possible derogations from applying certain provisions in Chapter III).

insecurity. As established in the European Pillar of Social Rights, probationary periods should therefore be of a reasonable duration.” Furthermore, in Recital 28 it is clarified that “where provided for in national law or practice, workers should be able to accrue employment rights during the probationary period.”

A Member State expert asked if this provision targets the duration of the entire probationary period or if it specifically targets the initial duration, excluding a potential renewal. In the view of the Commission services, this Article covers the duration of the probationary period as a whole (any possible renewal included). This interpretation is based on the fact that the provision states that the period (i.e. as a whole) cannot exceed six months. A different interpretation permitting different types of probationary period for the same worker, each with a six-month limit, would amount to circumvention. This is, as the title of Article 8 also demonstrates, a maximum period which can only be exceeded in exceptional circumstances and provided that the conditions laid down in Article 8(3) are met.

## 8.2. Maximum duration of any probationary period, cont. (Article 8(2))

*Article 8(2): In the case of fixed-term employment relationships, Member States shall ensure that the length of such a probationary period is proportionate to the expected duration of the contract and the nature of the work. In the case of the renewal of a contract for the same function and tasks, the employment relationship shall not be subject to a new probationary period.*

### 8.2.1. Issues

Article 8(2) applies to situations where fixed-term employment relationships are subject to a probationary period. In such cases, Member States shall ensure that this probationary period is proportionate to both the time the contract is expected to last, and the nature of the work. In Recital 28 it is stated that “in the case of fixed-term employment relationships of less than 12 months, Member States should ensure that the length of the probationary period is adequate and proportionate to the expected duration of the contract and the nature of the work.” I.e. the shorter the fixed-term employment relationship is, the shorter the probationary period should be. At the same time, the nature of the work shall be taken into account, e.g. as stated in Recital 28, managerial or executive positions or public service posts could justify a longer probationary period.

The second sentence of Article 8(2) states that, in the case of a renewal of a contract for the same function and tasks, this new employment relationship shall not be subject to a new probationary period. The Framework Agreement on fixed-term work annexed to Directive 1999/70/EC makes reference to the terms “renewal” and “successive” fixed-term contracts. By analogy with the case-law of the Court on successive fixed-term contracts in the context of the Framework Agreement, a short time period<sup>65</sup> between the contracts is

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<sup>65</sup> In Case C-212/04, *Adeneler and Others*, para 84, the Court stated: “It is clear that a national provision under which only fixed-term contracts that are separated by a period of time shorter than or equal to 20 working days are regarded as successive must be considered to be such as to compromise the object, the aim and the practical effect of the Framework Agreement.”

In joined Cases C-378-380/07, *Angelidaki and Others*, para 157, the Court considered that “a legislation at issue in the main proceedings, which recognises only fixed-term employment contracts separated by a period of less than three months

not sufficient to interrupt any existing employment relationship and consequently have the effect that any contract signed subsequently would not be regarded as being renewed.

A Member State expert drew, in relation to Article 8(2), attention to the issue of so-called “chain employment relationships”, where employers circumvent the legislation by using short successive fixed-term employment relationships. The Commission services replied that Article 8(2) would limit the probationary period within an individual employment relationship to a reasonable duration. Article 8(2) provides that fixed-term contracts renewed for the same function and tasks, shall not be subject to a new probationary period. Even if considered as separate contracts by employers, the use of chains of successive fixed-term contracts would come within the scope Clause 5 of the Fixed-term Directive.

### 8.3. Maximum duration of any probationary period, cont. (Article 8(3))

*Article 8(3): Member States may, on an exceptional basis, provide for longer probationary periods where justified by the nature of the employment or in the interest of the worker. Where the worker has been absent from work during the probationary period, Member States may provide that the probationary period can be extended correspondingly, in relation to the duration of the absence.*

#### 8.3.1. Issues

Article 8(3) is a may-clause, providing the Member States with an opportunity, not an obligation, on an exceptional basis, to provide for longer probationary periods. Either longer than the six month period provided for in Article 8(1), or longer than the period provided for in Article 8(2). This possibility applies to situations where it is justified by “the nature of the employment relationship” or if it is “in the interest of the worker”. In Recital 28 it is stated that “the nature of the employment relationship” could for example be in case of “managerial or executive positions or public service posts.” The same Recital also exemplifies that “in the interest of the worker” could be “in the context of specific measures promoting permanent employment, in particular for young workers.” Such longer probationary periods could be justified where this would promote the chances to attain a permanent position.

The second sentence of Article 8(3) provides the Member States with an opportunity to provide that the probationary period can be extended in cases where the worker has been absent during the probationary period, to enable the employer to assess the suitability of the worker for the task in question. In such cases, the probationary period can be

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as being ‘successive’ does not appear, as such, to be so inflexible and inherently so restrictive. Such breaks can generally be regarded as being sufficient to interrupt any existing employment relationship and consequently have the effect that any contract signed subsequently would not be regarded as being successive. It follows from this that clause 5(1) of the Framework Agreement does not, in principle, preclude legislation such as that at issue in the main proceedings. However, it is for the national authorities and courts responsible for implementing the measures transposing Directive 1999/70 and the Framework Agreement, and which are thus called upon to rule on the treatment of successive fixed-term employment contracts, to consider in each case all the circumstances at issue, taking account, in particular, of the number of successive contracts concluded with the same person or for the purposes of performing the same work, in order to ensure that fixed-term relationships are not abused by employers (see order in *Vassilakis and Others*, paragraphs 115 to 117).” See also joined Cases C-362/13, C-363/13 and C-407/13, *Fiamingo et al. v Rete Ferroviaria Italiana SpA*.

extended correspondingly, in relation to the duration of the absence. This means that the extension cannot exceed the length of the absence. According to Recital 28 such absence could, for instance, be because of sickness or leave.

A Member State expert stated that if the probationary period can be extended, this means that it can be interrupted. This is not possible under the national law in that Member State, except in certain circumstances and if there is an agreement between the parties. What if there is no provision in the national law for the probationary period to be interrupted? The Commission services replied that this provision is permissive, not an obligation, and Member States may choose not to implement it.

ETUC highlighted the non-regression clause (Article 20) in relation to the possibility to extend the probationary period according to Article 8(3). This possibility does not apply in Member States where this would lower the current level of protection. The Commission services replied that the situation may vary depending on what is more or less protective for a worker in an individual case. Article 20 is an overarching provision that needs to be respected in any case.

## 9.1. Parallel employment (Article 9(1))

*Article 9(1): Member States shall ensure that an employer neither prohibits a worker from taking up employment with other employers, outside the work schedule established with that employer, nor subjects a worker to adverse treatment for doing so.*

### 9.1.1. Issues

Article 9(1) states that Member States shall ensure that an employer does not prohibit a worker from taking up parallel employment outside the work schedule established with that employer. This means that it introduces a prohibition of exclusivity clauses that prevent workers from taking up secondary (or more) employment outside the work schedule established with the primary employer. Furthermore, Member States shall ensure that employers do not subject a worker to adverse treatment if he or she takes up parallel employment, such as giving a worker less favourable conditions when it comes to, for instance, promotion, annual salary negotiations, etc.

A Member State expert enquired about the need to coordinate between the employers when workers take up employment with other employers. Are Member States free to establish the procedures for this situation or are there common conditions; i.e. which employer would have priority in organising the hours of work, affecting when the worker may perform for the other employer? The Commission services replied that the Directive is silent on the issue of priority between the employers and that this is something that Member States may determine when transposing the Directive.

A Member State expert asked how to reconcile this provision with the right of employers to order overtime, which is provided for under national law. If the employee has another employment relationship, which right prevails: (a) right of the employer to order overtime or (b) right of the employee to work for another employer? If a Member State would prioritise the right of the employer, could the Directive be infringed? The Commission services replied that this is not regulated by the Directive and it would be for the Member States to determine which right should be given priority.



## 9.2. Parallel employment, cont. (Article 9(2))

*Article 9(2): Member States may lay down conditions for the use of incompatibility restrictions by employers, on the basis of objective grounds, such as health and safety, the protection of business confidentiality, the integrity of the public service or the avoidance of conflicts of interests.*

*Recital 29: An employer should neither prohibit a worker from taking up employment with other employers, outside the work schedule established with that employer, nor subject a worker to adverse treatment for doing so. It should be possible for Member States to lay down conditions for the use of incompatibility restrictions, which are to be understood as restrictions on working for other employers for objective reasons, such as for the protection of the health and safety of workers including by limiting working time, the protection of business confidentiality, the integrity of the public service or the avoidance of conflicts of interests.*

### 9.2.1. Issues

Article 9(2) constitutes an exception to the previous paragraph, as it provides the Member States with a possibility, not an obligation, to allow the use of incompatibility restrictions by employers. According to Recital 29, incompatibility restrictions should be understood as “restrictions on working for other employers”, i.e. limited situations when an employer can restrict or deny a worker to take up parallel employment. These restrictions must be based on objective grounds, such as health and safety, the protection of business confidentiality, the integrity of the public service or the avoidance of conflicts of interests. These are examples, not a comprehensive list, introduced by the Council in the negotiations with the European Parliament. Civil servants may serve as an example where restrictions on the possibility to take up parallel employment may be justified, depending on the specific circumstances, while regular workers may have restrictions on their liberty of taking up employment with competing businesses.

## 10.1. Minimum predictability of work (Article 10)

*Article 10(1): Member States shall ensure that where a worker’s work pattern is entirely or mostly unpredictable the worker shall not be required to work by the employer unless both of the following conditions are fulfilled:*

*(a) the work takes place within predetermined reference hours and days as referred to in point (m)(ii) of Article 4(2); and*

*(b) the worker is informed by his or her employer of a work assignment within a reasonable notice period established in accordance with national law, collective agreements or practice as referred to in point (m)(iii) of Article 4(2).*

*Recital 30: Workers whose work pattern is entirely or mostly unpredictable should benefit from a minimum level of predictability where the work schedule is determined mainly by the employer, be it directly, such as by allocating work assignments, or indirectly, such as by requiring the worker to respond to clients’ requests.*

*Recital 31: Reference hours and days, which are to be understood as time slots during which work can take place at the request of the employer, should be established in writing at the start of the employment relationship.*



*Recital 32: A reasonable minimum notice period, which is to be understood as the period of time between the moment when a worker is informed of a new work assignment and the moment when the assignment starts, constitutes another necessary element of predictability of work for employment relationships with work patterns which are entirely or mostly unpredictable. The length of the notice period may vary according to the needs of the sector concerned, while ensuring the adequate protection of workers. The minimum notice period applies without prejudice to Directive 2002/15/EC of the European Parliament and of the Council.*

### 10.1.1. Issues

Article 10 introduces a minimum level of predictability for workers whose work pattern is entirely or mostly unpredictable. According to Recital 30 this is “where the work schedule is determined mainly by the employer, be it directly, such as by allocating work assignments, or indirectly, such as by requiring the worker to respond to clients’ requests”. “Work pattern” in paragraph 1 refers to the term defined in Article 2(c): “the form of organisation of the working time and its distribution according to a certain pattern determined by the employer”. That means that where the worker him or herself freely determines the distribution of working time, without being constrained by the employer, this provision does not apply.

The concept of “predictable” was introduced during the discussions in the Council. The Commission’s original proposal COM(2017)797 used the concept of “variable / not variable”. The concept “variable” is discussed in the Impact Assessment SWD(2017)478 pages 18-19 and pages 40-41. This may provide useful pointers to Member States developing a definition of the concept of “predictable” in their national transposing measures.

Both points a) and b) of Article 10(1) have to be fulfilled (cumulatively) for the worker to be required to work. Point a) requires a predetermination of “reference hours and days” during which the work can take place. According to Recital 31 “reference hours and days, which are to be understood as time slots during which work can take place at the request of the employer, should be established in writing at the start of the employment relationship.” Point b) requires an establishment of “a reasonable notice period”, within which the worker shall be informed by the employer about the work assignment. This notice period shall be established in accordance with national law, collective agreements or practice. According to Recital 32 a reasonable minimum notice period is to be understood as “the period of time between the moment when a worker is informed of a new work assignment and the moment when the assignment starts, constitutes another necessary element of predictability of work for employment relationships with work patterns which are entirely or mostly unpredictable”. In the same Recital, it is stated that the length of the notice period “may vary according to the needs of the sector concerned, while ensuring the adequate protection of workers.” Furthermore, the minimum notice period applies without prejudice to Directive 2002/15/EC of the European Parliament and of the Council of 11 March 2002 on the organisation of the working time of persons performing mobile road transport activities. That means that the “period of availability” defined in Directive 2002/15/EC applies to such workers, and not Article 10 of Directive 1152/2019.

A Member State expert asked if a worker can refuse a work assignment even in a situation where the employer invokes an emergency as a justification for not meeting the preconditions stipulated under Article 10(1)(a) and (b). The Commission services replied that the provision does not contain any derogations from the right to decline a work assignment. This must be seen in connection with the fact that contracts that contain work patterns that are entirely or mostly unpredictable normally represent precarious employment relationships.

A Member State expert asked for clarification regarding “reasonable notice period” and pointed out that what is “reasonable” may vary considerably between different types of work or contracts. The Commission services replied that what is a reasonable notice period is indeed going to vary depending on sector and nature of the work. This was recognized by the co-legislators and Recital 32 states: “the length of the notice period may vary according to the needs of the sector concerned, while ensuring the adequate protection of workers.” This needs to be defined for different sectors or types of work as part of the transposition process, which can be done through collective agreements or national law.

An EEA/EFTA observer asked whether, in cases when the worker has a right always to refuse a work assignment, is there an additional need to establish a notice period under Article 10(1), or can the legislation simply refer to the fact that the requirement under Article 10(2) is fulfilled anyway? The Commission services replied that these are two different provisions and both need to be transposed by the Member States. The two conditions listed under points (a) and (b) of Article 10(1) need to be fulfilled in order for an employer to require a worker, who is subject to an unpredictable work schedule, to work. The employer must have defined the reference hours and days, the “slots”, in which the work may take place (point a) and the worker needs to be informed by the employer of the work assignment within a reasonable notice period (point b), that was defined in advance and set out in the written statement. Paragraph 2 is a reinforcement of paragraph 1. While paragraph 1 states that both requirements need to be fulfilled for an employer to require a worker to take up the assignment, paragraph 2 states that when one of these two requirements is not fulfilled, the worker has the right to refuse without adverse consequences.

## 10.2. Minimum predictability of work, cont. (Article 10(2))

*Article 10(2): Where one or both of the requirements laid down in paragraph 1 is not fulfilled, a worker shall have the right to refuse a work assignment without adverse consequences.*

*Recital 33: Workers should have the possibility to refuse a work assignment if it falls outside of the reference hours and days or if they were not notified of the work assignment in accordance with the minimum notice period, without suffering adverse consequences for this refusal. Workers should also have the possibility to accept the work assignment if they so wish.*

### 10.2.1. Issues

Article 10(2) clarifies that the worker shall have the right to refuse a work assignment if one or both of the requirements laid down in the previous paragraph (Article 10(1)) is not fulfilled. Such a refusal shall not lead to any adverse consequences, such as sanctions or the refusal to allocate work in the future. Furthermore, in the corresponding Recital 33 it is clarified that the worker can still agree to carry out the work even if one or both conditions in Article 10(1) are not fulfilled: “[...] Workers should also have the possibility to accept the work assignment if they so wish.”

### 10.3. Minimum predictability of work, cont. (Article 10(3))

*Article 10(3): Where Member States allow an employer to cancel a work assignment without compensation, Member States shall take the measures necessary, in accordance with national law, collective agreements or practice, to ensure that the worker is entitled to compensation if the employer cancels, after a specified reasonable deadline, the work assignment previously agreed with the worker.*

*Recital 34: Where a worker whose work pattern is entirely or mostly unpredictable has agreed with his or her employer to undertake a specific work assignment, the worker should be able to plan accordingly. The worker should be protected against loss of income resulting from the late cancellation of an agreed work assignment by means of adequate compensation.*

#### 10.3.1. Issues

Article 10(3) was not part of the Commission's original proposal, but included on the initiative of the European Parliament during the negotiations with the Council. The objectives of the provision are elaborated in Recital 34: "Where a worker whose work pattern is entirely or mostly unpredictable has agreed with his or her employer to undertake a specific work assignment, the worker should be able to plan accordingly. The worker should be protected against loss of income resulting from the late cancellation of an agreed work assignment by means of adequate compensation." The provision applies to situations when a Member State allows an employer to cancel an agreed work assignment without compensation. In such cases, the Member State shall take the measures necessary, in accordance with national law, collective agreements or practice, to ensure that the worker is entitled to compensation if the employer cancels, after a specified reasonable deadline. The "reasonable deadline" needs to be specified in the written statement. However, it does not have to be the same as the "reasonable notice period" referred to in Article 10(1)(b). Furthermore, in Recital 34 it is stated that the compensation "should protect the worker against loss of income resulting from the late cancellation of an agreed work assignment by means of adequate compensation". However, the exact level of compensation is not specified. It will be for the Member States, in accordance with national law, collective agreements or practice, to decide on the precise level of compensation when transposing the Directive.

### 10.4. Minimum predictability of work, cont. (Article 10(4))

*Article 10(4): Member States may lay down modalities for the application of this Article, in accordance with national law, collective agreements or practice.*

#### 10.4.1. Issues

Article 10(4) invites the Member States to lay down modalities for the application of Article 10. This shall be done in accordance with national law, collective agreements or practice.

## 11.1. Complementary measures for on-demand contracts (Article 11)

*Article 11: Where Member States allow for the use of on-demand or similar employment contracts, they shall take one or more of the following measures to prevent abusive practices:*

- (a) limitations to the use and duration of on-demand or similar employment contracts;*
- (b) a rebuttable presumption of the existence of an employment contract with a minimum amount of paid hours based on the average hours worked during a given period;*
- (c) other equivalent measures that ensure effective prevention of abusive practices.*

*Member States shall inform the Commission of such measures.*

*Recital 35: On-demand or similar employment contracts, including zero-hour contracts, under which the employer has the flexibility of calling the worker to work as and when needed, are particularly unpredictable for the worker. Member States that allow such contracts should ensure that effective measures to prevent their abuse are in place. Such measures could take the form of limitations to the use and duration of such contracts, of a rebuttable presumption of the existence of an employment contract or employment relationship with a guaranteed amount of paid hours based on hours worked in a preceding reference period, or of other equivalent measures that ensure the effective prevention of abusive practices.*

### 11.1.1. Issues

Article 11 was added at the initiative of the European Parliament during the negotiations with Council, and aims to prevent the abuse of on-demand or similar employment contracts, such as zero-hours contracts. The introductory sentence makes clear that the provision applies solely to Member States that permit on-demand or similar employment relationships, and does not imply that such employment relationships should be introduced in those Member States that do not permit them. This is reiterated in Recital 47, which clarifies that the “non-regression principle” means that the implementation of the Directive may not be used to reduce existing rights, nor the general level of protection for workers, “[i]n particular, it should not serve as grounds for the introduction of zero-hours contracts or similar types of employment contracts.”

Article 11 requires those Member States that permit on-demand or similar employment relationships to take at least one of the following three types of measures to prevent their abuse:

- a) limitations to their use and duration: this implies that such contracts should be limited to use in certain sectors or circumstances, as well as limited in their duration;
- b) introducing a right for a worker who has worked under an on-demand employment relationship for a certain defined period, to a guaranteed minimum number of paid hours based on the average time worked during that period;
- c) introducing any other measure with equivalent protective effect. This leaves the form and precise content of such anti-abuse measures open to Member States to decide, but the level of protection of on-demand workers should be at least as high as offered by point a) and b) above.

The final sentence of this Article is, following the judgment of the CJEU mentioned hereafter, rather redundant since Member States have the obligation to inform the Commission of all transposing measures and the provisions in the EU Directive to which they correspond.<sup>66</sup>

Article 11 should be read alongside Recital 35, which gives examples of what form the preventive measures could take. Article 11 is modelled on Clause 5 of the Framework Agreement annexed to Council Directive 1999/70/EC on fixed-term work. In the view of the Commission services, the term “contract” should not be read narrowly and this provision should not be limited to employment relationships which are based on a formal contract of employment. Rather it should apply to all employment relationships whatever the legal form in which they are recorded. In Article 1(2) it is stated that “This Directive lays down minimum rights that apply to every worker in the Union who has an employment contract or an employment relationship as defined by the law, collective agreements or practice in force in each Member State with consideration to the case-law of the Court of Justice.” This paragraph refers to both “employment contract” and “employment relationship”, where the latter is the wider concept that can cover employment relationships that are not based on a formal contract. Furthermore, Article 11 does not define “similar employment contracts” as on-demand contracts. Recital 35 includes zero-hours contracts under this category. It is for Member States to define any others that come within the notion “similar employment contracts” in their transposing measures.

A Member State expert asked for examples of “other equivalent measures” under point c). The Commission services replied that one example of an equivalent measure could be a complete ban, i.e. not to allow on-demand or zero-hour contracts at all. A Member State expert informed about a reform recently implemented in Ireland, the Employment (Miscellaneous Provisions) Act 2018<sup>67</sup> that restricts the use of zero-hour contracts. The only situations where these contracts are allowed are if the work has a genuinely casual nature and is performed under emergency circumstances or as short-term relief work to cover routine absences, e.g. in the healthcare sector. Furthermore, a system was introduced pursuant to which workers can claim to be placed in a band of guaranteed working hours, reflecting the hours they actually worked, based on the previous twelve months.

A Member State expert asked if open-ended on-demand contracts or intermittent contracts fall within the scope of Article 11. ETUC stressed that a broad definition should be applied. The Commission services replied that the duration of the contract is usually not the deciding factor but rather the nature of the employment relationship. E.g. an open-ended contract with no or few guaranteed hours, where all the work will be done on demand, would fall within the scope of Article 11.

A Member State expert enquired about a national situation where workers are hired on separate fixed-term employment relationships that only last for the time of the work-shift, with no formal employment relationship between the shifts. Would Article 11 apply to these situations? The Commission services replied that it is only able to give some initial reflections. What the CJEU tends to do, as seen in the Yodel case, is to take note of the legal contractual frame that expresses the employment relationship, but also to look at the functional underlying relationship not just the legal/contractual frame<sup>68</sup>. The question is whether the CJEU would consider this sort of successive arrangements to, effectively, be an on-demand employment relationship with the same employer. Furthermore, even if this

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<sup>66</sup> See judgment of the CJEU in Case C-543/17, *Commission v Belgium*.

<sup>67</sup> <http://www.irishstatutebook.ie/eli/2018/act/38/enacted/en/html>

<sup>68</sup> Case C-692/19, *Yodel*.



situation is not considered as an “on-demand or similar employment relationship”, but rather as successive fixed-term contracts, the anti-abuse clause (Clause 5) of the Fixed-Term Work Directive would be applicable.

SGI Europe highlighted the importance of referring back to Article 1(2) when discussing Article 11, since the purpose, subject matter and scope, as outlined in this paragraph, applies to the whole Directive. The Commission services replied that in Article 1 there is a reference to “employment contract” and “employment relationship”, where the latter is the wider concept that can cover employment relationships that are not based on a formal contract. Since this issue relates particularly to on-demand work (zero-hours contracts, etc.), it would in the view of the Commission services not be compatible with the aim of Article 11 to limit its scope to employment relationships with a formal contract. According to the CJEU settled case-law, the provisions must be interpreted within their context and aim.

A Member State expert asked if the measures under Article 11 need to be laid down in legislation or if they could be implemented through collective agreements or by the employers’ organisations. The Commission services replied that it is not a requirement to implement the Directive solely through national legislation. According to Article 21(5), it can also be done through collective agreements where there is a joint request from the social partners. Furthermore, Article 14 provides for a ‘second degree’ implementation where the social partners are not implementing the Directive as a whole but they are allowed to differ from certain provisions of the Directive, while respecting the overall protection of workers. The obligation to ensure that the minimum standards set out in the directive are respected remains however with the Member States.<sup>69</sup>

ETUC drew attention to Recital 35, which includes contracts under which employers have flexibility to call the worker to work as and when needed. Furthermore, ETUC highlighted the possibility for Member States to consult the social partners at national level when discussing possible transposing measures. The Commission services replied that both Articles 10 and 11 are areas where Member States may well want to look to social partners for help with definitions and implementation, given the variations in circumstances of different sectors.

## 12.1. Transition to another form of employment (Article 12(1))

*Article 12(1): Member States shall ensure that a worker with at least six months’ service with the same employer, who has completed his or her probationary period, if any, may request a form of employment with more predictable and secure working conditions where available and receive a reasoned written reply. Member States may limit the frequency of requests triggering the obligation under this Article.*

*Recital 36: Where employers have the possibility to offer full-time or open-ended employment contracts to workers in non- standard forms of employment, a transition to more secure forms of employment should be promoted in accordance with the principles established in the European Pillar of Social Rights. Workers should be able to request another more predictable and secure form of employment, where available, and receive a reasoned written response from the employer, which takes into account the needs of the employer and of the worker. Member States should have the possibility to limit the frequency of such requests. This Directive should not prevent Member States from*

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<sup>69</sup> See judgment in Case 143/83, *Commission v Denmark*.



*establishing that, in the case of public service positions for which entry is by competitive examination, those positions are not to be considered to be available on the simple request of the worker, and so fall outside the scope of the right to request a form of employment with more predictable and secure working conditions.*

### 12.1.1. Issues

Article 12 seeks to limit the duration of less secure forms of employment, by creating a right for a worker to request a more predictable and secure employment from his or her employer after a qualifying period of six months. This period does not have to be continuous. Article 12 is a pendant to the right to request flexible working arrangements set out in Article 9(2) of Directive (EU) 2019/1158 on work-life balance.

The reference to “at least” six months’ service makes clear that the right should be granted after six months but does not expire once those six months have elapsed. As the final sentence of paragraph 1 indicates, a worker may make more than one request for a transition to a more predictable and secure form of employment. The reference to completion of the probationary period means that, if a probationary period applies and that period is longer than 6 months, the right in Article 12 does not apply until the probationary period has expired. There is no definition of “more predictable and secure working conditions” but Recital 36 gives full-time or open-ended employment contracts as examples.

Principle 5 “Secure and adaptable employment” of the European Pillar of Social Rights is relevant to Article 12, notably the statement that “[t]he transition towards open-ended forms of employment shall be fostered.” The essence of the right in Article 12 is to receive a reasoned written reply from the employer, which takes into account the needs of the employer and of the worker. In the Commission services’ view, “reasoned” should be understood to mean that, if the request is rejected, the grounds for that should be explained. The final sentence of paragraph 1 permits Member States to limit the frequency with which workers can repeatedly request a more predictable and secure form of employment from their employer (implicitly, after a negative response to the first request). The Directive does not set any particular timeframe, but excessively long periods between requests may be contrary to the principle of *effet utile*.

A Member State expert asked if the form of employment with more predictable and secure working conditions should only be understood as a different organisation of the working time and different working conditions, or could it also be a different employment contract? The Commission services replied that there is no definition in the Directive of what is meant by more secure or predictable working conditions. The Recital refers to full-time and open-ended employment contracts as examples, but the identification of a more secure or predictable form of employment may vary according to the situation of the individual worker and employer. If another form of employment under a new contract is more secure it can indeed be a possibility.

A Member State expert highlighted that a new contract should not result in losing the benefits from the previous contract, otherwise it would be a loss. Furthermore, a more secure form of employment does not mean that all aspects need to be better. The expert also asked if “more predictable and secure working conditions” in Article 12(1) refer to the company level. For example, if a worker is offered work with better conditions in another town, would that be compatible with the provision? The Commission services replied that the Directive does not specify in such detail. It provides the worker with the opportunity to discuss the working conditions with the employer. What are more secure working conditions needs to be assessed on a case-by-case basis. Since it is the worker who makes the request, he or she can indicate what form of employment he or she would

consider to be more secure. It is up to the worker to accept or not the proposed new form of employment, the employer cannot impose this on the worker.

A Member State expert asked if the period of six months has to be one continuous period or if it can be the total period of employment with the employer. The expert also asked if this applies to employment under any fixed-term contract and what it means that a form of employment is “available” and who bears the burden of proving that another form of employment is available. The Commission services replied that the Directive does not require the period of six months to be continuous. The provision applies to a worker with at least six months’ service with the same employer, who has completed his or her probationary period, if any. Therefore, it also applies to fixed-term employment relationships. According to Article 12(2) the Member States shall ensure that the employer provides a reasoned written reply. Recital 36 corresponds to this provision, where it is stated that this reply should take into account the needs of the employer and of the worker.

A Member State expert asked whether Article 12(1) is limited to workers with less secure forms of employment, or if it also applies to workers who already have a stable employment. The Commission services replied that this provision will be most relevant for workers with less secure or on-demand forms of employment, but it is not limited only to them. There are many forms of work where the form of employment is predictable and secure, so this provision may not be as relevant. However, it can be relevant, for example, to fixed-term workers with a predictable schedule who may request an indefinite contract under this provision. The onus is on the worker to make a request under this Article.

A Member State expert stated that, in her view, the employer must reply to the worker who is asking for a more predictable form of employment, but the employer is not obliged to grant it. The only obligation is to provide a reasoned reply. The worker can possibly bring an action to a court, if the right to an answer was not granted. The expert further asked whether, in the context of requesting a more secure form of employment, the worker may request to be transferred to a work with different tasks, or whether the tasks must remain the same. The Commission services agreed with the expert’s statement regarding the obligation to provide a reasoned reply but that the employer is clearly not obliged to grant a request. As regards the question regarding the worker’s tasks, the directive neither requires nor excludes that different types of work can be requested by the worker or proposed by the employer in the context of this provision.

ETUC asked whether the “reasoned reply” should be justified by reasonable grounds. In the view of the Commission services, the word ‘reasoned’ implies that the response should provide an explanation of the reasons for the decision.

ETUC asked whether the right to request different employment contains a negotiating obligation. The Commission services stated that the provision does not imply an obligation to negotiate. While a discussion between the worker and the employer is probably going to take place, it is not mandatory. A written exchange fulfils this provision. It is up to Member States to decide how far the national provision will be prescriptive of this process.

## 12.2. Transition to another form of employment, cont. (Article 12(2))

*Article 12(2): Member States shall ensure that the employer provides the reasoned written reply referred to in paragraph 1 within one month of the request. With respect to natural persons acting as employers and micro, small, or medium enterprises, Member States may provide for that deadline to be extended to no more than three months and allow for*

*an oral reply to a subsequent similar request submitted by the same worker if the justification for the reply as regards the situation of the worker remains unchanged.*

### 12.2.1. Issues

Article 12(2) regulates the timing and format of the reasoned reply by the employer. The employer shall provide the reply within one month of the request. However, in order to reduce burdens on SMEs and single-person employers, which are less likely to have dedicated personnel departments, the deadline for the reply may be extended to three months, and the format of the second and subsequent responses may be oral rather than in writing, should the situation, and hence the original reasoning, be unchanged. Furthermore, “within one month” should be understood as a calendar month, i.e. the period between a particular date in one month and the same date in the next month.

## 13.1. Mandatory training (Article 13)

*Article 13: Member States shall ensure that where an employer is required by Union or national law or by collective agreements to provide training to a worker to carry out the work for which he or she is employed, such training shall be provided to the worker free of cost, shall count as working time and, where possible, shall take place during working hours.*

*Recital 37: Where employers are required by Union or national law or collective agreements to provide training to workers to carry out the work for which they are employed, it is important to ensure that such training is provided equally to all workers, including to those in non-standard forms of employment. The costs of such training should not be charged to the worker or withheld or deducted from the worker's remuneration. Such training should count as working time and, where possible, should be carried out during working hours. That obligation does not cover vocational training or training required for workers to obtain, maintain or renew a professional qualification as long as the employer is not required by Union or national law or collective agreement to provide it to the worker. Member States should take the necessary measures to protect workers from abusive practices regarding training.*

### 13.1.1. Issues

Article 13 introduces a right to training to be provided to the worker free of charge, where the employer is required by law or collective agreement to provide such training, for the worker to carry out the work for which he/she is employed. Recital 37 recalls the importance of ensuring that such training is provided equally to all workers, including to those in non-standard forms of employment. The scope of the Article is explained in Recital 37: “[...] That obligation does not cover vocational training or training required for workers to obtain, maintain or renew a professional qualification as long as the employer is not required by Union or national law or collective agreement to provide it to the worker.” That means that the Article relates solely to training which the employer is obliged to provide to workers for the job at hand and does not cover obligatory training that the worker must have completed in order to be qualified to take up a particular post (i.e. a “qualification”, such as a type rating for a particular aircraft in civil aviation), or vocational training, unless the employer is required to provide this training.

Where the obligation is placed on the employer to provide this training, the cost may not be passed on to the worker – neither in the form of a request for payment of all or part of

the training, nor as a deduction from or stopping of salary, nor by way of a reduction of benefits in any other form that would otherwise be paid to the worker.

At the initiative of the European Parliament, the final sentence clarifies that training under the scope of Article 13 must be counted as working time, not rest time, and requires employers, where possible, to ensure that it takes place during “working hours” (i.e. the normal working day). The final sentence of Recital 37 was added by the European Parliament during the negotiations. It does not further specify the forms of “abuse” to which it refers. It will be for Member States to consider what, beyond the charging of workers for training which employers are obliged to offer, might constitute other forms of abuse which should be prevented.

A Member State expert asked if this Article is applicable on contractual clauses that are strictly regulated and stipulate that, when training as mentioned in Article 13 of the Directive is provided and paid for by the employer, the worker has to pay back parts of the cost of the training if the worker terminates the employment contract within a certain period after the training has been completed. The Commission services replied that the Directive is silent on this particular issue. However, from Recital 37 it is clear that where the obligation is placed on the employer to provide such training, the cost may not be passed on to the worker – neither in the form of a request for payment of all or part of the training, nor as a deduction from or stopping of salary, nor, as the Commission services sees it, by way of a reduction of benefits in any other form that would otherwise be paid to the worker.

As Article 13 does not contain any derogation from this principle, contractual clauses that would oblige the worker to repay (partially) the cost of such training if he or she terminates the labour contract within a certain period after the training has been completed, would not be in conformity with the Directive. However, Article 13 applies exclusively to training which the employer is obliged to provide to the worker. Where the described arrangements apply to training that the employer may or may not provide to the worker, such as management training, or even if the worker is obliged to have followed training in order to do a certain job (i.e. qualification training, such as type rating in civil aviation), those arrangements are out of scope of this Article.

ETUC restated that they are disappointed that Article 1(6) allows the Member States to exclude, on objective grounds, civil servants, public emergency services, the armed forces, police authorities, judges, prosecutors, investigators or other law enforcement services from some of the provisions of Chapter III, including Article 13. ETUC recalled that this right stems also from the Pillar of Social Rights and suggested to advise Member States to notify how these workers, if excluded from Article 13 by virtue of Article 1(6), are informed of their rights to mandatory training. The Commission services stated that exclusions under Article 1(6) must be based on objective grounds. Therefore, there should be justified reasons if some of the categories of public sector workers listed in Article 1(6) were to be excluded by the Member States from the protection of Article 13. Blanket exclusions of civil servants without good reasons would not be compliant. The Commission services recalled that, in line with the constant CJEU case-law, derogations must be interpreted narrowly and be proportionate to the reasons giving rise to them. Furthermore, given the narrow scope of Article 1(6), it might be difficult to justify by objective reasons exclusions from the protections of Article 13 relating to such mandatory training.

## 14.1. Collective agreements (Article 14)

*Article 14: Member States may allow the social partners to maintain, negotiate, conclude and enforce collective agreements, in conformity with the national law or practice, which, while respecting the overall protection of workers, establish arrangements concerning the working conditions of workers which differ from those referred to in Articles 8 to 13.*

*Recital 38: The autonomy of the social partners and their capacity as representatives of workers and employers should be respected. It should therefore be possible for the social partners to consider that in specific sectors or situations different provisions are more appropriate, for the pursuit of the purpose of this Directive, than certain minimum standards set out in this Directive. Member States should therefore be able to allow the social partners to maintain, negotiate, conclude and enforce collective agreements which differ from certain provisions contained in this Directive, provided that the overall level of protection of workers is not lowered.*

### 14.1.1. Issues

Article 14 articulates the principle that social partners may, in certain sectors and certain situations, be in a position to define provisions that differ from those set out in Articles 8 to 13, while respecting the overall protection of workers. It creates a possibility for Member States to permit social partners to vary the material rights in Articles 8 to 13 by means of collective agreements.

Recital 38 provides an important guidance for interpretation of Article 14. In the light of the Recital, social partners' agreements which provide for standards differing from Articles 8 to 13 should be more appropriate than one or more of these standards, for the pursuit of the purpose of the Directive, taking into account the specificities of certain sectors or situations. Such arrangements must not lower the overall level of protection of workers.

Article 14 is permissive and Member States have a choice to transpose it or not. Member States that use this possibility may also set out conditions or limitations in the implementation of this Article.

The provisions adopted as Article 14 were included in the Commission's proposal in order to give appropriate space to social partners to reach agreements in the areas covered by Chapter III, which fell squarely within their field of interest, notably in Member States with strong collective bargaining tradition. This was a key element for reaching a political compromise on Chapter III of the Directive.

The Court has generally recognised a broad discretion of social partners as a result of their autonomy and fundamental right to bargain collectively.<sup>70</sup> Due to the fact that the task of striking a balance between their respective interests is entrusted to the social partners offers considerable flexibility, as each of the parties may, where appropriate, opt not to adopt the agreement.<sup>71</sup>

However, the Court has also highlighted a clear limit to the social partners' action, namely, the obligation to respect EU law. The Court has used a variety of formulae to express this limit, such as, the obligation to respect the Directive in question as a whole or specific

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<sup>70</sup> Case C-271/08, *Commission v Germany*, para 37.

<sup>71</sup> Case C-152/11, *Odar v Baxter Deutschland GmbH*, para 53.



provisions within it, or to the general principles expressed by the Directive, or to the general principles of EU law and fundamental rights.<sup>72</sup>

Therefore, in case of use of Article 14, the social partners' discretion is limited by:

- the obligation to respect EU law and its general principles (including proportionality, legal certainty) and fundamental rights;
- the obligation not to frustrate the core objective of the Directive (Article 1(1));
- ensuring the overall level of protection of workers.

Collective agreements providing for rules that are less protective than those in Articles 8 to 13 should ensure that the overall level of protection is not lowered. In other words, the agreement should contain other measures or advantages, which would maintain their level of protection at level equivalent to the protection granted by workers subject to the 'standard' minimum rules.

Furthermore, the non-regression clause, in Article 20(1) of the Directive, contains a key limit: the Directive itself may not 'constitute valid grounds for reducing the general level of protection already afforded to workers within Member States'.

The concept of 'overall protection of workers' has not been defined in EU law, nor has it been interpreted by the Court.<sup>73</sup>

The interpretation and scope of the notion of 'overall protection of workers' was not discussed by the co-legislators during the negotiations on Directive on Transparent and Predictable Working Conditions.

In the discussions held in the Expert Group, a number of Member State experts, BusinessEurope, SGI Europe and SMEunited expressed views that the notion of 'overall level protection' should have a wide interpretation and the autonomy of social partners should have a wide scope. They argued that the limitation of scope of application of Article 14 to Articles 8 to 13 does not restrict the social partners' wide discretion to agree on measures for maintaining the overall protection of workers. In their view, the agreed measures, which guarantee the overall protection of workers, should be limited by neither the scope of Chapter III nor the Directive as a whole.

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<sup>72</sup> See Case C-45/09, *Rosenblatt v Oellerking Gebäudereinigungsges.*; Cases C-297/10 and C-298/10, *Hennigs v Eisenbahn-Bundesamt and Land Berlin (C-298/10) v Alexander Mai*; Case C-447/09, *Prigge v Deutsche Lufthansa AG*; Case C-312/17, *Surjit Singh Bedi v Bundesrepublik Deutschland, Bundesrepublik Deutschland in Prozessstandschaft für das Vereinigte Königreich von Großbritannien und Nordirland*.

For example, in Case C-312/17, *Bedi*, the Court said that "where the right of collective bargaining proclaimed in Article 28 of the Charter is covered by provisions of EU law, it must, within the scope of that law, be exercised in compliance with that law (*Hennigs and Mai*, C-297/10 and C-298/10, EU:C:2011:560, paragraph 67 and the case-law cited). Consequently, when they adopt measures coming within the scope of Directive 2000/78, the social partners must comply with that directive (... *Hennigs and Mai*, C-297/10 and C-298/10, EU:C:2011:560, paragraph 68, and of 12 December 2013, *Hay*, C-267/12, EU:C:2013:823, paragraph 27)".

<sup>73</sup> The only other labour law Directive, which refers to this concept is Directive 2008/104/EC on Temporary Agency Work. Its Article 5(3) provides a possibility for social partners to derogate from the principle of equal treatment of temporary agency workers in comparison to workers employed by the user undertaking. The expert group on the transposition of that Directive considered in its 2011 report that where social partners agree to such derogations, 'a counterbalancing element of protection has to be present in the collective agreements concluded under Article 5(3) so as to ensure 'the overall protection of temporary agency workers'. For instance, the social partners may agree on a lower level of pay in exchange of better training opportunities in the time between assignments. However, such collective agreements cannot limit themselves to setting levels of pay lower than those that equal treatment would require: they must be balanced by other provisions favourable to temporary agency workers.'

This interpretation has not been tested by the Court.



Having regard to the social partners' autonomy and the wording and scope of Article 14, the Commission services considers that social partners have a wide discretion to conclude differing arrangements and compensatory measures, as long as such arrangements do not frustrate the Directive's objective (Article 1(1)) and respect EU law and its general principles and ensure the workers' overall protection.

The arrangements agreed by social partners, taking account of the specificity of the given sector/situation, will in any case need to be protective of workers' working conditions consistent with the aim of the Directive set out in its Article 1(1).

Finally, given that the Directive creates individual rights, in the view of the Commission services, to guarantee the workers' overall protection, it should be the same workers, for whom the minimum standards under Articles 8 to 13 have been lowered, who are compensated by a higher level of protection under the agreed measures in the collective agreement.

Regarding the practical aspects of transposition, ultimately, Member States remain responsible for compliance with the Directive, not least because Article 4(3) TEU requires it.<sup>74</sup>

Member States should ensure that all workers who fall within the scope of the Directive are protected for all rights provided for under Chapter III either by the national legal provisions or, in case of application of Article 14, a collective agreement which may differ from the minimum rights established by Articles 8 to 13, but which at the same time ensures the overall level of protection of workers.

## Discussion

ETUC stated that ILO practice and ILO supervisory bodies (Convention N° 98), which aim for derogations to be limited to particular articles and to have clear objectives, could serve as an inspiration. Furthermore, ETUC considered that derogations should be made by sectoral collective agreements, where there is a better representation of social partners, and not allowed at company level. Representative social partners can ensure that the derogations are compensated with an improved level of protection in other aspects of workers' protection. Finally, ETUC stated that, in order to derogate from all or some provisions under Chapter III through use of Article 14, national legislation must explicitly provide for this possibility.

The Commission services confirmed that social partners may not derogate from Chapter III through use of Article 14, unless Member States expressly provide for its use in their transposing legislation. ILO conventions can indeed serve as inspiration to Member States in implementing this Directive.

A Member State expert asked what rights could be used to maintain the overall protection of workers. The Commission services replied that there is no defined set of rights to be used to offset lowered standards under Chapter III. It is for the social partners to establish the arrangements, taking into account the specificities of their sector. However, the collective agreements have to demonstrate that they ensure the overall protection of workers and contribute to the Directive's objectives. Ultimately, it would be for the courts to consider whether a specific clause in a collective agreement ensures the overall protection of the workers concerned.

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<sup>74</sup> Case 143/83, *Commission v Denmark*, para 8.

## Chapter IV Horizontal provisions (Enforcement)

### 15.1. Legal presumptions and early settlement mechanism (Article 15(1))

*Article 15(1): Member States shall ensure that, where a worker has not received in due time all or part of the documents referred to in Article 5(1) or Article 6, one or both of the following shall apply:*

*(a) the worker shall benefit from favourable presumptions defined by the Member State, which employers shall have the possibility to rebut;*

*(b) the worker shall have the possibility to submit a complaint to a competent authority or body and to receive adequate redress in a timely and effective manner.*

*Recital 39: The public consultation on the European Pillar of Social Rights showed the need to strengthen enforcement of Union labour law to ensure its effectiveness. The evaluation of Directive 91/533/EEC conducted under the Commission's Regulatory Fitness and Performance Programme confirmed that strengthened enforcement mechanisms could improve the effectiveness of Union labour law. The consultation showed that redress systems based solely on claims for damages are less effective than systems that also provide for penalties, such as lump sums or loss of permits, for employers who fail to issue written statements. It also showed that employees rarely seek redress during the employment relationship, which jeopardises the goal of the provision of the written statement, which is to ensure that workers are informed about the essential features of the employment relationship. It is therefore necessary to introduce enforcement provisions which ensure the use of favourable presumptions where information about the employment relationship is not provided, or of a procedure under which the employer may be required to provide the missing information and may be subject to a penalty if the employer does not do so, or both. It should be possible for such favourable presumptions to include a presumption that the worker has an open-ended employment relationship, that there is no probationary period or that the worker has a full-time position, where the relevant information is missing. Redress could be subject to a procedure by which the employer is notified by the worker or by a third party such as a worker's representative or other competent authority or body that information is missing and to supply complete and correct information in a timely manner.*

#### 15.1.1. Issues

Article 15(1) is applicable when a worker has not received in due time all or part of the documents referred to in Article 5(1) – which refers to the two batches of information, as listed under Article 4(2) – and in Article 6.

The Article does not apply to the information required under Article 7 (additional information for workers sent abroad). Although Article 6 (modification of the employment relationship) mentions Article 7 in relation to updating information, a consistent interpretation entails that Article 15(1) does not apply to updates under Article 7 either, as it would seem contradictory if the obligation encompassed updates, but not the initial issuing of the document.

The provision underwent significant modifications in Council compared to the Commission's original proposal. These modifications had the purpose of focusing the

provisions of Article 15 on the aims to be achieved by the Member States, and removing procedural requirements which the Council considered insufficiently respected the principle of procedural autonomy of the Member States.

The reference to failure to provide information “in due time” must be understood as the deadlines stipulated in Article 5(1) and in Article 6. This means that the provision may become applicable at three different times: the two different deadlines set under Article 5(1): the seventh calendar day for basic information and one month for supplementary information, or on the day on which it takes effect as regards any change under Article 6.

Recital 39 explains that the consultation on the REFIT evaluation of the Written Statement Directive showed that redress systems based solely on claims for damages are less effective than systems that also provide for penalties, such as lump sums or loss of permits. It also showed that employees rarely seek redress during the employment relationship, which jeopardises the goal of the provision of the written statement. This, in turn, makes it necessary to introduce enforcement provisions such as those laid down in points (a) and (b), according to the Recital.

In accordance with Article 15(1), the Member States are under the obligation to ensure that, in a situation where it has been established that a worker has not received in due time all or part of the relevant information, the worker can resort to either (a) or (b). In other words, points (a) and (b) are alternative. The text, however, in addition states the obvious: The Member States are free to apply them both if they wish.

#### Point a:

“the worker shall benefit from favourable presumptions defined by the Member State, which employers shall have the possibility to rebut.”

The key concept is favourable presumptions. A definition of (a rebuttable) presumption that can serve as an example is: “a rule of law which permits a court to assume a fact is true until such time as there is a preponderance (greater weight) of evidence which disproves or outweighs (rebut) the presumption.”<sup>75</sup>

In the absence of a concrete example, the concept remains rather abstract. In that context, it is useful to recall the specific presumptions contained in the Commission’s original proposal, which are now included in Recital 39. One of those presumptions is that in the lack of information concerning the status of the employment relationship with respect to open-ended versus fixed-term, the presumption would be that the worker has an open-ended employment relationship.

This is important because the burden of proof is normally on the person who brings a claim in a dispute. This provision changes that starting point, as regards the favourable presumptions.

As the wording of point (a) clarifies, the employer shall have the possibility to rebut such favourable presumptions. “To rebut” essentially means that the employer must have the possibility to prove that an assumption is incorrect.

In short, a favourable presumption will shift the burden of proof from the worker (plaintiff) to the employer (defendant) in respect of the claim at issue, corresponding to the missing information. In practice, this would mean that if the worker (plaintiff) is able to produce

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<sup>75</sup> <https://legal-dictionary.thefreedictionary.com>

sufficient evidence that he or she has indeed been engaged in an employment relationship with the employer (defendant), and has not received written information in due time as regards for instance the issue of a fixed-term versus open-ended employment relationship, the worker shall benefit from a favourable presumption towards the latter. This would in turn mean that the court or body hearing the case will *assume* that the employment relationship is open-ended (without the worker having to produce evidence to that end), and it would be for the employer to prove otherwise.

However, the standard of proof is not harmonized at EU level, and remains in the competence of the Member States, subject to the principles of equivalence and effectiveness.<sup>76</sup>

As regards the specific presumptions, the wording of point (a) stipulates that it is for the Member States to define them. The Commission's original proposal contained three mandatory, specific presumptions. However, these were moved into Recital 39: "[...] It should be possible for such favourable presumptions to include a presumption that the worker has an open-ended employment relationship, that there is no probationary period or that the worker has a full-time position, where the relevant information is missing. [...]" Applying these three specific presumptions is not compulsory, they serve as examples for those Member States which decide to transpose Article 15(1)(a).

A Member State expert commented that having a legal presumption in a worker's favour does not change the need for the worker to bring a lawsuit, should the employer not recognise and act on the presumption.

In the Commission services' view, the idea behind the provision is to equip the worker, in a situation of missing information, with a presumption to his or her favour – which the employer shall have the possibility to rebut. Given that point (a) is silent as regards any procedural requirements, it is for the Member States to lay down how a worker can enforce such a favourable presumption. As the Commission services see it, the worker would still have to bring his or her claim before a court or other competent body to *enforce* that presumption, where the employer would then be given the opportunity to rebut it.

Further, as the Commission services understand it, the "burden of proof" encompasses two connected, but separate ideas: the "burden of production" and the "burden of persuasion." The burden of production is a minimal burden to produce at least enough evidence for the trier of fact to *consider* a disputed claim (by some referred to as *prima facie* establishing the case). After litigants have met the burden of production, they have the burden of persuasion: The burden to present sufficient evidence so as to *persuade* the trier of fact that their side is correct.

In the view of the Commission services, it is only the latter concept that is affected by a favourable presumption as described in Article 15(1)(a). This means that when hearing a case, in the lack of the relevant written information stipulated by the Directive, the court or other competent body will *presume* the facts to the advantage of the worker, corresponding to the missing information, in line with the presumption as laid down by national law. The employer will then have the opportunity to rebut that presumption, and bears the burden of proof (persuasion) in that regard.

In the view of the Commission services, Article 15(1)(a) does not, therefore, stand in the way of national procedural rules under which it rests upon the plaintiff to (*prima facie*) establish the case. This could mean, for instance, that the worker would still have the burden of establishing that he or her was indeed hired by the alleged employer, and that the relevant information was not provided in due time. In this context, it is important to

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<sup>76</sup> This is commented in more detail under the discussion of Article 18(3).

recall that 15(1)(a) does not change the fundamentals of the legal systems in place in the Member States. This remains, as the general rule, in their competence.

However, a system where the only legal effect of a favourable presumption is that the worker has met the requirement of establishing a case, but where the burden of persuading the Court or body, in the lack of a written statement concerning the relevant point, still rests on the worker, would, in the Commission services' view, most likely not satisfy the conditions of Article 15(1)(a). Accordingly, when the wording of the provision says that the favourable presumptions shall be defined by the Member States, the Commission services believe this refers to the substantive content of the presumptions, not their legal effect.

#### Point b:

“the worker shall have the possibility to submit a complaint to a competent authority or body and to receive adequate redress in a timely and effective manner.”

Point (b) stipulates that the worker shall have the possibility to submit a complaint to a competent authority or body. This means that there must be an authority or body that is competent to receive such complaints – and to provide adequate redress. From the detailed explanation in the Commission's proposal, it is clear that the body in question could be an existing body such as a labour inspectorate or a judicial body. The phrase “authority **or body**” was added in Council explicitly to permit such an interpretation.

Under the Commission's original proposal, the recourse described under (b) had to be an administrative procedure. However, that obligation was removed during the negotiations. The point remains, that the worker should have access to a scheme that allows rapid resolution. The filing of a formal law suit through the “ordinary legal path” would meet this requirement, only if the court or body in question is able to deliver swift decisions. This interpretation is supported by the fact that ordinary legal procedure is referred to in Article 16. The wording in the heading of Article 15 “early settlement mechanism”, further supports this interpretation.

“Adequate redress”: wherever EU law does not contain an explicit provision, the Member States are, in principle, free to choose the remedies which will apply for the enforcement of EU law in the national legal order, subject to the principles of equivalence and effectiveness. In practice, a wide range of possible remedies exist, depending upon the type of law (e.g. civil, criminal, administrative remedies). Examples: restitution, compensation, decision of change, etc.

In conjunction with Recital 39, the Commission services' understanding is that redress in this context may mean either restitution (the employer is ordered to provide the missing information – possibly under threat of a penalty), or even payment of compensation to the worker (as regards the latter, cf. also Recital 40). The most relevant part of Recital 39 reads: “[...] It is therefore necessary to introduce enforcement provisions which ensure the use of favourable presumptions [...], or of a procedure under which the employer may be required to provide the missing information and may be subject to a penalty if the employer does not do so, or both.”

“Timely and effective manner”: the provision does not lay down any specific indications of what amounts of time would be acceptable. Consequently, it would be for the Member States to stipulate this in their national legislation. However, as explained above, the logic behind this provision is to provide workers with a scheme that allows rapid resolution in relation to missing information that the employer has an obligation to produce swiftly (see Article 5(1) and Article 6), knowing that the ordinary legal procedure may be very time



consuming. Accordingly, the time frame granted to the competent authority/body should reflect those considerations.

A Member State expert enquired how the Commission services would look at relying on already existing systems, for example access to labour courts, as a means to implement point (b).

The Commission services expressed that in their view, Article 15(1)(b) does not impose the creation of a new system on Member States that already have a scheme that works in a sufficiently timely and effective manner. The wording “authority or body” allows for existing labour courts to fulfil this obligation, provided they meet the requirement of timeliness and effectiveness.

## 15.2. Legal presumptions and early settlement mechanism, cont. (Article 15(2))

*Article 15(2): Member States may provide that the application of the presumptions and mechanism referred to in paragraph 1 is subject to the notification of the employer and the failure of the employer to provide the missing information in a timely manner.*

### 15.2.1. Issues

Paragraph 2 is a may-clause, an option that the Member States may or may not make use of. A similar rule exists in Article 8(2) of the Written Statement Directive, although its scope is more limited.

In order to avoid the burden of formal redress procedures in situations where, for example, incorrect or missing information was a simple oversight by the employer, and so can be easily remedied, Member States may provide that before a worker can have recourse to Paragraph 1 point (a) or (b), any omission of information must first be notified to the employer, and the employer must then fail to supply the missing information in a timely manner.

“Timely manner” is not defined. In the Commission services’ view, again, the definition of that term should be seen in relation to the initial deadlines for providing the information in the first place. In the Commission’s original proposal, the deadline to provide the missing information was 15 days. Though such deadline was not retained in the text of the Directive, it may give some helpful orientation in transposition.

## 16.1. Right to redress (Article 16)

*Article 16: Member States shall ensure that workers, including those whose employment relationship has ended, have access to effective and impartial dispute resolution and a right to redress in the case of infringements of their rights arising from this Directive.*

*Recital 40: An extensive system of enforcement provisions for the social acquis in the Union has been adopted since Directive 91/533/EEC, in particular in the fields of equal treatment, elements of which should be applied to this Directive in order to ensure that workers have access to effective and impartial dispute resolution, such as a civil or labour*



*court and a right to redress, which may include adequate compensation, reflecting the Principle No 7 of the European Pillar of Social Rights.*

*Recital 41: Specifically, having regard to the fundamental nature of the right to effective legal protection, workers should continue to enjoy such protection even after the end of the employment relationship giving rise to an alleged breach of the worker's rights under this Directive.*

### 16.1.1. Issues

Article 16 stipulates that Member States must ensure that national legal systems provide access to effective and impartial dispute resolution and a right to redress and, where appropriate, compensation, for infringements of any of the rights established under the Directive. It reflects the obligations under the EU Treaties<sup>77</sup> and the Charter of Fundamental Rights of the EU<sup>78</sup> and reflects also Principle 7 of the European Pillar of Social Rights.

Essentially, the provision clarifies the existing obligation under Article 8(1) of the Written Statement Directive, adding “effective and impartial dispute resolution” as well as the “right to redress”. As stipulated, those rights also apply to workers whose employment relationship has ended.

In fact, the right to remedy is a general principle of EU law, and does not depend upon the existence of an explicit provision laying it down.

The starting point in EU law is that the matter of remedies is left to Member States, provided that they observe the principles of equivalence and effectiveness derived from Article 4 TEU.<sup>79</sup>

Under these principles, it is for the domestic legal system of each Member State to designate the courts and tribunals having jurisdiction and to lay down the detailed procedural rules governing actions for safeguarding rights derived from EU law, provided first that such rules are not less favourable than those governing similar domestic actions (principle of equivalence) and second, that, they do not render virtually impossible or excessively difficult the exercise of rights conferred by EU law (principle of effectiveness).<sup>80</sup>

In order to be effective, EU rights have to be accompanied by adequate remedies, wherever they are enforced. The right to redress and adequate remedies must therefore be available for all rights protected under the Directive. Regardless of the national redress systems, adequate judicial protection must be available under the national law.

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<sup>77</sup> Article 4(3) of the Treaty on European Union: “The Member States shall take any appropriate measure, general or particular, to ensure fulfilment of the obligations arising out of the Treaties or resulting from the acts of the institutions of the Union.”

Article 19(1) of the Treaty on European Union: “Member States shall provide remedies sufficient to ensure effective legal protection in the fields covered by Union law.”

<sup>78</sup> Article 47(1) of the Charter of fundamental rights of the EU.

<sup>79</sup> Established by the CJEU in Case 33/76, *Rewe*, see also joined Cases C-222/05 to 225/08, *van de Weerd*, para 28, Case C-268/06, *Impact*, paras 44 and 46.

<sup>80</sup> Case C-30/02, *Recheio-Cash&Carry*, para 17.

## 17.1. Protection against adverse treatment or consequences (Article 17)

*Article 17: Member States shall introduce the measures necessary to protect workers, including those who are workers' representatives, from any adverse treatment by the employer and from any adverse consequences resulting from a complaint lodged with the employer or resulting from any proceedings initiated with the aim of enforcing compliance with the rights provided for in this Directive.*

*Recital 42: The effective implementation of this Directive requires adequate judicial and administrative protection against any adverse treatment as a reaction to an attempt to exercise rights provided for under this Directive, any complaint to the employer or any legal or administrative proceedings aimed at enforcing compliance with this Directive.*

### 17.1.1. Issues

This provision requires Member States to provide workers, including workers' representatives, complaining about breaches of provisions adopted pursuant to this Directive with adequate judicial protection against any adverse treatment or consequences by the employer. The protection must encompass both complaints lodged with the employer and proceedings, legal or administrative, initiated externally with the aim of enforcing compliance with the rights provided for in the Directive.

The Article is based on Article 24 of Directive 2006/54 (equal treatment of men and women in matters of employment and occupation), Article 9 of Directive 2000/43 (equal treatment between persons irrespective of racial or ethnic origin), and Article 11 of Directive 2000/78 (equal treatment in employment and occupation).

Essentially, the provision protects workers who assert rights provided by the Directive from actions of retaliation by the employer. As regards the particular adverse treatment of dismissal or its equivalent, including refusal of future work assignments to on-demand workers, Article 18 provides specific provisions.

'Adverse treatment' is a wide concept. In Case C-185/97, the Court found that Article 6 of Council Directive 76/207/EEC<sup>81</sup> required Member States to ensure judicial protection for workers whose employer, after the employment relationship has ended, refuses to provide references as a reaction to legal proceedings brought to enforce compliance with the principle of equal treatment within the meaning of that Directive.<sup>82</sup>

## 18.1. Protection from dismissal and burden of proof (Article 18)

*Article 18(1): Member States shall take the necessary measures to prohibit the dismissal or its equivalent and all preparations for dismissal of workers, on the grounds that they have exercised the rights provided for in this Directive.*

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<sup>81</sup> Council Directive 76/207/EEC of 9 February 1976 on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions.

<sup>82</sup> Case C-185/97, *Coote*.

*Recital 43: Workers exercising rights provided for in this Directive should enjoy protection from dismissal or equivalent detriment, such as an on-demand worker no longer being assigned work, or any preparations for a possible dismissal, on the grounds that they sought to exercise such rights. Where workers consider that they have been dismissed or have suffered equivalent detriment on those grounds, workers and competent authorities or bodies should be able to require the employer to provide duly substantiated grounds for the dismissal or equivalent measure.*

### 18.1.1. Issues

Paragraph 1 obliges the Member States to prohibit the dismissal or its equivalent, as well as preparations for dismissal, motivated by the fact that a worker has exercised rights under the Directive. The provision is a parallel to Article 12 of the Work-life Balance Directive (2019/1158).

“Equivalent” could, for example, be an on-demand worker ceasing to be assigned work, as explained in Recital 43. “Preparations for dismissal” could, for instance, be “searching for and finding a permanent replacement for the relevant employee”.<sup>83</sup>

## 18.2. Protection from dismissal and burden of proof (Article 18(2))

*Article 18(2): Workers who consider that they have been dismissed, or have been subject to measures with equivalent effect, on the grounds that they have exercised the rights provided for in this Directive, may request the employer to provide duly substantiated grounds for the dismissal or the equivalent measures. The employer shall provide those grounds in writing.*

### 18.2.1. Issues

Under the second paragraph, workers who consider that they have been subject to treatment prohibited under Paragraph 1, may request the employer to provide “duly substantiated grounds” for the dismissal or the equivalent measures. Those grounds must be provided in writing.

“Duly substantiated grounds” are not defined. In the Commission services’ view, this should be understood as reasons capable of explaining the motivation behind the contested action. The provision does not set any concrete deadline for providing the information. Accordingly, this will be for the Member States to define in accordance with national law and practice, taking into account the principles of equivalence and effectiveness. A long deadline could run counter to the principle of effectiveness.

A Member State expert enquired about three issues in relation to Article 18. Firstly, which rights does Article 18(1) refer to? Secondly, what is meant by “measures with equivalent effect” in Article 18(2)? Thirdly, if national rules require to always state the grounds for dismissal, does Article 18(2) have to be implemented?

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<sup>83</sup> See Case C-460/06, *Paquay*, para 33.

The Commission services explained that Article 18 covers the rights in the entire Directive. Regarding the second question on what is “equivalent effect”, this could be the situation where a person with an on-demand employment relationship does not receive any more work assignments and is therefore deprived of the possibility to work without being formally dismissed, cf. Recital 43. Concerning the third question, the Commission services pointed out that Article 18(2) also refers to measures with an equivalent effect since it states that duly substantiated grounds may be requested ‘for the dismissal or the equivalent measures.’ Consequently, national transposition measures need to provide also workers who are not formally dismissed, but subject to “measures with equivalent effect”, with the possibility to request the employer to give duly substantiated grounds for the equivalent measures.

### 18.3. Protection from dismissal and burden of proof, cont. (Article 18(3))

*Article 18(3): Member States shall take the necessary measures to ensure that, when workers referred to in paragraph 2 establish, before a court or other competent authority or body, facts from which it may be presumed that there has been such a dismissal or equivalent measures, it shall be for the employer to prove that the dismissal was based on grounds other than those referred to in paragraph 1.*

*Recital 44: The burden of proof with regard to establishing that there has been no dismissal or equivalent detriment on the grounds that workers have exercised their rights provided for in this Directive, should fall on employers when workers establish, before a court or other competent authority or body, facts from which it may be presumed that they have been dismissed, or have been subject to measures with equivalent effect, on such grounds. It should be possible for Member States not to apply that rule in proceedings, in which it would be for a court or other competent authority or body to investigate the facts, in particular in systems where dismissal has to be approved beforehand by such authority or body.*

#### 18.3.1. Issues

Paragraph 3 stipulates that if a worker is able to establish facts which support the presumption that he or she has been dismissed or subject to equivalent measures on the grounds that he or she has exercised the rights provided for in this Directive, the burden of proving that the dismissal or alleged detrimental treatment was based on other objective reasons is placed on the employer.

The provision is based on Article 12 of Directive (EU) 2019/1158 on Work Life Balance, which itself derives from similar provision in EU non-discrimination instruments, such as Article 19 of Directive 2006/54, Article 8 of Directive 2000/43, and Article 10 of Directive 2000/78.

Recital 30 of Directive 2006/54 contains useful information to better understand the reasoning and logic behind this paragraph:

“[...] The adoption of rules on the burden of proof plays a significant role in ensuring that the principle of equal treatment can be effectively enforced. As the Court of Justice has held, provision should therefore be made to ensure that the burden of proof shifts to the respondent when there is a prima facie case of discrimination, except in relation to proceedings in which it is for the court or other competent national body to investigate the facts. It is however necessary to clarify that the appreciation of the facts from which it may be presumed that there has been direct or indirect discrimination remains a matter for the

relevant national body in accordance with national law or practice. Further, it is for the Member States to introduce, at any appropriate stage of the proceedings, rules of evidence which are more favourable to plaintiffs.”

In analysing the rule stipulated in Article 18(3), it is useful to recall that the burden of proof is normally on the person who brings a claim in a dispute (plaintiff). This provision modifies that starting point, under certain circumstances. To better understand the logic behind this provision, one can think of it as a two-step process.

In the first step, the worker must be able – *prima facie* – to establish a case of unlawful dismissal or equivalent measures, as described in paragraph 2. If the worker is successful in doing that, then the burden of proof is shifted from the worker (plaintiff) to the employer (defendant). This is the second step, where it is for the employer to prove that the presumption is incorrect.

For instance, if a worker is able to establish that three days after having filed a complaint against the employer for not having fulfilled the obligation to provide a written statement in due time – he or she was dismissed – this could be sufficient to establish a presumption that there has been a dismissal as referred to in paragraph 1. This would then shift the burden of proving that this is *not* the case to the employer.

It is important to note that the logic of this paragraph, and similar provisions in non-discrimination instruments, build on the premise that the standard of proof for *prima facie* establishing the case is lower than the ordinary standard of proof. Otherwise, the *effet utile* of this provision would not be respected as the worker would in any case have to meet the ordinary standard of proof in establishing unlawful dismissal as described in Paragraph 1, and the burden of proof would in reality still rest on him or her.

However, the appreciation of the facts from which it may be presumed that there has been a dismissal or equivalent measures remains a matter for the relevant national body in accordance with national law or practice, as follows from the general principle of the procedural autonomy of the Member States (see Recital 30 of Directive 2006/54/EC, cited above).

Accordingly, the burden of proof (standard of proof) is not harmonized at EU level, but remains with the Member States to regulate at national level.

## 18.4. Protection from dismissal and burden of proof, cont. (Article 18(4))

*Article 18(4): Paragraph 3 shall not prevent Member States from introducing rules of evidence which are more favourable to workers.*

### 18.4.1. Issues

This paragraph stipulates that the Member States are free to introduce rules of evidence which are more favourable to workers than those laid down in paragraph 3.

## 18.5. Protection from dismissal and burden of proof, cont. (Article 18(5))

*Article 18(5): Member States shall not be required to apply paragraph 3 to proceedings in which it is for the court or other competent authority or body to investigate the facts of the case.*

### 18.5.1. Issues

The paragraph is a “standard exception” that can be commonly found in non-discrimination instruments. The exception is reflected and explained in Recital 44 last sentence, which says that: “It should be possible for Member States not to apply that rule in proceedings, in which it would be for a court or other competent authority or body to investigate the facts, in particular in systems where dismissal has to be approved beforehand by such authority or body.” The last part of the sentence following the second comma in the Recital was inserted to accommodate certain national systems where dismissal has to be approved beforehand.

## 18.6. Protection from dismissal and burden of proof, cont. (Article 18(6))

*Article 18(6): Paragraph 3 shall not apply to criminal proceedings, unless otherwise provided by the Member State.*

### 18.6.1. Issues

This paragraph is a “standard exception”, reflecting the fact that EU non-discrimination law does not require the shift of the burden of proof to be applied in the context of criminal law. By default, the provision stipulates that unless the Member States decide to provide otherwise, paragraph 3 is not applicable to criminal proceedings. This has to do with, amongst others, the higher standard of proof in criminal cases, which typically would be “beyond reasonable doubt” or equivalent.

## 19.1. Penalties (Article 19)

*Article 19: Member States shall lay down the rules on penalties applicable to infringements of national provisions adopted pursuant to this Directive or the relevant provisions already in force concerning the rights which are within the scope of this Directive. The penalties provided for shall be effective, proportionate and dissuasive.*

*Recital 45: Member States should provide for effective, proportionate and dissuasive penalties for breaches of the obligations under this Directive. Penalties can include administrative and financial penalties, such as fines or the payment of compensation, as well as other types of penalties.*



### 19.1.1. Issues

This provision requires Member States to provide for effective, proportionate and dissuasive penalties for breaches of the obligations under this Directive, including for the relevant provisions already in force concerning the rights which are within the scope of this Directive.

*Effectiveness* points towards the ability of a sanction to achieve the desired goal to guarantee real and effective judicial protection.<sup>84</sup> *Dissuasiveness* requires that the sanctions constitute a real and adequate deterrent on the employer or for others (general prevention).<sup>85</sup> *Proportionality* warrants that the sanction be adequate in relation to the damage sustained.<sup>86</sup>

The Court's case-law does not provide general guidelines regarding the application of these concepts to individual cases. Consequently, the implications must be determined in each concrete case in the light of the individual circumstances – i.e. a case-by-case assessment is needed.

Penalties can include administrative and financial penalties, such as fines or the payment of compensation, as well as other types of penalties, as laid down in Recital 45.

## Chapter V Final provisions

### 20.1. Non-regression and more favourable provisions (Article 20)

*Article 20(1): This Directive shall not constitute valid grounds for reducing the general level of protection already afforded to workers within Member States.*

*Recital 47: This Directive lays down minimum requirements, thus leaving untouched Member States' prerogative to introduce and maintain more favourable provisions. Rights acquired under the existing legal framework should continue to apply, unless more favourable provisions are introduced by this Directive. The implementation of this Directive cannot be used to reduce existing rights set out in existing Union or national law in this field, nor can it constitute valid grounds for reducing the general level of protection afforded to workers in the field covered by this Directive. In particular, it should not serve as grounds for the introduction of zero-hour contracts or similar types of employment contracts.*

#### 20.1.1. Issues

This provision lays down the so-called non-regression principle. Essentially this means that the implementation of the Directive shall not serve as grounds to reduce the general level of protection already in place for workers. Recital 47 specifies that in particular, the

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<sup>84</sup> Case C-81/12, *Accept*, Case 14/83, *Von Colson*.

<sup>85</sup> To that effect, Case C-180/95, *Draehmpaehl*, para 40.

<sup>86</sup> To that effect Case C-263/11, *Rēdlihs*, paras 44-47.

Directive should not constitute a reason for introducing zero-hour contracts or similar types of employment contracts.

The Court has elucidated on the interpretation of the concept of non-regression, in the light of the Fixed-Term Work Directive, in Case C-378/07, *Angelidaki*. In paragraph 126, the Court elaborates on the general principle of non-regression, in paragraphs 130-133 on the notion of “implementation”, and in paragraph 140 on the concept of “general level of protection”.

## 20.2. Non-regression and more favourable provisions, cont. (Article 20(2))

*Article 20(2): This Directive shall not affect Member States’ prerogative to apply or to introduce laws, regulations or administrative provisions which are more favourable to workers or to encourage or permit the application of collective agreements which are more favourable to workers.*

### 20.2.1. Issues

Paragraph 2 reiterates the fact that the Directive does not prevent the Member States from providing workers with more favourable conditions, including through collective agreements. This is already clear from the fact that the Directive establishes minimum requirements under Article 153(2) TFEU. Paragraph (4) second indent of the same article stipulates that the provisions adopted pursuant to this Article shall not prevent any Member State from maintaining or introducing more stringent protective measures compatible with the Treaties.

## 20.3. Non-regression and more favourable provisions, cont. (Article 20(3))

*Article 20(3): This Directive is without prejudice to any other rights conferred on workers by other legal acts of the Union.*

### 20.3.1. Issues

The provision stipulates that the Directive is without detriment to any other rights conferred on workers by other legal instruments of the Union.

## 21.1. Transposition and implementation (Article 21)

*Article 21(1): Member States shall take the necessary measures to comply with this Directive by 1 August 2022. They shall immediately inform the Commission thereof.*

### 21.1.1. Issues

The provision stipulates that the Member States have until 1 August 2022 to put in place the necessary measures to comply with the Directive, i.e. the transposition deadline, as well as the obligation on the Member States to immediately notify the Commission of those measures.

## 21.2. Transposition and implementation, cont. (Article 21(2))

*Article 21(2): When Member States adopt the measures referred to in paragraph 1, they shall contain a reference to this Directive or shall be accompanied by such reference on the occasion of their official publication. The methods of making such reference shall be laid down by Member States.*

### 21.2.1. Issues

This provision is a standard formulation, obliging the Member States to include a reference to the Directive when transposing it. The final sentence clarifies that the Member States themselves decide exactly how such reference shall be made. Still, in Case C-628/18, the CJEU expressed the following: “[T]he Court has repeatedly held that if a directive expressly requires Member States to ensure that the necessary measures transposing the directive include a reference to it or that such reference is made when those measures are officially published, it is, in any event, necessary for Member States to adopt a specific measure transposing the directive in question containing such a reference [...]”<sup>87</sup>

## 21.3. Transposition and implementation, cont. (Article 21(3))

*Article 21(3): Member States shall communicate to the Commission the text of the main measures of national law which they adopt in the field covered by this Directive.*

*Recital 52: In accordance with the Joint Political Declaration of 28 September 2011 of Member States and the Commission on explanatory documents, Member States have undertaken to accompany, in justified cases, the notification of their transposition measures with one or more documents explaining the relationship between the components of a directive and the corresponding parts of national transposition instruments. With regard to this Directive, the legislator considers the transmission of such documents to be justified[.]*

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<sup>87</sup> Case C-628/18, *Commission v Slovenia*, para 22 and case-law cited.

### 21.3.1. Issues

Paragraph 3 repeats the obligation on the Member States to inform the Commission of the measures of national law which they adopt in order to transpose the Directive. Fundamentally, this obligation derives from the principle of sincere cooperation laid down in Article 4(3) TEU. In Case C-543/17, *Commission v Belgium*, the Court elaborates further on this obligation, in the light of Articles 258 and 260(3) TFEU.

The Court holds the following in paragraph 59 second sentence: “*In order to satisfy the obligation of legal certainty and to ensure the transposition of the provisions of that directive in full throughout its territory, the Member States are required to state, for each provision of the directive, the national provision or provisions ensuring its transposition.*”

In Paragraph 51, the Court says: “[...] *Thus, notification, to which a correlation table may be added, must indicate unequivocally the laws, regulations and administrative provisions by means of which the Member State considers that it has satisfied the various requirements imposed on it by that directive. In the absence of such information, the Commission is not in a position to ascertain whether the Member State has genuinely implemented the directive in full.*”

From this Grand Chamber judgment, it is clear that the Member States may not simply send a copy of, or link to, the national laws (bare notification), and then leave it for the Commission to find the pertinent provisions. Although providing a correlation table is not an obligation, the Member States are required to indicate, for each provision of the directive, the national provision or provisions ensuring its transposition, as referred to above.

In fact, the CJEU has confirmed this interpretation in Case C-549/18, *Commission v Romania*, para 46, and in Case C-550/18, *Commission v Ireland*, para 56, both Grand Chamber judgments.<sup>88</sup>

## 21.4. Transposition and implementation, cont. (Article 21(4))

*Article 21(4): Member States shall, in accordance with their national law and practice, take adequate measures to ensure the effective involvement of the social partners and to promote and enhance social dialogue with a view to implementing this Directive.*

*Recital 49: [...] They should also, in accordance with national law and practice, take adequate measures to ensure the effective involvement of the social partners and to promote and enhance social dialogue with a view to implementing the provisions of this Directive.*

### 21.4.1. Issues

Paragraph 4 was introduced in the negotiations at the initiative of the European Parliament. It is founded on the recognition that the social partners in several Member States have a strong role in determining rights and obligations of workers and employers in some or all of the fields covered by the Directive. In its report of 26 October 2018, the

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<sup>88</sup> See also Case C-628/18, *Commission v Slovenia*, para 45.

European Parliament's EMPL Committee pointed out that "the role of social dialogue and collective agreements is part of the DNA of social Europe, and social dialogue in all its forms therefore needs to be given a greater role in order to develop, supplement, improve, implement and enhance these minimum rights at national level."<sup>89</sup> The provision accordingly obliges the Member States, in accordance with their national law and practice, to ensure the effective involvement of the social partners and to promote and enhance social dialogue with a view to implementing this Directive.

## 21.5. Transposition and implementation, cont. (Article 21(5))

*Article 21(5): Member States may entrust the social partners with the implementation of this Directive, where the social partners jointly request to do so and provided that Member States take all necessary steps to ensure that they can at all times guarantee the results sought under this Directive.*

*Recital 49: The Member States may entrust the social partners with the implementation of this Directive, where the social partners jointly request to do so and provided that the Member States take all the necessary steps to ensure that they can at all times guarantee the results sought under this Directive. [...]*

### 21.5.1. Issues

This provision reflects the principle established in Article 153(3) TFEU, which reads: "A Member State may entrust management and labour, at their joint request, with the implementation of directives adopted pursuant to paragraph 2, [...]."

In this case, it shall ensure that, no later than the date on which a directive or a decision must be transposed or implemented, management and labour have introduced the necessary measures by agreement, the Member State concerned being required to take any necessary measure enabling it at any time to be in a position to guarantee the results imposed by that directive or that decision."

In a judgment that was handed down before the Treaty, or the Directive in question, explicitly allowed the delegation of implementation to the social partners, the Court held that where the Member States allow the implementation of Directives through collective agreements, they have to ensure "[...] *that all workers in the Community are afforded the full protection provided for in the directive. That State guarantee must cover all cases where effective protection is not ensured by other means, for whatever reason, and in particular cases where the workers in question are not union members, where the sector in question is not covered by a collective agreement or where such an agreement does not fully guarantee the principle of equal pay*".<sup>90</sup>

In other words, if a Member State decides to make use of this option, it must be in a position to guarantee that the content of the Directive is fully implemented both in terms of personal scope and content.

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<sup>89</sup> [https://www.europarl.europa.eu/doceo/document/A-8-2018-0355\\_EN.html](https://www.europarl.europa.eu/doceo/document/A-8-2018-0355_EN.html)

<sup>90</sup> Case 143/83, *Commission v Denmark*, para 8.

## 22.1. Transitional arrangements (Article 22)

*Article 22: The rights and obligations set out in this Directive shall apply to all employment relationships by 1 August 2022. However, an employer shall provide or complement the documents referred to in Article 5(1) and in Articles 6 and 7 only upon the request of a worker who is already employed on that date. The absence of such a request shall not have the effect of excluding a worker from the minimum rights established in Articles 8 to 13.*

### 22.1.1. Issues

This Article stipulates that the Directive is applicable to all employment relationships by 1 August 2022 – i.e. not only those entered into subsequent to that date.

The provision further establishes the rule that employers are not obliged to update or complement existing written statements unless a worker who is already employed on that date requests such an update/complement. This regime is the same as under the Written Statement Directive (Article 9(2)). The rule is an important element in reducing burdens on employers in connection with the implementation of the new Directive.

However, it is important to note that the absence of a request to update/complement existing written statements does not mean that the worker has waived the minimum rights in Articles 8–13. In other words, the minimum rights under those Articles are still fully applicable to workers who are already employed on 1 August 2022 (as from that date), regardless of whether the worker has asked for an update of his or her written statement.

## 23.1. Review by the Commission (Article 23)

*Article 23: By 1 August 2027, the Commission shall, after consulting the Member States and the social partners at Union level and taking into account the impact on micro, small and medium-sized enterprises, review the implementation of this Directive and propose, where appropriate, legislative amendments.*

### 23.1.1. Issues

This Article is a standard provision stipulating that the Commission, five years after the expiry of the transposition deadline, shall review the implementation of the Directive. It shall do so after consulting the Member States and the social partners at Union level, and taking into account the impact on micro, small and medium-sized enterprises. Where appropriate, the Commission shall propose legislative amendments.

In the minutes to the EPSCO Council-meeting of 13 June 2019 adopting the Directive, the Commission made the following statement:

“In accordance with Article 23 of the Directive, the Commission will review the application of this Directive 8 years after the directive entered into force, with a view to propose, where appropriate, the necessary amendments. The Commission undertakes in its report to pay particular attention to the application of Articles 1 and 14 by the Member States. The Commission will also verify compliance with Article 14 when assessing whether Member States have fully and correctly transposed the Directive into their national legal systems.”



As can be seen, the Commission will place a particular focus on the implementation by Member States of Articles 1 and 14 in the preparation of the 2027 report, as well as examining the use of Article 14 when assessing transposition.

## 24.1. Repeal (Article 24)

*Article 24: Directive 91/533/EEC shall be repealed with effect from 1 August 2022. References to the repealed Directive shall be construed as references to this Directive.*

*Recital 51: In view of the substantial changes introduced by this Directive with regard to the purpose, scope and content of Directive 91/533/EEC, it is not appropriate to amend that directive. Directive 91/533/EEC should therefore be repealed.*

### 24.1.1. Issues

Article 24 stipulates that the Written Statement Directive is repealed on the same date as the deadline for transposition of the new Directive expired, and that references to the repealed Directive shall be understood as references to the new Directive.

## 25.1. Entry into force (Article 25)

*Article 25: This Directive shall enter into force on the twentieth day following its publication in the Official Journal of the European Union.*

### 25.1.1. Issues

This is a standard formulation, and the Directive entered into force on 31 July 2019.

## 26.1. Addressees (Article 26)

*Article 26: This Directive is addressed to the Member States.*

### 26.1.1. Issues

This provision is a standard formulation. It reiterates what follows from Article 288 TFEU, namely that a directive is binding on the Member States to whom it is addressed as to the result to be achieved, while leaving national authorities the competence as to form and means. The latter, again, subject to the principles of equivalence and effectiveness.<sup>91</sup>

There was no substantial discussion on Articles 20–26.

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<sup>91</sup> See discussion under section 16.1.1.



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