Delivering on the European Pillar of Social Rights : the new directive on transparent and predictable working conditions in the European Union

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Abstract

Chapter II of the European Pillar of Social Rights envisages fair working conditions that are further spelled out in two principles on secure and adaptable employment (Principle 5) and on information about employment conditions and protection in case of dismissals (Principle 7). In order to deliver on this framework, in December 2017 the Commission presented an ambitious and far-reaching proposal for a Directive on transparent and predictable working conditions in the European Union to repeal Directive 91/533/EC on an employer's obligation to inform employees of the conditions applicable to the contract or employment relationship. The proposal, after a series of uneasy negotiations in the Parliament and the Council, and with substantial modifications, was subsequently adopted in June 2019. Against this background, the main aim of this contribution is to analyse the new Directive (EU) 2019/1152. This piece focuses firstly on the Directive’s nuanced hybrid personal ambit of application. Secondly, it examines its material scope of application and sheds some light on the new set of rights and entitlements available to workers including novel enforcement mechanisms. Finally, this note provides a critical assessment of the Directive to unravel its potential to boost workers’ rights in the European Union, in particular those engaged in non-standard forms of employment, who are especially prone to experiencing precarious working conditions, such as on-demand and platform workers.

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1. Introduction: Written Statement and the new world of work

Directive 91/533/EEC on an employer’s obligation to inform employees of the conditions applicable to the contract or employment relationship,¹ commonly known as the Written Statement Directive, has remained in force unamended for the past 27 years. Over that period, the world of work has changed significantly, with new labour market patterns hitting the headlines, including the discussions surrounding work in the gig economy.² More specifically, non-standard forms of employment arrangements (i.e. part-time, fixed-term, temporary agency, intermittent, on-demand work, etc.), in 2016 already constituted over a quarter of total employment arrangements.³ On top of that, the ongoing digitalisation process has only exacerbated the casualisation of the labour, although it is often invoked as ensuring flexibility for employers since they gain access to a large pool of workers. In fact, the Commission has

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always considered flexibility to be a major driver for job creation and labour market growth as long as it is balanced with security. Nonetheless, achieving that balance remains a rather onerous task as it has already been reflected in the academic literature. In sum, these trends led to an increased instability and lack of predictability of employment which overall contributes to the growing levels of precarity for some workers who are the most vulnerable in the labour market, including workers in the gig economy.

It seemed thus that the Written Statement Directive might not be fit for its purpose as it was adopted in times when the world of work was not subject to such rapid developments. Other concerns that were raised about the Written Statement Directive revolved around the timeliness and content of written statements and weak enforcement mechanisms. In order to address these rising concerns, the Commission, within the framework of the European Pillar of Social Rights (EPSR) that serves in its apt words as a compass for the renewed upwards convergence in social standards in the context of the changing realities of the world of work.

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5 See for the discussion on flexicurity inter alia: Anne Davies, ‘Regulating atypical work: beyond equality’ in Nicola Countouris and Mark Freedland (eds), Resocialising Europe in a Time of Crisis (CUP 2013); Manfred Weiss, ‘Job security: a challenge for EU social policy’ in Nicola Countouris and Mark Freedland (eds), Resocialising Europe in a Time of Crisis (CUP 2013); Astrid Sanders, ‘The changing face of “flexicurity” in terms of austerity?’ in Nicola Countouris and Mark Freedland (eds), Resocialising Europe in a Time of Crisis (CUP 2013).


7 Commission, ‘Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions Establishing a European Pillar of Social Rights’ COM (2017) 250 final, 1 (European Pillar of Social Rights or EPSR).
presented a proposal for a Directive on transparent and predictable working conditions in the European Union\textsuperscript{8} that resulted not only from the conclusions of the 2017 REFIT (the European Commission's Regulatory Fitness and Performance Programme) Written Statement Directive evaluation\textsuperscript{9} but also the consultations on the EPSR that indicated gaps between the current EU social \textit{acquis} and the recent developments on the European labour markets.\textsuperscript{10}

In light of the above, the main aim of this article is to present and analyse the newly adopted Directive (EU) 2019/1152 on transparent and predictable working conditions in the European Union to critically assess its potential and its added value.\textsuperscript{11} As the Directive was proposed as emanating from the EPSR, the second section delves into presenting its brief background that shows how the Commissioner Thyssen’s social agenda aligned with the proposal for a directive stemming from the Pillar. Then, section three addresses the adopted Directive and lays down its aim, personal and material scope of application. Section four on the other hand, contains a critical assessment of the selected provisions of the Directive and attempts to draw out its added value to the existing EU employment law framework focusing in particular on non-standard workers. Finally, the fifth section comprises of some concluding remarks that recap the most relevant findings of this contribution and highlights the fact that whilst the Directive was presented as aimed at platform workers, most self-employed persons engaged in gig work will remain outside of its scope of protection.


\textsuperscript{10} ibid 34.

2. Background: A turbulent way

2.1. European Pillar of Social Rights: A clean slate

The Directive is one of the very first legally binding instruments that has been fleshed out from the European Pillar of Social Rights which was interinstitutionally proclaimed by the European Commission, European Parliament and the Council in 2017. The European Pillar of Social Rights itself is a breakthrough and dazzling initiative presented by the Commission at the European Summit in Gothenburg in November 2017. The Pillar, consisting of a set of 20 principles and rights, is to serve as a delivery tool for new and more effective rights to the citizens in three main categories: equal opportunities and access to the labour market, fair working conditions and social protection and inclusion. As far the legal nature of the Pillar is concerned, it is still merely a Recommendation issued under Art. 292 TFEU. Therefore, it lacks any solid enforceability mechanisms vis-à-vis the Member States, so at least for the time-being it is more of a symbolic value, yet with a fully-fledged potential to become a catalyst for the European Court of Justice in interpreting the Directive on transparent and predictable working conditions to highlight once again the importance of the social acquis. Furthermore, the Pillar can have an indirect impact on the way not only the existing but also future legal developments on social protection in the EU under a gig deal of pressure’ (2018) 9 European Labour Law Journal 329, 336.

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acquis is to be applied across the EU yet with an important caveat to be made. Albeit, a non-legally binding instrument, the soft-law nature of the Pillar has some promising potential to be enforced through already existing and also new mechanisms such as European Semester and Social Scoreboard respectively.

2.2. Proposal: A tall order

In Commission’s terms, the targeted group of the proposal for a new directive were apparently all workers in all forms of work, including those in the most flexible non-standard and new forms of work such as zero-hour contracts, casual work, domestic work, voucher-based work or even platform work. According to the Impact Assessment presented by the Commission, the coverage would extend up to 2-3 million workers including amongst them 3% of platform workers, overall encompassing over 200 million workers in the EU. In essence, the proposal aimed at guaranteeing that all workers, regardless of the specific working arrangements they are engaged in, should be provided with more thorough and complete information regarding the essential aspects of their work, which was to be received by the worker within a certain deadline. It further concentrated on workers’ rights to be informed within a reasonable period in advance when exactly their employment will start, which is especially important for those

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18 Commission (n 8) 2-3.
with very variable working schedules that are to be determined by the employer in cases of on-demand work or zero-hours contracts. Furthermore, workers were to also have a right to seek additional employment by having widespread exclusivity clauses prohibited. More importantly, the proposal envisaged a broad personal scope of application as the Commission presented a codified concept of a worker derived from the CJEU case-law on the free movement of workers enshrined in Art. 45 TFEU.19 Against that background, the proposal stated that ‘a worker is a natural person who for a certain period of time performs services for and under the direction of another person in return for remuneration’,20 leaving out (at first sight) the condition that the economic activity cannot be regarded as purely marginal or ancillary, which has also been established in the case-law.21

However, despite the apparent noble intentions coming from Brussels, as suspected, Member States were far from happy with the new proposal, especially with its far-reaching nuanced personal scope of application. Heated discussions in the Council were to be expected soon after the reasoned opinion came in from the Swedish Parliament asserting that the draft does not comply with the principle of subsidiarity. As further anticipated, the proposal

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20 Commission, (n 8) Art. 2(1)(a).

21 Joined Cases C-22/08 and C-23/08 Vatsouras and Koupatantze ECLI:EU:C:2009:344 para 26: ‘[a]ny person who pursues activities which are real and genuine, to the exclusion of activities on such a small scale as to be regarded as purely marginal and ancillary, must be regarded as a “worker”. The essential feature of an employment relationship is, according to that case-law, 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’.
underwent some serious modifications in the Council, which under the Bulgarian Presidency, struck down and undercut its most ambitious provisions relating to the introduction of a Union definition of a worker. The general approach, after apparent political discussions at the Coreper level, envisaged simply a modest reference to the definition of a worker from the law, collective agreements or practice in force in each Member State, thus severely undermining the initial ambitious intention of the Commission. The proposal has been fortunately saved in the February 2019 trilateral, mostly thanks to the European Parliament that again played a key role in the negotiations, building upon the provisions, introducing new concepts and clarifying their overall scope. More importantly, it was possible to keep the explicit references to the European Pillar of Social Rights and the EU Charter and modify both the personal and material scope of application of the Directive and to include a clear reference to the EU concept of worker as established by the CJEU. Finally, in April 2019, the European Parliament approved the proposal and almost two months later, in June 2019, the Council adopted by qualified majority the negotiated and agreed proposal without any further amendments, thereby closing the file with twenty-five Member States voting in favour and three abstaining (Belgium, Germany and Austria).

3. Directive: Cold comfort

3.1. Purpose and subject matter

The Directive’s primary objective is the improvement of working conditions by promoting more transparent and predictable employment while ensuring labour market adaptability. On the one hand, it is not unusual for an EU employment directive to refer to the concepts of adaptability or flexibility, in similar vein, Directive 97/81/EC on part-time work and Directive 1999/70/EC on fixed-term work are drafted. On the other hand, one may wonder how transparent and predictable employment can have an impact on labour market adaptability as they should be regarded as an inherent and standard feature of employment. In other words, the concept of adaptability should not have to do anything with it. In that sense, the wording of the provision seems to be rather unfortunate as it might somehow imply that the improvement of working conditions is achieved at the expense of adaptability, so adaptability should perhaps prevail over working conditions in some cases. To the contrary, since the Directive bears a social legal basis enshrined in Art. 153(1)(b) TFEU, the overarching aim of working conditions should be attained without the need for any uncomfortable compromises.

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30 See: Directive on part-time work, Clause 1(b) that speaks of flexible organization of working time in a manner which takes into account the needs of employers and workers; and Directive on fixed-term work, Recital 8 that reads that the European Council invited the social partners to negotiate agreements to modernise the organisation of work, including flexible working arrangements, with the aim of making undertakings productive and competitive and achieving the required balance between flexibility and security.
With regard to the overarching objective of the Directive, what is particularly admirable and promising is that the Directive, albeit only in its recitals refers to not only the EU Charter, which is fully binding, but also, more importantly, to the European Pillar of Social Rights (EPSR). In that sense, it provides an ample room for the Court of Justice to take into account these instruments in the interpretation of the Directive should a preliminary reference depicting it be submitted.31 Allowing the judges to consider the potential influencing nature of the Pillar can result in further mainstreaming of social rights, so that the Directive is to apply broadly in light of its overarching relevant social objectives.32 Therefore, not only a lot of optimism and faith, but also pressure, is to be put onto the EU court to alleviate the concerns and contribute to strengthening the social acquis by unequivocally supporting the evident social policy goals.33

3.2. Personal scope of application

As far as the personal scope of application is concerned, the 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 (emphasis added).34 That provision proved to be one of the most disputed in the course of negotiations and has been changed significantly in comparison to the proposal put forward by the Commission, the Council’s general approach and the text adopted by the Parliament. The Commission indeed proposed a codified definition of a worker stemming from the case-law decided under free

31 Aranguiz and Bednarowicz (n 14) 336.
32 On the Pillar’s mainstreaming potential in the social field see: Aranguiz (n 16).
movement of workers in *Lawrie-Blum*. Therefore, 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 they receive remuneration.

The Council however quashed that provision and levelled down the EU concept by making a reference to solely national law. However, it was thanks to the European Parliament that brought back the EU definition of a worker in a form of a reference ‘with consideration’. Such a solution was not particularly welcomed in the Council by some Member States which resulted in statements of the German and Czech governments highlighting the relevance of national laws in governing the definition of a worker and explaining that the Directive’s provision referring to the case-law of the CJEU does not mean the concept of an employment relationship is to be interpreted uniformly throughout the Union. The status of such statements is purely political in nature since, as far as legal value is concerned, they are not provided for in the Treaties and do not in any way form a binding legal source. They do represent nevertheless a certain reservation that a Member State expressed its discomfort in the formulation of the EU social *acquis* and might signal a cautious approach in the implementation process.

Still, the wording of this provision remains rather ambiguous and may prove difficult for the Member States to not only implement it properly in its full capacity but also for the judiciary to enforce it effectively. It can seem like Art. 1(2) reflects some sort of a *hybrid* legal

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35 Case 66/85 Lawrie-Blum v Land Baden-Württemberg ECLI:EU:C:1986:284.
36 ibid. para 17.
37 Council (n 22).
38 European Parliament (n 25).
definition of a worker unseen before in the social *acquis*. First and foremost, it refers to national laws, collective agreements or practice in force but it also requires consideration of the case-law of the CJEU on the concept of a worker.\(^{41}\) It is the latter part of the proviso in fact that raises most of the doubts. What if the national definition of a worker is constructed in a different way and is impossible to reconcile with the EU one? Then, a question emerges which one should prevail and to which extent can the EU concept influence the national one. In principle, EU law should take priority over national law. Admittedly, there is a big responsibility on the Commission’s shoulders to assist the Member States in the implementation process and also to oversee it in order to safeguard proper application of the material rights enshrined in the Directive for the widest categories of workers. Moreover, the hybrid concept of a worker implies a greater obligation placed on the judiciary to not only be familiar with the EU case-law on the subject matter but also to make the laws depicting the notion of a worker that is usually embodied in hard law to be more flexible and open to new interpretations. This can prove to be difficult in jurisdictions where labour and social laws are governed mostly by the social partners, like in the Nordic countries, which are not fervent supporters of the EU interference in these areas.\(^{42}\) The Commission could perhaps alleviate these concerns and

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\(^{41}\) On the EU concept of the worker see: Risak and Dullinger (n 19); Kountouris (n 19); Giubboni (n 19); Verschueren (n 19); and Van Overmeiren, O’Brien, Spaventa, Jorens and Schulte (n 19).

besides providing adequate training for judges, issue a comprehensive overview of the CJEU case-law on the concept of a worker that could serve as guidelines for the national judge who is mostly used to simply and bluntly applying national provisions, usually without realising that the national provision might have an EU origin.

Furthermore, Member States can decide in the implementation process not to apply the Directive to workers whose 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.\textsuperscript{43} Time worked with all employers forming or belonging to the same enterprise, group or entity is to be aggregated and counted towards the three hours average.\textsuperscript{44} However, for those engaged in zero-hours contracts, which are contracts that do not stipulate guaranteed working hours and do not create any obligations for the employer to offer the job and for the worker to accept the job, do not enjoy such an exclusion, so the Directive applies to such cases in full.\textsuperscript{45} The reasoning behind such a solution is that such workers constitute the most vulnerable workforce prone to experience precarity, thus low income and unstable employment.\textsuperscript{46} The applicability of the Directive can be also ruled out on objective grounds by the Member States in cases of civil servants, public emergency services, the armed forces, and law enforcement services such as police authorities, judges, prosecutors, investigators or other law enforcement services.\textsuperscript{47} On top of that, Member States can decide to exclude domestic workers.\textsuperscript{48} Finally, some of the parts of the employment information regime might not apply to seafarers and sea fishermen in full.\textsuperscript{49}

\textit{Seamen’s Union} ECLI:EU:C:2007:772 and C-341/05 \textit{Laval un Partneri} ECLI:EU:C:2007:809. For more on the issue see: Mark R. Freedland and Jeremias Prassl (eds), \textit{Viking, Laval and Beyond} (Hart Publishing 2016).

\textsuperscript{43} Directive (EU) 2019/1152, Art. 1(3).

\textsuperscript{44} ibid.

\textsuperscript{45} ibid. Art. 1(4).

\textsuperscript{46} Broughton et al (n 3 ) 23.

\textsuperscript{47} Directive (EU) 2019/1152, Art. 1(6).

\textsuperscript{48} ibid. Art. 1(7).

\textsuperscript{49} ibid. Art. 1(8).
Such restrictions of the ambit of the potential beneficiaries of the transparent and predictable working conditions were widely criticised by the stakeholders representing the workers organisations.\textsuperscript{50} Sadly, domestic workers are still being treated in the eyes of EU employment laws as second class workers who cannot enjoy all the protection, despite the 2011 ILO Convention on Domestic Workers (No. 169)\textsuperscript{51} that has been ratified by just seven EU Member States so far (Belgium, Finland, Germany, Ireland, Italy, Portugal and Sweden) and the 2016 European Parliament resolution calling the Commission to act in this field.\textsuperscript{52} The Convention


C169 aims to respect, promote and realise the fundamental principles and rights at work of domestic workers\(^{53}\) so that domestic workers can enjoy fair terms of employment as well as decent working conditions.\(^{54}\) Moreover, it foresees providing domestic workers with terms and conditions of their employment in an appropriate, verifiable and easily understandable manner.\(^{55}\) The extent of the provision of information is somehow similar to the one envisaged by the Directive, yet such a set of rights is not to be enjoyed by all domestic workers throughout the EU as the Directive excludes domestic workers employed by natural persons in their own households.\(^{56}\) In other cases however, if domestic workers are employed through other schemes such as platforms, agencies or cooperatives, the Directive is to apply in its full capacity.

### 3.3. Information about the employment relationship

A revised, minimal, set of information about employment is now expected to be provided by the employer to the worker either within first seven days since employment commenced (core information) or within a month (corollary information).\(^{57}\) The employer can take advantage of the electronic means of communication for provision of information to the worker also in an electronic form.\(^{58}\) In order to safeguard clarity and uniform application of the information obligation, the Directive encourages Member States to develop templates and models for the employer with the set of information that needs to be communicated to the worker.\(^{59}\)

In general, the duty to ensure the transparent and predictable working conditions of the workers is mostly placed on the employers. Nonetheless, Member States can decide that some

\(^{53}\) ILO Convention No. 189, Art. 3.

\(^{54}\) ibid. Art. 6.

\(^{55}\) ibid. Art. 7.


\(^{57}\) ibid. Art. 5(1).

\(^{58}\) ibid. Art. 3.

\(^{59}\) ibid. Art. 5(2).
of the obligations, or all, can be assigned to a natural or legal person who is not a party to the employment relationship.\textsuperscript{60} This allows the outsourcing human resources firms to fulfil the obligations on behalf of the employers. Such a solution also remains without prejudice\textsuperscript{61} to Directive 2008/104/EC on temporary agency work.\textsuperscript{62}

Below, the following three subsections will lay down the two regimes depicting provision of information and will further address the minimum requirements relating to working conditions that the Directive strives to safeguard.

### 3.3.1. Core information

The core information is to consist of: identification of the parties to the employment contract, the place of work, job description including duties, the date of commencement of the employment relationship and date of termination (in cases of fixed-term contracts), the duration and conditions of the probationary period, remuneration, its composition and due payment and the work patterns.\textsuperscript{63} Interestingly, with regard to the last point, there are two rules that further dictate the notice of the work patterns. Firstly, if the work pattern is entirely or mostly predictable, the employer must inform the worker of 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.\textsuperscript{64} In the second instance, thus when the work pattern is entirely or mostly unpredictable, the employer must inform the worker of 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, the reference hours

\textsuperscript{60} ibid. Art. 1(5).
\textsuperscript{61} ibid.
\textsuperscript{63} Directive (EU) 2019/1152, Art. 4(a) to (e), (g), (k) to (m).
\textsuperscript{64} ibid. Art. 4(2)(l).
and days within which the worker may be required to work and the minimum notice period to which the worker is entitled before the start of a work assignment. In other words, workers working on zero-hours contracts or else engaged in on-demand work, can be only called into work within the time-frames they have made themselves available to the employer. If they are called in outside their reference hour period, workers are allowed to refuse the job assignment and cannot be subject to adverse consequences by the employer, i.e. dismissal by not engaging the worker again. In situations where the employer cancels a previously agreed work assignment, workers are also entitled to compensation. This surely gives certain stability for the workers who are working on contracts with variable and unstable working patterns. The Directive however does not provide any detailed explanations on the concepts of entirely or mostly predictable or unpredictable working pattern which opens up the door for various interpretations and possible abuse by the employers to keep the workers affiliated with the entirely or mostly predictable working pattern to avoid extra obligations from their side.

3.3.2. Corollary information

65 ibid. Art. 4(2)(m).
66 ibid. Art. 10(2).
67 ibid. Art. 10(3).
Corollary information, to be communicated within the first month, includes: the identity of the user undertaking in cases of temporary agency work, the necessary free training to be covered and provided by the employer, the amount of paid leave, the procedure regarding notice leaves, applicable collective bargaining agreements and information about the identity of the social security institutions and social security provided by the employer.69

Moreover, the Directive has an impact on the working conditions of workers who work in another Member State or third country other than the Member State in which they habitually work.70 In such cases, the employers need to provide the core information about the employment relationship to the worker before their departure and that it should include additional information such as the country of work, anticipated duration of work, the currency of remuneration, benefits in cash or kind relating to the work assignments if applicable and information about repatriation.71 More specifically, posted workers, thus workers who are temporarily seconded by their employer to perform work in another Member State, have to be notified about the entitled remuneration in accordance with the applicable law of the host Member State, any allowances and arrangements for reimbursement (travel, board and lodging) and the link to the single official national website with extra information72 as required by Art. 5(2) of Directive 2014/67/EU.73

The provisions targeted at the workers sent to another Member State or to a third country clearly aim at enhancing the transparency of their working arrangements and align with

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69 Directive (EU) 2019/1152, Art. 4(2)(f), (h) to (j), (n) to (o).
70 ibid. Art. 7.
71 ibid. Art. 7(1).
72 ibid. Art. 7(2).
the revised Posting of Workers Directive,\textsuperscript{74} also presented within the broad agenda of the European Pillar of Social Rights, although not emanating from it directly. Nevertheless, the accessibility of such information can be levelled down by the Member States as they can provide that some of that information can be simply given in the form of a reference to specific provisions of laws.\textsuperscript{75} A simple referral to the exact legal provision is far from helping the workers to get more information about their entitlements and guarantees, which is further exacerbated by language that the worker might not speak. The Enforcement Directive requires the information to be generally available free of charge in a clear, transparent, comprehensive and easily accessible way at a distance and by electronic means.\textsuperscript{76} The information must be provided free of charge in the \textsuperscript{77}official language(s) of the host Member State and in the most relevant languages taking into account demands in its labour market, the choice being left to the host Member State. In that vein, the example of the Enforcement Directive shows that leaving such a margin to the Member States can lead to rather disappointing results that do not constitute much added value for the incoming workforce in terms of accessibility of information.\textsuperscript{78}

\textbf{3.4. Minimum requirements relating to working conditions}

Moreover, the Directive regulates length of maximum probationary periods and sets it at a maximum six month period, which is subject to exceptions in extraordinary circumstances


\textsuperscript{75} Directive (EU) 2019/1152, Art. 7(3).

\textsuperscript{76} Enforcement Directive, Art. 5.

\textsuperscript{77} ibid. Art. 5(1)(c).

where it is justified by the nature of the work or where it is in the interest of the worker.\textsuperscript{79} Furthermore, parallel employment understood as taking up employment with other employers, outside the work schedule, must be allowed.\textsuperscript{80} The employers’ exclusivity clauses are therefore banned unless it is so justified on the basis of objective grounds, such as health and safety, business confidentiality, integrity of the public service or avoidance of the conflict of interest.\textsuperscript{81} It remains unclear whether the ban of prohibition of parallel employment would mean that the worker still needs to ask the permission of their employer to take up extra work with a different employer and get their consent to make the employer aware of parallel employment or not. However, in light of the overarching social policy objective that the Directive pursues, it would seem that obtaining employer’s prior consent to engage in parallel employment would not be compatible with the aim of the Directive unless the exclusivity clause is stipulated in the initial employment contract on the basis of objective grounds that the Directive spells out.

What is more, the Directive addresses the minimum predictability of work requirements and it encompasses special provisions that are targeted at on-demand workers that place on the Member States obligations to prevent abusive practices of the undertakings.\textsuperscript{82} Therefore, Member States can take measures to fight abuse such as setting limitations to the use and duration of such contracts, or introduction of a rebuttable presumption of an existence of an employment contract stipulating a minimum amount of paid hours.\textsuperscript{83} Perhaps the most far-reaching provision of the Directive depicts granting the workers a right to transition to another form of employment.\textsuperscript{84} Workers with six months service with the employer have a right to request in writing transition to another form of employment that is more predictable and secure

\textsuperscript{79} Directive (EU) 2019/1152, Art. 8.
\textsuperscript{80} ibid. Art. 9(1).
\textsuperscript{81} ibid. Art. 9(2).
\textsuperscript{82} ibid. Art. 10.
\textsuperscript{83} ibid. Art. 11.
\textsuperscript{84} ibid. Art. 12.
and they must receive a written reply from the employer with clear reasons within one month.\textsuperscript{85} The Directive also prescribes a legal presumption in cases when worker has not received in due time all or partially the mandatory information.\textsuperscript{86} Then, the worker is to enjoy the favourable presumptions to be defined in national law, which the employer has a right to rebut.\textsuperscript{87} On top of that, the worker can have a right to lodge a complaint to a national competent authority or body.\textsuperscript{88} Naturally, workers are to be protected against adverse treatment or consequences resulting from their actions such as submitting complaints or enforcing their rights stemming from the Directive, including preclusion from dismissal.\textsuperscript{89} If however the worker is dismissed or adversely treated simply because they exercised their rights, it is up to the employer to demonstrate before the court that the dismissal was not unfair and was based on different grounds.\textsuperscript{90} Finally, as any other employment law instrument, the Directive contains a non-regression clause not allowing levelling-down the protection that has been already awarded to the workers based on existing national provisions and more favourable clause allowing Member States to introduce more beneficial protection to the workers.\textsuperscript{91} In that instance, the Directive is a minimum harmonisation instrument for which Member States have been granted three years, until 1 August 2022, to implement and notify the Commission accordingly.\textsuperscript{92}

4. Assessment: A light breeze of hope

\textsuperscript{85} ibid.
\textsuperscript{86} ibid. Art. 15.
\textsuperscript{87} ibid. Art. 15(1)(a).
\textsuperscript{88} ibid. Art. 15(1)(b).
\textsuperscript{89} ibid. Art. 17.
\textsuperscript{90} ibid. Art. 18.
\textsuperscript{91} ibid. Art. 20.
\textsuperscript{92} ibid. Art. 21(1).
The Directive is to be warmly welcomed as it introduces a rather nuanced approach towards the mandatory information obligation regime for every employment relationship, regardless of its form. The only criterium is personal ambit of application, i.e. being a worker under national law which at least in theory grants the Member States a possibility to police the national definition of a worker rigidly. However, a clear reference to the case-law of the CJEU on the concept of a worker gives certain hope that the Directive could have a capacity of having a broad scope of application. Placing an explicit reference to the EU concept of a worker in the Directive definitely strengthens legal awareness that the concept is to be interpreted broadly. Nevertheless, its proper application can be shrouded in ambiguity due to its hybrid nature and concerns stemming from the legal value of mainstreaming the EU concept of a worker into the existing national laws. The effective achievement of such a goal remains therefore questionable. Implementation of the Directive will surely vary in the Member States, especially with regard to its personal scope of application. Indeed, whilst Member States are primarily responsible for safeguarding working conditions and improving the quality of work at national level by virtue of enforcement and control measures, the EU social acquis is to support and complement the actions of the Member States in that domain.93

Moreover, it must be outlined that the Directive will not bring a remedy to the workforce engaged in non-standard forms of employment under the widespread schemes of self-employment or in cases of working arrangements that do not stipulate mutuality of obligations thus do not give rise to a status of a worker under national law.94 However, this could provide an ample room for the Court of Justice to be yet again called out to put the

remedy in such instances like it was the case with other non-standard workers whose independence was merely notional.95

Unfortunately, despite the Directive being mostly projected as an instrument oriented at workers in the gig economy, it proved to have a different target group in practice.96 No provision of the Directive touches upon the issue of reclassification of the workforce that in essence happens to be false self-employed by providing any kind of guidance to the national judges besides referring to the CJEU case-law in the recitals.97 As the national definition of a worker is to prevail, albeit with consideration of the CJEU case-law, it remains rather unlikely that the national courts will start looking into the EU case-law, particularly if the Member States will implement the Directive in a vague manner, giving the suggested priority to national laws. It also remains questionable whether the Commission will diligently monitor the implementation process and be eventually willing to instigate infringement procedures against Member States which decided to implement and police the Directive in a rather narrow manner.

Another pitfall of the Directive connected with its personal scope of application is a deeply regretful possible exclusion of domestic workers who yet again, seem to be a forgotten second category of workforce despite the currently existing ILO standards on that subject matter that could be seen as a source of inspiration, worth taking onboard at EU level.

Nevertheless, one of the major accomplishments is that the Commission has finally delivered a new legal instrument in the long-forgotten field of employment. Moreover, social policy is back on the agenda again. The European Pillar of Social Rights is therefore not a doomed and empty set of profound Eurojargon. Explicit references made in the Directive to the Pillar will hopefully allow the Court of Justice, when faced with a preliminary question

95 Case C-256/01 Allonby ECLI:EU:C:2004:18.
from the national Court regarding application of the Directive, an opportunity to elaborate on the value and the status of the Pillar and take it into account just as it happened to be the case with the EU Charter.\textsuperscript{98}

5. Conclusion: Fits and starts

In any case, simple information rights are far from combating precarious employment and social exclusion.\textsuperscript{99} However, the material rights emanating from the Directive are to be classified as of progressive character with a capacity to have a positive impact on the workforce, especially the ones depicting enforcement. The Directive is therefore to be seen as a stepping stone in paving the windy road leading to securing decent working conditions, improving jobs qualities and repealing the archaic Written Statement Directive, with potential to make a real impact on the working conditions, yet only for those who are lucky enough to enjoy the status of a worker. Indeed, transparent and predictable working conditions might not seem to have a direct impact on the job quality, however, they ensure that the rules of the game between the employer and the worker are fairer which overall leads to an increased legal certainty as well.

In general, non-standard working arrangements should not be seen as problematic \textit{per se}, as they grant access to the labour market for some workforce that enjoys and values the given flexibility,\textsuperscript{100} but only as long as the workers are secured with a certain level of


\textsuperscript{99} Aranguiz and Bednarowicz (n 14) 336.

\textsuperscript{100} Prassl (n 2) 24-26.
employment and social protection. In other words, flexibility is assuredly not inherently at odds with labour and social law in so far as there is a social level playing field for both employers and workers. This is why the aims of the Directive can be read together with the other EPSR’s initiative - a proposal for a Council recommendation on access to social protection for workers and the self-employed due to be adopted in autumn 2019. In short, the proposal is designed to implement Principle 12 of the EPSR that highlights that regardless of the type and duration of their employment relationship, workers, and, under comparable situations, the self-employed have the right to adequate social protection. The proposal therefore aims at increasing income security, reducing precariousness, fighting poverty, reducing unfair competition and creating more stable economic structures.

In conclude, the Directive takes an approach towards providing more transparent and predictable working conditions for standard workers and workers mostly engaged in zero-hours contracts provided they are seen as workers under national law with consideration of the CJEU case-law. They can enjoy the broadest range of protection which cannot be restricted by making it impossible for the Member States to exclude them from the scope of application of the Directive. Stability and predictability of employment is surely crucial for the vulnerable workforce prone to experience precariousness. In that field, the Directive certainly aims to contribute to make the unpredictable employment more secure and the overall agenda of making employment more decent and sustainable. It is rightly especially so in the wake of the ILO centenary, to reaffirm its famous declaration that labour is not a commodity and to emphasise

102 Prassl (n 2) 133.
104 ibid 12.
the need to fulfil the ILO’s Decent Work Agenda which aims to achieve Goal 8 of the UN 2030 Agenda for Sustainable Development to which the European Union committed itself as well.