

February 2018

Transparent and predictable working conditions

Impact assessment (SWD(2017) 478, SWD(2017) 479 (summary)) of a Commission proposal for a directive of the European Parliament and of the Council on transparent and predictable working conditions in the European Union (COM(2017) 797)

Background

This note seeks to provide an initial analysis of the strengths and weaknesses of the [European Commission's impact assessment](#) (IA) accompanying the above-mentioned [proposal](#), submitted on 21 December 2017 and referred to the European Parliament's Committee on Employment and Social Affairs. The proposal updates and replaces [Directive 91/533/EEC](#) (the Written Statement Directive, hereafter WSD), which gives employees the right to be notified in writing of the essential aspects of their contract or employment relationship. Taking into account that the labour market has evolved and new forms of work¹ have developed in recent years, the [REFIT evaluation of the WSD](#) found that there is a need to modernise and complement the existing obligations to inform workers of their working conditions, and to create minimum standards to ensure that each worker benefits from more clarity regarding his/her working terms, irrespective of the type of employment relationship they have. According to the IA, the initiative would set a framework within which new forms of work could develop, offering fairer protection for workers, a clearer legal framework and a more level playing field for companies in the internal market (IA, pp. 6-7).

The proposal, which is part of the [2018 Commission work programme](#), is a follow-up to the [European Pillar of Social Rights](#). In line with the Treaty on the Functioning of the European Union (TFEU), the Commission conducted a two-stage consultation with the social partners on the revision of the WSD. There was no agreement among the social partners to enter into direct negotiations on concluding an EU-level agreement.

The European Parliament has stressed the need to address the developments of the labour market and protect workers in all forms of employment. It has called for a framework directive on decent working conditions and for a revision of the WSD to take account of new forms of employment.²

Problem definition

The IA report notes that since the adoption of the WSD in 1991, the labour market has evolved significantly. There is a growing diversity of forms of work, which has led to gaps in the protection of workers in new and non-standard forms of employment; this is the main problem that the initiative seeks to address (IA, pp. 5-7). The

¹ Examples include casual work, telework, employee-sharing, zero-hours contracts, on-demand work, voucher-based work, job sharing and ICT-based mobile work. For further information on relevant new and non-standard forms of work, see Annex 6 of the IA report.

² See [European Parliament resolution of 19 January 2017](#) on A European Pillar of Social Rights (call for a framework directive on decent working conditions in all forms of employment); [European Parliament resolution of 4 July 2017](#) on Working conditions and precarious employment.

WSD provided a possibility for the EU Member States to use [exemptions](#) for marginal situations.³ However, as the number of these situations has grown in recent years, and the WSD does not cover all the new and non-standard jobs (for example, voucher-based, on-demand, domestic or marginal part-time jobs), there is a risk that people doing such jobs will not be fully aware of their employment conditions or their rights (IA, p. 13). The IA notes that the proportion of non-standard work was around 25 % of the workforce in the EU-28 in 2016 (p. 17). An estimated number of those excluded from the right to have a written statement is 2-3 million workers,⁴ many of whom are younger, less educated and lower-skilled individuals doing non-standard jobs. Women are over-represented among non-standard workers (IA, p. 13).

According to the IA report, the problem drivers are (i) labour market drivers (for example, growth of non-standard employment) and (ii) regulatory drivers (for example, the diversity of national requirements concerning the written statement, due to the possibility to use the exemptions under the WSD; different national definitions of a 'paid employee'; issues of enforcement; and gaps in the EU social legislation) (IA, pp. 9-21).

According to the findings made during the REFIT evaluation of the WSD and the feedback from the [public consultation](#) on the European Pillar of Social Rights, the insufficient protection of the working conditions of a growing number of workers manifests itself in various ways, for example, workers do not receive the written statement at all or the information included in the written statement is provided too late and/or is inadequate. The two-month deadline for providing the written statement is considered a problem because it creates transparency issues and increases the risk of undeclared work or rights abuse. In addition, the standard information package concerning the essential elements of the employment relationship may not be sufficient for migrant workers, for whom it should also include information about social security, for example (IA, pp. 9-15). Furthermore, workers may also have problems accessing mandatory training. The enforcement mechanisms do not ensure effective implementation of the legal provisions, and some working relationships are affected by an increased level of unpredictability and instability (IA, pp. 15-20). The differences among the Member States' national provisions concerning new and non-standard work (resulting from the use of the exemptions provided in the WSD and the different definitions of a 'paid employee') are an obstacle to the WSD's effectiveness (IA, pp. 7-13). Other issues related to the new forms of work include: variable work schedules, exclusivity and incompatibility clauses, which prevent workers from taking on any other work; a limited opportunity to transit from non-standard employment to a more permanent job; and unjustifiably long probation periods (IA, pp. 18-20).⁵

The problem has negative impacts not only on workers, but also on companies. Among the examples listed in the IA report are exposure to unfair competition, lower commitment of hired-in workers and risks posed by temporary work to productivity growth. The IA also describes impacts on the Member States, mentioning, for example, the risk of undeclared work and its link with public finances; higher social security spending; and the risk of abuse of workers' rights in case of absence of a written statement. In addition, the IA discusses some broader impacts resulting from non-standard work in society, such as delayed parenthood and exclusion from the housing market (IA, pp. 21-26).

For the baseline scenario, the IA presents a chart on the evolution of non-standard work over the 1995-2016 period and a projection for the 2017-2080 period by type of contract (IA, p. 27). The IA stresses that the steady increase of non-standard work indicates that the trend is structural, not cyclical. Economic, social and technological developments may continue to feed the increase in various forms of non-standard work and the further diversification of new forms of employment. Therefore, the number of workers not covered by the WSD

³ Article 1(2): 'Member States may provide that this Directive shall not apply to employees having a contract or employment relationship (a) with a total duration not exceeding one month, and/or with a working week not exceeding eight hours; or (b) of a casual and/or specific nature provided, in these cases, that its non-application is justified by objective considerations'.

⁴ See the [Study to support the Impact Assessment on the review of the Written Statement Directive, CSES and PPMI](#), December 2017.

⁵ See also M. Remáč, [The Written Statement Directive](#), implementation appraisal, EPRS, April 2017.

is likely to grow in the next 20-30 years (IA, pp. 26, 34). According to the IA, it is 'likely' that the national regulatory responses to new and non-standard forms of work will continue to be diverse (p. 27) and a lack of EU minimum requirements would sustain and 'probably deepen divergences' across the EU, which would have a negative impact on the equal treatment of workers and may lead to unfair competition and a risk of social dumping within the internal market (pp. 34-35). It would have been useful to have more information on these conclusions. It would also have benefited the analysis if the report had explained the internal market aspects (equal treatment, mobility and migrant workers, posting of workers, risk of social dumping, and a level playing field for companies) in greater detail.

Objectives of the legislative proposal

The **general objective** of the Commission proposal is to 'promote more secure and predictable employment while ensuring labour market adaptability and improving living and working conditions' (IA, p. 33).

The IA identifies four **specific objectives**: 1) 'to improve workers' access to information concerning their working conditions'; 2) 'to improve working conditions for all workers, notably those in new and non-standard employment, while preserving scope for adaptability and for labour market innovation'; 3) 'to improve compliance with working conditions standards through enhanced enforcement'; and 4) 'to improve transparency of the labour market while avoiding the imposition of excessive burdens on undertakings of all sizes' (IA, pp. 33-34).

The IA presents the **operational objectives** in the context of the preferred option (p. 68) and the monitoring section (pp. 80-84), as required by the [Better Regulation Guidelines](#). The operational objectives are:

- in relation to specific objective 1: (i) 'increase the number of workers receiving written information on working conditions'; (ii) 'improve the quality of information on working conditions received in writing'; and (iii) 'improve the timeliness of working conditions received in writing';
- in relation to specific objective 2: (iv) 'increase the predictability of work schedules'; (v) 'increase transitions from non-standard to standard employment'; (vi) 'improve the match between willingness to work and the work available (decrease underemployment)'; (vii) 'decrease of abuse of probation periods'; and (viii) 'facilitate take-up of mandatory training';
- in relation to specific objective 3: (ix) 'facilitate identifying and resolving incompliance'; and (x) 'increase incentives for compliance';
- in relation to specific objective 4: (xi) 'company level simplification, increase coherence and facilitate creation of written statements'; (xii) 'labour market simplification, increase the consistency of written statement requirements across the EU labour markets'; and (xiii) 'facilitate workers' mobility'.

The objectives seem to be largely based on the problem definition and the REFIT evaluation. According to the Better Regulation Guidelines, objectives should be specific, measurable, achievable, realistic and time-bound (S.M.A.R.T.) ([Better Regulation Toolbox, Tool #16](#)). It can be noted that the defined objectives seem rather broad and could have been formulated in a more specific and measurable manner; nor are they time-bound.

Range of options considered

The IA report presents four policy package options (PP), including the baseline scenario (pp. 52-53). The range of options appears to be sufficiently broad, providing three options in addition to the baseline. However, one of the options (PP C) does not address the problem definition, which establishes that the new initiative should apply to all workers. The IA report explains that this option has been kept 'in order to examine what the impact of the new rights would be if the scope of the directive remained unchanged' (p. 53). This could have been substantiated further, as the IA report does not seem to provide sufficient justification for keeping option C.

PP A (Baseline scenario): The existing WSD continues to apply (IA, pp. 34-35, 53).

PP B (Extended personal scope and strengthened requirements): This option comprises REFIT measures such as extending the content of the written statement (to include remuneration, working time, social security, training entitlement, probationary period, written statement templates and additional information for posted workers), shortening the deadline (the written statement should be provided on the first day of the employment relationship at the latest) and improving enforcement (legal presumptions of working terms in case of missing information, and an early settlement mechanism⁶). Furthermore, the personal scope would be extended by removing the exemptions in the existing WSD. However, Member States may exclude employment relationships of up to eight hours per month from the scope.⁷ The jurisprudence of the Court of Justice of the European Union (CJEU) would be taken into account in the definition of a 'worker'.⁸ No substantial new rights would be proposed (IA, pp. 45-53).

PP C (Strengthened requirements and new minimum rights): PP C would not change the personal scope of the existing WSD. This package comprises REFIT measures, similar to PP B (except for the extension of the personal scope), and proposes new rights. Concerning predictability, employers should notify workers of the periods of hours and days within which they may be requested to work; they also have to inform workers of a work assignment in advance within a reasonable period (the length of this period is not defined). The maximum length of probation would be six months, unless there is a justification for a longer period. The package would also provide workers a right to mandatory training provided by their employer. Exclusivity and incompatibility clauses cannot be applied, which means that employers cannot prohibit workers from working for another employer outside the working schedule fixed by the first employer, unless it is justified by legitimate reasons (e.g. business secrets). Workers would also have a right to request a more predictable and secure form of employment and receive a reply from the employer to this request (IA, pp. 45-53).

PP D (Extended personal scope, strengthened requirements and new minimum rights) (**preferred option**): This package of measures would be a combination of PP B and PP C (IA, pp. 45-53).

Scope of the Impact Assessment

The assessment analysis is largely based on the results of an external study (IA, p. 54).⁹ In the IA report, social, economic and legal impacts as well as benefits and costs of the policy package options have been assessed. The IA notes that environmental impacts do not appear to be significant. The assessed impacts of the options are presented as regards (i) workers and working conditions (social impacts); (ii) employers, including competitiveness and productivity (economic impacts); and (iii) labour markets, public finances, fundamental rights, application and enforcement (broader impacts) (IA, p. 54). The options have been compared with the criteria of effectiveness, efficiency and coherence (IA, p. 65) as required in the Better Regulation Guidelines.

The preferred option PP D would, according to the IA, address all the defined objectives (pp. 67-68). According to the IA, significant positive impacts are expected for workers. For example, 2-3 million workers, currently excluded from the scope of the WSD, would benefit from the protection of the revised directive; 5-31 million workers would receive extended information on their prospective working conditions; 4-7 million workers would benefit from enhanced predictability (for example, reference hours); 14 million workers are expected to request another form of work; and 91 000-364 000 on-demand workers could work an additional 33-133 million hours per year and obtain an increase in earnings of €355-1 424 million per year (IA, p. 68-69).

⁶ A procedure under which the competent authority can order the employer to issue the missing information and to impose a fine if the information is not provided (IA, p. 51).

⁷ This threshold does not apply 'where no guaranteed amount of paid work is predetermined before the employment starts' (IA, p. 46). Furthermore, 'when work is performed for a household, Member States may consider that natural persons belonging to this household are not subject to employers' duties for the purposes of responding to a request for a new form of employment, the right to mandatory training and are not subject to redress based on favourable presumptions' (IA, p. 72).

⁸ The revised WSD would cover any 'natural person who for a certain period of time performs services for and under the direction of another person in return for remuneration' (IA, p. 46).

⁹ Ibid., CSES and PPMI study (2017).

The preferred option entails costs for companies. The IA report notes that there are rather modest administrative costs of the preferred option for employers compared to overall personnel costs. Issuing a new written statement or responding to requests for a new form of employment would cost €18-153 for SMEs and €10-45 for larger companies. One-off costs concerning familiarisation with the provisions of the new directive would amount to around €53 for SMEs and €39 for larger companies. Other costs would be incurred for legal advice and revised scheduling systems, for example. The IA points out that costs would accrue in particular to employers who use non-standard forms of work (e.g. in agriculture, construction and hotels) or have not applied predictability measures. The benefits for the employers would relate to the increased uniform minimum standards, the prohibition of the exclusivity clause (secondary employers would have more workers available), the provision of templates, higher staff loyalty, improved relations with workers and better resource planning. The IA estimates that the proposed measures could also be beneficial to company-level productivity (IA, pp. 69-71). As regards the concerns voiced by employer organisations about the impacts the initiative might have on job creation and flexibility, the IA explains that the proposed measures have been assessed from the point of view of unintended effects, such as limitations to flexibility (for example, the requirement to give reasonable advance notice to workers with variable working schedules) and recourse to undeclared work (for example domestic work). The IA explains that these concerns have been taken into account when considering the measures (including mitigating the risks) (IA, pp. 72-74).

The IA expects that undeclared work would decrease, and estimates the value of undeclared work that could be incorporated into the formal economy to be €40-120 million per year. Consequently, tax revenues would increase by €8-25 million per year and social security payments¹⁰ see an annual decrease of €4-24 million. Other highlighted benefits for the Member States include better work-life balance and well-being, enhanced training of the workforce, and improved productivity and growth of the national economies. Furthermore, the initiative is expected to support mobility in EU national labour markets and in the internal market. Positive effects for social cohesion and fundamental rights are also mentioned (IA, pp. 74-76).

The main text does not provide information about the basis of the estimates, although Annex 4 does provides related assumptions and calculations. The IA report points out that there are uncertainties concerning the estimates. For example, the IA notes the difficulties regarding both the availability of consistent and comparable data and the estimates on the correlation between undeclared work and payments of social benefits. The main text describes the impacts with a rather positive emphasis, and at times the analysis would have benefited from a more detailed discussion. For example, regarding the impact on public finances and the scenario involving a reduction of social security payments, it would have been relevant to discuss all the elements mentioned in Annex 9, including also the possible increase in legitimate social security claims on account of workers' improved awareness of their rights (p. 210).

Subsidiarity / proportionality

The legal basis of this initiative is Article 153(1)(b) and 153(2)(b) TFEU. According to the REFIT evaluation, the current WSD has achieved added value but needs to be reviewed. The IA report explains that the weaknesses of the WSD may lead to precarious employment relationships or conditions, increased risks to the health and safety of workers and harmful social competition within and across Member States. All these factors could affect the quality of the workforce, the relative competitiveness of employers, companies and Member States, and the functioning of the internal market. The IA notes that the revision of the WSD can be done only at EU level. Furthermore, EU action is required in order to achieve the defined objectives, taking into account the national regulatory differences between the Member States. The IA report notes that minimum standards would be used, which would leave scope for national-level decisions (IA, pp. 30-33). It discusses the subsidiarity principle in

¹⁰ According to Annex 9, the reduction refers to fraudulent social security claims linked to undeclared work or bogus self-employment and additional working hours by on-demand or zero-hour contract workers in their possible second job with another employer (p. 210).

relation to the initiative in general. It should be pointed out that during the consultation with the social partners, some concerns were voiced by certain employer organisations regarding the subsidiarity and proportionality principles.

The IA report states that the proportionality principle has been taken into account by giving due consideration to social partners' views and to practices already developed in the Member States (pp. 79-80). Mitigating measures and compliance support have also been included in the proposal (IA, pp. 76-78). The IA considers costs to be reasonable and expects longer-term benefits in terms of more secure employment, simplified procedures for workers and employers, and improved living and working conditions. The IA report is of the view that the revision of the WSD is a proportionate approach to addressing the defined problem (IA, pp. 79-80).

No reasoned opinions from the national parliaments had been submitted at the time of writing. The deadline for the subsidiarity check for the national parliaments is 6 March 2018.¹¹

Budgetary or public finance implications

According to the explanatory memorandum of the proposal, implementing this initiative would not require additional resources from the EU budget (p. 10). The IA report expects that the Member States will incur some costs in adapting their legal frameworks and ensuring enhanced enforcement. On the other hand, it predicts an increase in tax revenues and a decrease in social security payments as a result of implementing the proposed measures (IA, pp. 62-65).

SME test / Competitiveness

SMEs and micro-companies have been taken into account when making the assessment, as required by the Better Regulation Guidelines (Toolbox, [Tool #22](#)). The SME test is presented in Annex 3 (IA, pp. 104-113). The revised WSD will apply to all employers, with no exemptions for micro-companies and SMEs. The IA report notes potentially higher costs for SMEs than for larger companies, per written statement and in familiarisation costs. However, overall impacts will depend on a company's business model rather than size (e.g. extent of use of non-standard contracts). On the other hand, the IA report points out that written statement templates could facilitate SMEs' compliance. It furthermore proposes some mitigating measures for SMEs, such as a longer deadline in case of request for a new form of employment, which is expected to reduce the costs the SMEs would face. In Annex 4, the IA report provides explanations of the methodology used for assessing the impacts on SMEs.

Impacts on competitiveness are only briefly dealt with in the main text of the IA report, which mentions that there would be no such significant impacts in relation to third countries, and that there would be costs in particular for employers and sectors (such as agriculture, construction and hotels) using non-standard forms of employment. The IA report argues that there is little competition in these sectors with third countries based on labour costs (IA, p. 71). It can be noted that the internal market aspect could have been discussed in this context, in line with the section on the problem, where enhancing the functioning of the internal market was mentioned as one of the arguments for this initiative. Furthermore, the possible positive effects of the preferred option mentioned earlier, such as the predictability of working conditions and its link to internal market mobility and a more motivated, productive and skilled workforce (through access to training), would have a role when assessing impacts on competitiveness. In addition, while the IA notes that the diverse national regulatory approaches and unfair competition may affect not only the quality of the workforce, but also the relative competitiveness of companies and Member States and the functioning of the internal market, it would have been useful to have a discussion on these aspects in relation to competitiveness, keeping in mind that this initiative also aims to ensure a more level playing field for companies and fairer competition in the internal market.

¹¹ See, [Platform for EU Interparliamentary Exchange \(IPEX\)](#).

Simplification and other regulatory implications

The initiative, which is part of the REFIT programme, aims to reduce regulatory costs and simplify existing legislation. The IA notes that the preferred option includes the main observations and proposed measures in the REFIT evaluation, which aims to improve the effectiveness of the WSD. As regards the new obligations and costs, the IA proposes mitigating measures, such as electronic templates for written statements, an extended deadline for SMEs and microbusinesses regarding replies to requests for another form of employment, and easily available familiarisation information for workers and employers. The REFIT cost savings are estimated to be €230 million regarding one-off costs (written statements, familiarisation) and at least €38 million regarding recurrent costs (written statements, compliance with administrative requirements) (IA, pp. 76-78). As regards simplification, the IA explains that the extended scope of the revised directive would facilitate the legal clarity and coherence of written statements and the legal framework across the EU, which would ease cross-border business and mobility (IA, pp. 78-79).

Quality of data, research and analysis

In Annex 1, the IA provides information on the supporting studies and external expertise that have been used in its preparation, such as the REFIT evaluation, the report on the public consultation and the commissioned study, performed by CSES and PPMI (pp. 88-89). In addition, the IA mentions that it has drawn on expert advice from the European Centre of Expertise (ECE) and the European Labour Law Network (ELLN) (IA, pp. 89). The IA does not provide links to all of the documents generated in the above consultations and studies, which compromises its transparency. The annexes present useful information on issues such as non-standard work in the Member States, the EU social *acquis*, assumptions and calculation methods for the impact assessment and legal impacts in the Member States. The impacts of the preferred option tend to be presented with a strong positive emphasis. The IA openly stresses that whenever quantification was possible, numbers and values were sometimes presented as broad ranges on account of data uncertainties (pp. 54, 131). In some parts of the main text, a more detailed explanation would have been useful, for example, regarding the possible impacts on public finances (social security payments), competitiveness and the internal market. It can also be pointed out that one of the policy package options (PP C) does not appear to be in line with the problem definition.

Stakeholder consultation

Annex 2 provides information on the stakeholder consultation. In the preparation of the initiative, two Treaty-based consultations of the social partners (between April and June 2017 and between September and November 2017), one consultation on the REFIT evaluation (revision of the WSD) (between January and April 2016) and one public consultation on the European Pillar of Social Rights (between March and December 2016) were conducted. The social partners' consultation yielded mixed views on further EU measures in this field. As regards the revision of the WSD, employers were largely opposed to the proposal to extend the scope and insert a definition of 'worker', to grant new minimum rights, to amend the information package and to reduce the two-month-deadline. When stating their concerns, they pointed out the possible negative impacts on flexibility and job creation, and stressed the proportionality and subsidiarity principles. On the other hand, the trade unions supported further EU measures in this field. At the two-stage consultation, the social partners did not agree to enter into negotiations to propose their own agreement. The views of the social partners on the proposed measures are presented in Annex 2, but not in the options in the main text. The annex presents only the results of the social partners' consultation. The other consultations are referenced in the annex, but no links are provided to the documents.

Monitoring and evaluation

The IA explains that monitoring of implementation is carried out in the context of labour market developments. It presents a table describing the specific objectives, the operational objectives, the indicators and the data sources. In order to avoid generating an administrative burden, the defined indicators will largely rely on existing data sources, such as Eurostat, Eurofound, implementation reports and labour inspection checks. The benchmark against which progress will be measured is the baseline (PP A) defined in the IA (pp. 80-85).

Commission Regulatory Scrutiny Board

The European Commission's Regulatory Scrutiny Board (RSB) issued a [positive opinion with reservations](#) on a draft version of the IA report on 1 December 2017. The RSB drew attention to the lack of clarity of the initiative as regards the personal scope. It also considered that the report should have been more specific regarding its 'rationale and expected benefits of the measures in terms of upward convergence towards better working conditions'. A further observation concerned the need to better substantiate the reasons for selecting or discarding different options. The report should also have discussed more about risks and possible unintended consequences of the measures. The IA report explains in Annex 1 how the criticisms made by the RSB have been addressed (pp. 86-88). It can be noted that the RSB's remarks have largely been taken into account in the final version. However, more substantiated arguments could have been provided for keeping PP C as one of the options.

Coherence between the Commission's legislative proposal and IA

The legislative proposal appears to be coherent with the recommendations expressed in the IA.

Conclusions

The IA makes a clear link between the problem description and the defined objectives, in line with the Better Regulation Guidelines. As for the options, one option (PP C) does not address the problem definition and the IA report could have substantiated better why it has been kept. SMEs and micro-companies have been duly taken into account in the assessment, and comprehensive stakeholder consultations have been conducted. It can be pointed out that the social partners have different views on the initiative. In the analysis of the impacts, a more detailed explanation would have been useful in some parts in the main text, for example, regarding public finances, competitiveness and the internal market. As regards the quantification of impacts, the IA openly stresses that the amounts and values are sometimes presented as broad ranges due to data uncertainty and ranges of assumptions. Finally, it would have been useful and more transparent if there had been links to the documents mentioned in the IA, in particular those generated by the consultations and supporting studies.

This note, prepared by the Ex-Ante Impact Assessment Unit for the European Parliament's Committee on Employment and Social Affairs, analyses whether the principal criteria laid down in the Commission's own Better Regulation Guidelines, as well as additional factors identified by the Parliament in its Impact Assessment Handbook, appear to be met by the IA. It does not attempt to deal with the substance of the proposal. It is drafted for informational and background purposes to assist the relevant parliamentary committee(s) and Members more widely in their work.

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