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CONSULTATION DOCUMENT

Second phase consultation of Social Partners under Article 154 TFEU on a possible revision of the Written Statement Directive (Directive 91/533/EEC) in the framework of the European Pillar of Social Rights

{SWD(2017) 301 final}

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1. INTRODUCTION

The purpose of this document is to consult the social partners at EU level, in accordance with Article 154(3) of the Treaty on the Functioning of the European Union (TFEU), on the content of the envisaged Commission proposal concerning a revision of the Written Statement Directive in the framework of the European Pillar of Social Rights and to ask whether they wish to enter into negotiations as provided for by Article 154(4) TFEU.

On 26 April 2017, the Commission adopted the European Pillar of Social Rights ('the Pillar'). Its twenty principles are designed to guide the social development of the EU in the next decade. The ambition of the Pillar is that the EU remains able, as one of the few world areas, to reconcile strong economy and high welfare.

The Principles of the Pillar explicitly address the challenges related to new forms of employment and adequate working conditions in atypical forms of employment, notably 'Secure and flexible employment' (Principle 5) and 'Information about employment conditions and protection in case of dismissals' (Principle 7).

As regards labour relations, the Pillar intends to ensure that our EU acquis maintains its relevance and effect in 21st century labour markets, where globalisation and digitalisation are changing existing forms of employment and bring in new work arrangements. In particular, the Pillar seeks to promote secure and adaptable employment relationships that are protected from precariousness and abuses, not only among new and atypical forms of work but also within established employment types, while not stifling job creation and innovation on the labour market.

The Commission's REFIT evaluation of the Written Statement Directive (Directive 91/533/EEC, 'the Directive'), and the public consultation which preceded it, concluded that, while the Directive remains broadly fit for purpose, there are a number of deficiencies in its content and coverage.¹

As the extensive public consultation on the Pillar clearly revealed,² there is a growing challenge to define and apply appropriate rights for many workers³ in new and non-standard

¹ REFIT Evaluation of the 'Written Statement Directive' (Directive 91/533/EEC), SWD(2017)205 final. The results of the public consultation, which ran between January and April 2016, are included in the annex to this document.

² See launching Communication COM(2016)127 final and Report of the public consultation SWD(2017)206 final, pages 18-21.

forms of employment relationships. Such forms of work are creating opportunities for people to enter or remain in the labour market and the flexibility they offer can be a matter of personal choice. However, inadequate regulation means that many people in work are stuck in legal loopholes, which may make them subject to unclear or unfair practices and make it difficult to enforce their rights.

Also for employers the legal loopholes give rise to uncertainty and unnecessary litigation costs. Over-reliance on non-standard forms of work can cause tensions in the workforce, harm productivity and hamper innovation and skills development. Adequate working conditions moreover contribute to a committed, involved and healthy workforce and can foster productivity and competitiveness of individual companies and the EU economy as a whole. Clear rules and common fair employment standards can ultimately protect the large number of companies in Europe which do provide workers with adequate protection and are in a disadvantaged position in relation to companies which compete on the basis of limited labour costs.

Against this background, the Commission identified two main challenges that could be addressed:

- ensuring all workers get the right set of information about their working conditions in a written form and in a timely manner.
- providing all workers with a number of new minimum rights aimed at reducing precariousness in employment relationships and achieving upward convergence across Member States.

These challenges are translated into a single overarching objective: ensuring that each worker receives a written confirmation of his or her working conditions, and benefits from a set of minimum rights⁴. The Commission concluded that there was a need for EU action which would address those issues through a revision of the Directive, without obstructing the development of new forms of work.

On 26 April 2017, the European social partners were invited to give their views on the possible direction of EU action in a first phase consultation as provided under Article 154 TFEU.⁵

Following the responses received, the Commission is now launching a second phase consultation of the social partners on the content of a possible proposal, as required under the Treaty.

This document brings together the main results of the first-stage consultation. It describes the problem that the Commission aims to address and the objectives of the initiative, provides a summary of the results of the first phase consultation, an overview of the legal basis for EU

³ In the present Consultation Document, the terms 'worker' and 'employee', where not referred to in a specific context or in a citation, are used as synonyms and have the meaning predominantly used at EU level: '*any person who for a certain period of time performs services for and under the direction of another person in return for which he receives remuneration*'.

⁴ The first phase consultation document used the terms 'floor of rights' since these new rights will complement the existing floor of rights (as regards working conditions and protection of health and safety at work) already established at EU level.

⁵ C(2017) 2611, First phase consultation of Social Partners under Article 154 TFEU on a possible revision of the Written Statement Directive (Directive 91/533/EEC) in the framework of the European Pillar of Social Rights

action, the added value of EU action and the measures that could be considered as possibilities for EU action. It is accompanied by an analytical document giving further background information and analysis on, inter alia, relevant EU regulatory framework and the current situation in the Member States.

2. THE FIRST-PHASE CONSULTATION OF SOCIAL PARTNERS

The first phase of social partner consultation closed on 23 June 2017.

2.1 Workers' organisations

Six trade unions replied to the first phase consultation: the European Trade Union Confederation (ETUC), Eurocadres, the European Confederation of Executives and Managerial Staff (CEC), the European Confederation of Independent Trade Unions (CESI), the European Arts and Entertainment Alliance (EAEA) and the European Federation of Journalists (EFJ). It should be noted that ETUC's reply also took into account the view of 10 ETUC sectoral trade union organisations.

The workers' organisations agreed, broadly, with the challenges described in the consultation document, the need to improve the effectiveness of the written statement directive and to broaden its objectives in order to improve the working conditions of vulnerable workers. They welcomed, in particular, the initiative of a minimum floor of rights for workers, and acknowledged the need for further action at EU level in line with the European Pillar of Social Rights.

Possible improvements to the EU legal framework

The workers' organisations were generally in favour of the insertion of a definition of worker based on the case law of the Court of Justice of the European Union (CJEU), however ETUC argued additionally for the inclusion of self-employed in the scope of application. Trade unions stated the need to cover, in particular, casual workers, and those in new and atypical forms of employment. They favoured removing the exemptions for short employment relationships and short working hours.

With regard to the extension of the information package, trade unions were in agreement with the list suggested in the consultation document, however ETUC advocated broader and more detailed information requirements regarding working time arrangements (rest periods, length of break), elements of remuneration (bonus, overtime, sick pay), the identity of sub-contractors, an obligation to hand out and ensure access to relevant documents, information for temporary agency workers on the duration of assignment and name of user undertaking, information on worker representatives and on equal pay rights, information on (equal) pay and social contributions for workers working abroad, information to posted workers about their rights, information on conditions of accommodation, as well as a series of specific elements for interns, trainees and apprentices.

Trade unions unanimously agreed with the proposal to reduce the 2 months deadline for the employer to provide the written statement and stated that this should be prior to the start of the employment relationship or immediately on signing the contract.

The need to improve access to and the effectiveness of sanctions and means of redress was acknowledged, including by introducing a presumption of employment in case the employer fails to provide a written statement.

Workers' organisations were strongly in favour of a floor of rights for workers. In addition to the proposals in the consultation document ETUC advocated a minimum notice period (3 months), a right to decent working hours, a right to at least the minimum wage, and finally a right to social protection in conjunction with the access to social protection initiative of the Commission. ETUC also argued for inclusion of collective rights in the minimum floor of rights such as the right to join and be represented by a trade union, right to freedom of association and finally the right to collective bargaining.

Willingness to enter into negotiations

The workers' organisations expressed their willingness to enter into negotiations with employer organisations; however in case negotiations are not launched or if they fail they urge the Commission to come up with a legislative proposal that will improve the situation of workers.

2.2 Employers' organisations

Thirteen employers' organisations replied to the first phase consultation: Business Europe, the European Association of Craft Small and Medium-sized Enterprises (UEAPME), the Council of European Employers of the Metal, Engineering and Technology Based Industry (CEEMET), the Association of Hotels, Restaurants and Cafés in Europe (HOTREC), Eurocommerce, the Confederation of European Security Service (COESS), the European Chemical Employers Group (ECEG), the Council of European Municipalities and Regions (CEMR), the World Employment Confederation, the European Farmers Association (GEOPA-COPA), the European Community Ship-Owners' Associations (ESCA), the European Coordination of Independent Producers (CEPI), and the European Centre of Employers and Enterprises providing Public Services and Services of general interest (CEEP).

A large majority of employers' organisations stated their opposition to the need to revise the Directive and all rejected the idea of creating a minimum floor of rights for all workers.

Possible improvements to the EU legal framework

A large majority were opposed to the extension of the scope of application of the Directive and the insertion of a definition of worker. They argued that this definition would be too broad, would hamper flexibility for business, and would depress job creation. They raised concerns about subsidiarity and impacts on Member States' national legal arrangements. However COESS was in favour of introducing a definition of worker, to cover all forms of employment and simplify the exclusion provisions, so reducing unfair competition.

All employer organisations expressing a view, with the exception of COESS and HOTREC, did not support amending the information package. COESS supported the possible extension outlined in the consultation document. HOTREC indicated that some of its members supported including information about probation and about the applicable social security system.

Regarding the reduction of the 2 months deadline for providing the written statement, most employer organisations were not in favour of any change. HOTREC stated that it could be reduced to 1 month but exemptions should remain so as to avoid creating additional administrative burdens.

No employer organisation supported changes at EU level to the system of redress and sanctions. Some indicated that this should be left to Member States. For the World Employment Confederation, better implementation and enforcement of the existing directive would be more effective than a revision. HOTREC indicated that some of its members could accept favourable presumptions of employee status.

All organisations were opposed to the floor of rights of EU workers, arguing that this would infringe proportionality and subsidiarity principles. They also highlighted the importance of respecting the autonomy of the social partners and stated that the issues raised in the consultation should be tackled either at national level or in collective agreements.

Willingness to enter into negotiations

Business Europe, UEAPME and CEEP expressed their willingness to engage in exploratory talks with the ETUC in order to assess the feasibility and appropriateness of initiating a dialogue under Article 155 TFEU on the Written Statement Directive (challenge 1 of the consultation document). The other organisations were not in favour of opening discussions at EU level.

Subsequent to the first phase consultation, ETUC, CEEP and Business Europe confirmed that they were not in a position to initiate formally the joint negotiation process provided for in Article 155 TFEU, while reserving the possibility to do so in the context of the second phase consultation

3. PROBLEMS RELATED TO THE PROTECTION OF WORKERS

The problem to be addressed remains the same as identified in the first stage consultation document, and relates to the risk of **insufficient protection of workers, including those in new and non-standard forms of employment, with a specific focus on the timely provision of information on their working conditions.**

First, there is a growing number of workers in **precarious employment relationships** in the context of segmented and quickly evolving labour markets.⁶

A full-time permanent labour contract is still the predominant contractual employment relationship for the workforce as a whole, but **non-standard forms of employment⁷ have increased over the last 20 years.** In 1995, 32 % of the EU-15 workforce had non-standard contracts. This proportion had increased to 36 % in the EU-28 by 2015. In absolute terms, there were 5.5 million more workers on non-standard contracts in 2015 compared with a decade before, but only 3.8 million more workers employed in standard employment (permanent full-time).⁸ The multiplicity of contracts makes the profiles of non-standard workers difficult to define as a homogeneous group. Available data indicate for instance that non-standard jobs - and particularly fixed-term jobs - are still disproportionately held by

⁶ See Analytical Document section 2.2.1

⁷ "Non-standard forms of employment" here includes permanent part-time, temporary full-time and part-time, self-employed persons with no employees and family workers.

⁸ The growth of non-standard employment has also been pointed out by the European Parliament in its resolution of 4 July 2017 on working conditions and precarious employment.

younger, less-educated and lower-skilled workers, and are not a voluntary choice for most.⁹ Only 37% of younger workers were employed on full-time permanent contracts in 2015, down from 48% in 2002. These developments create an increasing so-called ‘precariat’¹⁰ of workers on temporary or non-standard contracts who are in a vulnerable position without access to adequate protection.

Most of the new and non-standard forms of employment contribute to labour market innovation, making this market more attractive to both employers and a wider range of potential workers. However, some types of non-standard forms of employment relationship, expected to grow in the future, might be worrying from the point of view of increased insecurity (in terms of stability of employment, income, access to social protection etc.): casual work, (involuntary) marginal part-time, voucher-based work and crowd employment/platform work. In addition, some long-standing forms of non-standard work - domestic work, paid traineeships and temporary agency work - continue to present challenges from the point of view of job security and adequate working conditions. These are discussed in more detail in the accompanying Analytical Document.

Workers in new and non-standard forms of employment are more likely to suffer from job insecurity.¹¹ Non-standard jobs tend to offer lower hourly pay than permanent full-time jobs¹² and as a result pose the highest poverty risk among those in employment.¹³ Non-standard employment goes together with a higher risk of unemployment and inactivity.¹⁴ At the same time non-standard workers tend to have shorter and lower records of social security contributions and this negatively affects their eligibility for social security benefits, as well as the amount and duration of those benefits.¹⁵ Some categories of workers in new and non-standard forms of employment are less protected from occupational safety and health risks and in addition to physical health and safety issues, workers in insecure and casual forms of employment are more likely to suffer from stress at work.¹⁶ Such negative health impacts are confirmed even among young people.¹⁷ Workers in the new forms of employment also tend to have more limited access to representation and collective bargaining.¹⁸ Low transition rates from temporary to permanent jobs suggest that inequalities tend to persist over time. Evidence

⁹ For a full discussion on characteristics of non-standard workers see the Analytical Document.

¹⁰ Employment and Social Developments in Europe (ESDE), 2016, p.99.

¹¹ For a full discussion of possible consequences for workers see Analytical Document section 2.3.1

¹² European Commission (2016), "Employment dynamics and social implications". Chapter 2 in Employment and Social Developments in Europe 2016. Luxembourg: Publication Office of the European Commission.

¹³ European Commission (2017), "Working lives: the foundation of prosperity for all generations". Chapter 3 in Employment and Social Developments in Europe 2017, published on 18 July 2017.

¹⁴ OECD Employment Outlook 2014, Non-regular employment, job security and labour market divide, p. 141-209

¹⁵ Matsaganis M., Özdemir E., Ward T., Zvakou A. (2016), "Non-standard employment and access to social security benefits", Social Situation Monitor research note, European Union.

¹⁶ Eurofound (2010) *Work-Related Stress*, p.17.

¹⁷ ‘Economic activity and health – Initial findings from the Next Steps Age 25 Sweep’ by Dr Morag Henderson, Centre for Longitudinal Studies, 5.07.2016 (<http://www.cls.ioe.ac.uk/shared/get-file.ashx?itemtype=document&id=3301>)

¹⁸ Eurofound (2015), *New forms of employment*, Publications Office of the European Union, Luxembourg, page 139.

for European countries shows that less than 50% of the workers who were on temporary contracts in a given year were employed with full time permanent contracts three years later.¹⁹

As discussed in greater detail in the Analytical Document²⁰, overall, new and non-standard forms of work have advantages for business in terms of flexibility, cost savings and the possibility to tap from a greater pool of skills. However, they may also create disadvantages for employers, often over the longer term. While there may be some initial cost savings, there are also substantial hidden costs. Management of a workforce composed of permanent and temporary workers is complex, with risks of conflicts and demotivation leading to productivity losses. Innovation may be negatively affected by insecurity in employment relationships leading to a lack of trust and risk-averse behaviour.²¹ Data from the European Union Structure of Earnings Survey (SES)²² reveals that in 2010, only 6.8 % of firms used non-standard forms of work intensively (more than 50 % of their workers were either fixed-term or temporary agency workers).²³ Moreover, 5 % of enterprises accounted for 76 % of all temporary workers employed. In the same vein, 2016 data from the UK shows that only some 7 % of enterprises make some use of contracts that do not guarantee a minimum number of hours and use of such contracts is significantly more widespread among the biggest enterprises in comparison with SMEs.²⁴ This could mean that the relatively large number of companies in Europe, which provide workers with protection related to standard employment status, may be in a disadvantaged position in relation to companies which compete on the basis of limited labour costs, though establishing such a link would require further analysis.

The Analytical Document²⁵ also shows that the abuse of some new forms of work, especially casual work, can have detrimental effects on labour markets and society at large, resulting in deepening labour market segmentation, impacting social protection systems and having broader demographic consequences.

Secondly the EU existing labour law acquis does not apply today uniformly to all workers, creating disparities and leading to inequalities in term of working conditions and social protection in general.²⁶

Not all workers are covered in practice by the Written Statement Directive.²⁷ For instance, in some Member States, workers in employment relationships of less than one month are not

¹⁹ OECD Employment Outlook 2014, Non-regular employment, job security and labour market divide, p. 141-209

²⁰ See Analytical Document section 2.3.2.

²¹ The above statements are based on a literature review presented in the "Non-standard employment around the world: Understanding challenges, shaping prospects" International Labour Office – Geneva: ILO. 2016 and "Non-standard forms of employment. Report for discussion at the Meeting of Experts on Non-Standard Forms of Employment" (Geneva, 16–19 February 2015)/International Labour Office, Conditions of Work and Equality Department, Geneva, 2015

²² Establishment level survey covering private sector firms with at least ten employees in 22 European countries

²³ "Non-standard employment around the world: Understanding challenges, shaping prospects" International Labour Office – Geneva: ILO.

²⁴ <https://www.ons.gov.uk/employmentandlabourmarket/peopleinwork/earningsandworkinghours/articles/contractsthatdonotguaranteeaminimumnumberofhours/may2017>

²⁵ See Analytical Document section 2.3.3.

²⁶ See the parallel European Commission initiative Social Protection for All addressing the challenges of access to social protection for people in all forms of employment in the framework of the European Pillar of Social Rights.

covered, nor are workers under zero-hours contracts or on-demand contracts as well as voucher-based workers and ICT-based mobile workers. In addition, the concept of 'worker' varies among countries, leading to differences in the coverage of the Directive.

The REFIT evaluation established that there exists a core group of protected persons (typically working under standard open-ended contracts or long-term contracts), while a wide divergence in practice and/or uncertainty in coverage was observed for many other categories of workers. Many workers are not sufficiently aware of or do not possess a confirmation of some of their basic rights, such as working time, holiday pay, duration of the probation period, duration of the relationship (if temporary), protection against unfair dismissal or applicable conditions when posted abroad. Furthermore, the two-month deadline after the commencement of employment during which employers are not obliged to provide their employees with any information was highlighted by stakeholders as an aspect of the Directive that does not support the objective of increasing transparency and which may in fact increase the potential for undeclared work or abuse of employee rights.

This situation can and should be addressed without hindering the development of new forms of work. If a set of minimum fair working conditions were to be ensured across the EU and across all forms of employment contracts, this would set a framework within which new forms of work could develop, whilst offering fair protection to workers, a clear reference framework for national legislators and courts and a level playing field for business within the internal market, with limited incentives for unfair competition based on regulatory arbitrage.

4. NEED FOR EU ACTION

On the basis of Article 153(2) TFEU, which is the main legal basis in the social policy field, the Union can adopt binding rules only in the form of minimum requirements, and without imposing administrative, financial and legal constraints in a way which would hold back the creation and development of small and medium-sized undertakings.

Establishing new minimum rights at EU level on working conditions of workers, and the corresponding requirement to inform the workers in writing on the applicable working conditions, is essential as it increases certainty for both employers and employees and prevents a detrimental race to the bottom which might otherwise take place between Member States in the regulation of working conditions. EU action would bring particular added value in Member States where certain workers are not covered by the Directive.²⁸ It will also increase predictability for businesses and transparency of the labour market. Action at EU level could not only ensure a level playing field, as unfavourable and very different national approaches can lead to distortions of competition and barriers to the free movement of labour within the internal market; it could also improve the efficiency of the EU labour market, promote economic and social progress, as well as cohesion and a renewed process of convergence towards better working and living conditions, while upholding the integrity of the internal market, which is a key objective of the European Pillar of Social Rights.²⁹

²⁷ REFIT Evaluation of the 'Written Statement Directive' (Directive 91/533/EEC), SWD(2017)205 final, p.25.

²⁸ See Analytical Document section 3.2.

²⁹ See Recital 7 of the Commission Recommendation of 26 April 2017 on the European Pillar of Social Rights, C(2017)2600 final.

5. AVENUES FOR EU ACTION

The Commission identified possible avenues for a revision of the Written Statement Directive in the first phase consultation document. The Commission has reviewed them in the light of the responses from the social partners to the first phase consultation, and in the light of the obligation in Article 153(2) TFEU to avoid imposing administrative, financial and legal constraints in a way which would hold back the creation and development of small and medium-sized undertakings. The Commission is mindful of the need to balance essential protection for workers with the scope for job creation and labour market innovation. It therefore proposes for further consideration in the second phase of consultation the content set out in more detail below. Social partners are invited to express their views on these avenues, and to indicate whether they wish to initiate negotiations between themselves.

By means of this initiative, the Commission intends to develop fairer working conditions for EU workers by ensuring a wide scope of application of the revised Directive, extending the list of information to be notified to the worker at the start of his employment, establishing new minimum rights aimed at reducing precariousness, and providing for effective enforcement measures.

5.1. A scope of application encompassing all workers in the EU

Currently Article 1 of the Written Statement Directive affords some discretion to Member States in terms of applying their own definition of what is an employee³⁰. However, according to settled case-law where Member States are empowered 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.³¹ Nevertheless, Member States’ remaining discretion can lead to certain provisions of the Written Statement Directive being applied in the Member States in a different way to same categories of workers. Furthermore, it can also cause a lack of consistency in the coverage for the growing category of non-standard forms of employment. Those disparities can cause unequal treatment of workers across the EU, hinder the effectiveness and equitable application of EU labour law, and thus may lead to negative social and economic impacts in the labour market.

Therefore, the Commission suggests clarifying the personal scope of the revised Written Statement Directive in line with the parameters set out by the CJEU to identify an employment relationship³² by including criteria which would help achieve more consistency in the personal scope of application of this Directive while making clear that it applies to every type of person that for a certain period of time performs services for and under the direction of another person in return for remuneration, including domestic workers, temporary

³⁰ According to Article 1 of the Directive, it applies to every paid employee *'having a contract or employment relationship defined by the law in force in a Member State and/or governed by the law in force in a Member State'*.

³¹ See, for instance, Cases C-61/11 PPU El Dridi, para 55 and C-393/10, O’Brien paras 33, 34. Case C-216/15, *Ruhrlandklinik* could be interpreted as limiting Member State’s discretion in terms of defining the concept of “worker” even further.

³² The CJEU stated that *'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'*, case C-66/85.

agency workers, on-demand workers, intermittent workers, voucher based-workers, and platform workers.³³

Consideration should also be given to the removal of the exclusion provisions under Article 1(2) of the Directive, under which Member States may exclude people working less than 8 hours a week or whose employment relationship lasts less than one month or is of a casual and/or specific nature, in view of the growth in short contracts and short working hours.³⁴ These provisions could be replaced with a more limited exclusion of isolated, marginal and very short employment relationships, to avoid unnecessary administrative burden. This would address concerns expressed by employers' organisations during the first phase consultation about disproportionate burden if the exclusions were removed altogether.³⁵

5.2. A right to information on the applicable working conditions

A revised Directive could establish a list of rights applicable to all workers regarding their employment conditions. The aim of these rights would be to help create fairer working conditions and to reduce unfair competition between employers based on loopholes in labour market regulation. The aim is to create a positive dynamic between workers and employers that would improve EU competitiveness at large. If the establishment of minimum rights helps to trigger higher investment in the work relationship on the side of both the worker and the employer, then the initiative could contribute to increasing labour productivity in the EU.³⁶

In line with the current Directive, each worker should be informed in writing at the start of employment about his or her rights and obligations resulting from the employment relationship. The list set out in Article 2 of the current Directive could be enhanced by adding the following:

- the duration and conditions of the probation period (if any);
- the normal working schedule or the principle that there is no predetermined and recurrent working schedule; in the latter case, the minimum advance notice the worker is entitled to before a new assignment and the system for determining the work schedules;
- the amount of guaranteed paid hours or the principle that there is no guaranteed paid hours, and criteria for identifying the paid hours;
- the training entitlement, if any, provided by the employer;
- the extent to which paid extra hours (overtime) can be requested on top of the amount of guaranteed hours and its remuneration;
- the public social security system(s) receiving the social contributions attached to the employment relationship in respect of pension, sickness, maternity and/or family

³³ As regards trainees, the Commission notes that they are already subject to protection under the Council Recommendation of 10 March 2014 on a Quality Framework on Traineeships, in particular its Articles 2 and 3 on the conclusion of a written traineeship agreement. The forthcoming Commission proposal for a Quality Framework for Apprentices referred to in Communication COM(2016)940 *Investing in Europe's Youth* is planned to include a similar provision covering apprentices.

³⁴ See Analytical Document section 2.2.1.

³⁵ See responses from the Council of European Municipalities and Regions (CEMR), EuroCommerce, HOTREC.

³⁶ Extensive data has shown that more involvement of workers is likely to lead to better performance and well-being. See for instance Eurofound (2015), *Third European Company Survey – Overview report: Workplace practices – Patterns, performance and well-being*, Publications Office of the European Union, Luxembourg.

leave, unemployment benefits and any health and/or social security protection provided by the employer;

- more comprehensive information on the national law applicable in case of termination of contract (beyond the mere mention of the notice period, which is already foreseen by the current Directive).

The information would have to be transmitted to each worker at the start of employment in the form of:

- a written employment contract; and/or
- a letter of engagement; and/or
- other written documents issued by the employer

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

5.3. New minimum rights aimed at reducing precariousness in employment

As noted above, the Commission has reviewed the list of possible additional substantive rights mentioned in the first phase consultation, in the light of the need to balance essential worker protection with scope for job creation and labour market flexibility, and with keeping burdens on employers (notably SMEs) limited and proportionate. These rights would be available for all EU workers and of particular relevance for those engaged in new and atypical forms of employment.

It proposes to focus on those additional rights which address directly the key gaps in protection arising from the expansion of non-standard and casual forms of work, and which derive directly from the bilateral relationship between worker and employer, as follows:

5.3.1. Right to predictability of work

Labour market flexibility is an asset for the EU economy and contributes to job creation and adaptability to economic challenges. Nevertheless, within some employment relationships such as casual or on-demand employment relationship³⁷, workers are often unable to predict the hours and days in which their work, or the essential part of it, will be performed. Conversely, exclusivity clauses may unduly limit the flexibility sought by certain workers. There is currently no protection under the EU acquis for workers in those situations.

Therefore, employers and workers in such casual or on-demand situations could be required to agree before the employment relationship starts on reference hours and reference days in which work may be performed. A minimum advance notice period could also be required to be given to workers.

Where the casual employment relationship endures beyond a certain period, workers could start benefiting from a minimum number of guaranteed hours after a predefined continuous

³⁷ Or within employment relationships where part of the work is performed under standard conditions and another part is on-demand.

period of on-call or on-demand employment, based on the average number of hours performed during this period.

Recourse to exclusivity clauses could be limited to full-time employment relationships only.

5.3.2. *Right to request another form of employment and receive a reply in writing*

Employers may not always have the possibility to grant full time permanent labour contracts to workers in non-standard forms of employment. However, getting stuck in such forms of employment may be detrimental to individual workers if it prevents them from delivering their full potential. For the economy at large this may have consequences for the overall level of skills in the workforce.

A revised Directive could establish the right for a worker who is not employed on a permanent basis to request another form of employment after achieving a certain degree of seniority with his/her employer, and to receive a reply in writing within a set timeframe from the employer. Employers could be required to justify any refusal of such request.

5.3.3. *Right to a maximum duration of probation period:*

A revised Directive could limit a maximum duration of any probation period. This measure should allow enough flexibility for the employer to ensure that the worker is suitable for his or her position while ensuring enough security for the worker by setting an upper limit on the duration of the probation period.

5.4. **Enforcement**

The means of redress and sanctions could be modified in order to improve compliance with the information obligations under the Directive and, thus, its effectiveness.

In almost one third of Member States the only available means for redress are civil or labour courts and these may be considered ineffective as a means of enforcement when the only available remedy is damages.³⁸ More effective approaches seem to be the use of injunctions to require employers to provide the missing information or favourable presumptions of an employment relationship in case of missing written statements could be provided for, proportionate to the missing elements.

5.5. **Impact of measures**

Further elaboration on the legal, social and economic background of the various possible avenues for EU action is indicated in the accompanying Analytical Document. In the case that the Commission decides to put forward a legislative proposal, the cost and benefits of the proposed measures will be assessed in a detailed impact assessment. In order to feed the development of the next stage of its work, the Commission would welcome the social partners' views on the potential impacts of the measures identified above.

³⁸ *Refit Study to support evaluation of the Written Statement Directive (91/533/EC)*, Rambøll Management Consulting, March 2016, page 80.

6. NEXT STEPS

The Commission will take into account the results of this consultation in its further work to develop a legislative proposal to improve the information of workers about their working conditions and to set up new minimum rights for all workers. It may suspend such work if the social partners decide to negotiate between themselves and communicate a decision to do so **within six weeks** of the launch of this consultation. In the event that the social partners do not decide to start negotiations, the Commission will consider bringing forward a proposal to modify and/or complement the existing legislation, which would be supported by an impact assessment.

7. AIM OF THE CONSULTATION

The Commission therefore seeks the views of the social partners on the following questions:

1. What are your views on the possible avenues for EU action and the elements set out in section 5 of this document?
2. Are the EU social partners willing to enter into negotiations with a view to concluding an agreement with regard to any of the elements set out in section 5 of this document under Article 155 TFEU?