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Newsletter EUSOCP project

Issue III – January 2018



UNIVERSITY OF AMSTERDAM

Erasmus+ Jean Monnet Action

European Labour Law Perspectives - Enhancing the Social Pillar

Project Reference: 587919-EPP-1-2017-1-NL-EPPJMO-PROJECT

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Within the Jean Monnet action EUSOCP, the Labour Law Departments at the University of Amsterdam and the University Carlos III-Madrid are issuing a monthly newsletter summarizing the development of the EU Pillar of Social Rights and including comments on EU legislation and case law in the field of Labour and Social Security Law. The newsletter is available via the following links:

- <http://hsi.uva.nl/en/jean-monnet/test.html>

The European Pillar of Social Rights is divided into three main categories in the field of employment and social policies. Each of these categories contains a number of policy domains, to which different principles are attached. The three categories are:

- Equal opportunities and access to the labour market;
- Fair working conditions (adequate and reliable balance of rights and obligations between workers and employers);
- And adequate and sustainable social protection.

For a further description of the pillar see:

EN: https://ec.europa.eu/commission/priorities/deeper-and-fairer-economic-and-monetary-union/european-pillar-social-rights_en

NL: https://ec.europa.eu/commission/priorities/deeper-and-fairer-economic-and-monetary-union/european-pillar-social-rights_nl

ES: https://ec.europa.eu/commission/priorities/deeper-and-fairer-economic-and-monetary-union/european-pillar-social-rights_es

European Pillar of Social Rights

Commission's proposal on a new Directive for more transparent and predictable working conditions

December 20, 2017

As a direct follow-up to the European Pillar of Social Rights, the European Commission has adopted a proposal for a new Directive for more transparent and predictable working conditions across the EU. The proposal includes a revision of the current Written Statement Directive. If the Commission proposal goes ahead, the Written Statement Directive will be repealed by the new Directive on Transparent and Predictable Working Conditions. The Commission's proposal complements and modernises existing obligations to inform each worker of his or her working conditions. In addition, the proposal creates new minimum standards to ensure that all workers, including those on atypical contracts, benefit from more predictability and clarity regarding their working conditions.

The Commission aims to reduce the risk of insufficient protection of workers by:

- Aligning the **notion of worker** to the case-law of the European Court of Justice.
- Bringing within the scope of the Directive **forms of employment** that are now often excluded. This includes domestic workers, marginal part-time workers or workers on very short contracts, and extending it to new forms of employment, such as on-demand workers, voucher-based workers and platform workers.
- Ensuring that workers are provided with an **updated and extended information** package directly at the start of employment from day one, instead of two months following the starting date as is currently the case.
- Creating **new minimum rights**, such as the right to greater predictability of work for those working mostly with a variable schedule, the possibility to request transition to a more stable form of employment and receive a reply in writing, and the right to mandatory training without deduction from salary.
- Reinforcing the **means of enforcement and redress** as a last resort to resolve possible disagreements.

Read on:

<http://ec.europa.eu/social/main.jsp?langId=en&catId=89&newsId=9028&furtherNews=yes>

Video record of the press conference:

<http://ec.europa.eu/avservices/focus/index.cfm?sitelang=en&focusid=2848>

Report on the impact assessment on the review of the Written Statement Directive

December 20, 2017

The study supporting the Commission's Impact Assessment on the review of the Written Statement Directive (Directive 91/553/EEC) was published in December 2017. The study relies on evidence gathered through review of relevant national and European literature and data, interviews with national stakeholders in all member states, as well as European stakeholders, and an expert panel.

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

- **The Directive does not cover all workers in the EU** as it allows exemptions for employment of less than 8 hours a week or with a total duration not exceeding one month; as well as the employment relationships of a casual/specific nature. In addition, it does not provide a definition of 'a paid employee', creating a 'grey' area between self-employment and subordinate employer-employee arrangements. There is also a lack of clarity in whether some categories of workers (e.g. domestic workers) or some new forms of employment (e.g. on-call work or ICT-based mobile work) are covered by the Directive or not. Not knowing the basic information about their working conditions makes such workers more susceptible to exploitation by their employers.
- **Those workers who do receive a written statement can receive it too late due to the current two-month deadline** requirement for its provision. This increases the likelihood of undeclared work, abuse of workers' rights, and a risk to never receive a written statement if employees are only hired for short term assignments.
- Some workers who are already covered by the Directive are **unable to gain redress or sanctions that would stop their abuse**. Employees feel that the lack of a written statement alone is not enough to start proceedings, the proceedings themselves are often too slow and expensive, and lastly, many employees are afraid their employment may be terminated due to worsened relations with the employer.
- **The information included in the written statement sometimes may be inefficient**. A high number of lawsuits related to the termination of the contracts shows that workers might lack comprehensive information about the applicable national law. Most migrant or low skilled workers lack information about the social security system to which the employer is contributing. This leads to poor social protection of such workers. Finally, the most pressing issue, as indicated by the national experts, is the lack of information about precise working time.
- **The current Directive does not correspond to the needs of atypical employees**, with casual workers being the most vulnerable and in need of protection. The information requirements that are stated in the Directive can no longer guarantee basic rights in some types of employment that have emerged or grown since 1991: knowing an average number of likely working hours, having a reference period of hours between which they could be asked to work, and receiving a minimum notice before the start of work. Work unpredictability and insecurity leads to unstable and low

income as well as a lack of social protection, poor health, and a worse work-life balance. Poor working conditions are amplified by some casual workers having exclusivity clauses in their contracts. Having no right to request a more standard form of employment in the event of relevant job openings traps casual workers in poor working conditions.

- **All these problems create negative socio-economic effects.** Casual and atypical work is characterised by poor social protection, little or no access to benefits, little job security, no predictability, less job satisfaction, lower wages and worse health than other employees. Furthermore, as the extent to which atypical forms of employment are actually covered by the scope of the Directive varies greatly between countries. This leads to the fragmentation in the labour market across the EU, lower level of transparency and barriers to the free movement of labour in the EU.

The study concludes that an EU revised directive will help fighting precarious working conditions and the abuse of workers' rights in the future. In addition, the non-standard forms of employment are likely to continue to grow, although it is difficult to say with certainty, as it will depend on the degree of flexibility and regulation of the labour market. Thus, it could be also assumed that the likely future growth in new and atypical forms of employment would have an upward effect on the incidence of workers' rights abuse. In addition, it is possible that new and atypical forms of employment associated with precariousness might spread geographically. This would mean that without an introduction of minimal safeguards, the member states newly introducing such forms would experience the expected associated workers' rights abuse. This provides an additional argument for improving the working conditions of casual and atypical workers now, so that member states newly adopting such employment forms would set decent working conditions from the start of the employment relationship.

Read on: https://webmail.uva.nl/owa/redir.aspx?C=i_byvh-u6L743eLQdb2bqoEB5AasXSqCXzFEVylBg8o1w1NA627VCA..&URL=http%3a%2f%2fbt.it.ly%2fwSD-PPMI

European Reports/Studies

EUROFOUND blogs on wage developments and inequality

January 25, 2018

In a summarising blog, published by Eurofound, it is said that the growth in average (nominal) pay of employees has accelerated in recent years in EU countries after the slump following the economic crisis. Similar developments show up in data on collectively agreed wages. However, higher wage growth figures do not automatically mean that all employees benefit equally. The data illustrate the vast differences across Europe of the minimum wage rates and an included graph shows the nominal growth in statutory minimum wages. At EU-level, the discussion about the necessity of a minimum wage intensified in 2017. A second blog looks after the income inequalities and disparities in Europe. EU-wide income inequality declined notably prior to 2008, driven by a strong process of income convergence. The Great Recession broke this trend. After 2008, income convergence has been sluggish, while inequality within many countries increased significantly.

Read on: [in English \(1\) ...](#) [in English \(2\) ...](#)

Violations related to health, social security and social protection in 2017

January 24, 2018

The European Committee of Social Rights (ECSR) published its 2017 conclusions in respect of 33 states parties (European Social Charter (1961) and the revised European Social Charter (1996)) showing 175 violations (36%), 228 situations of conformity (47%) and 83 cases (17%) where the Committee was unable to assess the situation due to lack of information, known as ‘deferrals’. The Committee concluded that, in many countries in Europe, poverty level is far too high and the measures taken to remedy this fundamental problem are insufficient. In particular, in many states the social security benefits (notably in respect of unemployment and old age) are well below the poverty level, even when taking into account social assistance, which remains too low. The conclusions adopted by the ECSR in the framework of its reporting system can be consulted using the European Social Charter HUDOC Database.

Read on: [in English ...](#) The link to the HUDOC Database: [in English ...](#)

Negotiations at Ryanair not self-evident

January 24, 2018

Several Ryanair pilots' unions have demanded a joint meeting with management, saying individual talks on a new collective bargaining system were not satisfactory. In a letter sent by the European Cockpit Association and signed by 11 trade unions, the pilots also demand that Ryanair commit by March 1 to introduce permanent direct employment contracts in accordance with the local laws of the country where staff are based. Ryanair, in a statement, refused the idea of meeting unions collectively. In the past, the company's practice was to deal with pilots from its 87 bases separately.

Read on: [in English ...](#)

Quality of life 2016 full report online

January 23, 2018

The complete outcomes of the European Quality of Life Survey (EQLS), a tool established by Eurofound for monitoring and analysing quality of life in the EU, are now online. The overview report presents the findings for the EU Member States. It uses information from previous survey rounds, as well as other research, to look at trends in quality of life against a background of the changing social and economic profile of European societies. Ten years after the global economic crisis, it examines well-being and quality of life broadly, to include quality of society and public services. The findings indicate that differences between countries on many aspects are still prevalent – but with more nuanced narratives. Each Member State exhibits certain strengths in particular aspects of well-being, but multiple disadvantages are still more pronounced in some societies than in others; and in all countries significant social inequalities persist.

Read on: [in English ...](#)

World employment social outlook – Chapter 2 on Europe

January 22, 2018

The ILO published a report with a forecast on employment trends. Chapter 2 on Europe

comes up with several graphs and statistics. The business cycle has been closely synchronised across European countries, with the majority of economies expected to see slightly slower GDP growth in 2018, after a strong rebound in 2017. The unemployment rate is projected to have dropped from 9.2% in 2016 to 8.5% in 2017, the lowest rate since 2008. But, while employment has been expanding since 2015, wage growth remains subdued, constraining further improvement in aggregate demand and, in turn, in the labour market.

Read on: [in English ...](#)

EU Case Law

Uber is a transport service, not a tech company

December 20, 2017

ECJ 20 December 2017 (C-434/15) Asociación Profesional Élite Taxi/Uber Systems Spain
SL

In this case the CJEU had to decide whether Uber Systems (Uber) is a transport service or an 'information society service'. The relevance of the question is that in the first case, Uber falls under Article 58 (1), TFEU and therefore is exempted from the scope of Article 56 TFEU, directive 2006/123 and directive 2000/31. National law may in that case require prior administrative authorization in order to provide the services, without being in contravention with European law.

The Uber activity at stake is the service consisting of connecting a non-professional driver using his or her own vehicle with a person who wishes to make an urban journey. It is a fact that neither Uber nor the non-professional drivers concerned have the licenses and authorizations required for taxi services under the relevant local law. Elite Taxi, a professional association of taxi drivers who initiated the national proceedings, claims that Uber infringes the applicable national legislation in force and amounts to misleading practices and acts of unfair competition.

The CJEU has decided that an intermediation service as provided by Uber in this case, must be regarded as being inherently linked to a transport service and, accordingly, must be classified as 'a service in the field of transport' within the meaning of Article 58 (1) TFEU. In this ruling, the CJEU first established that the Uber service at stake in principle is a separate service from a transport service and in principle meets the criteria for classification as an 'information society service'. However, the service at stake is more than an intermediation service connecting the non-professional driver with the person who wishes to make an urban journey. The main element of this combined service is a transport service.

This is because the relevant service is not only intermediating but simultaneously offers urban transport service which it renders accessible through software tools. The CJEU bases this judgement on the following facts: (i) without the app, the drivers would not be led to provide transport services and the person who wish to make the urban journey would not use the service provided by the driver and (ii) Uber exercises decisive influence over the conditions of the service. This decisive influence consists, inter alia, in (a) Uber determining at least the maximum fare via the app, (b) receives that amount from the client before paying part of it to the non-professional driver and (c) exercises a certain control over the quality of the vehicles, the drivers and their conduct that can (d) under circumstances lead to their

exclusion.

The conclusion of the CJEU is supported by its earlier case law stating that the concept of 'services in the field of transport' includes not only transport services in themselves, but also any service inherently linked to any physical action of moving persons or goods from one place to another. The CJEU decision is in line with the conclusion of the Advocate General of 11 May 2017.

Although this case is not an employment law case, the decision is nevertheless relevant. First of all, it gives guidance regarding the sector that Uber belongs to, which can be relevant for industry-wide collective labour agreements. Secondly, the CJEU's conclusion that the service at stake is more than an intermediate service can be of relevance for the question how Uber's position is to be qualified in an employment law perspective.

Read the full judgment on:

<http://curia.europa.eu/juris/document/document.jsf?jsessionid=9ea7d0f130de4f7685550dbe46c6be078ef642ebf881.e34KaxiLc3eQc40LaxqMbN4PaNyPe0?text=&docid=198047&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=415646>

Working Time

November 29, 2017

[ECJ 29 November 2017 \(C-214/16\) Conley King v The Sash Window Workshop Ltd and Richard Dollar](#)

This decision concerns the interpretation of Article 7 of Directive 2003/88/EC on the organisation of working time. More specifically, it is about the workers' right to annual holiday pay and the qualification of the employment relationship.

The case deals with the case of a worker (Mr. King) who worked for the company Sash Window Workshop ('Sash') on the basis of a self-employed commission contract from 1 June 1999 until his retirement on 6 October 2012. During that period, when he took holiday leave, it was unpaid. When Mr. King's retirement was approaching, he sought to recover payment for unpaid taken and not taken annual leave for the entire period of his employment at Sash. Sash rejected the claim by stating that Mr. King was not entitled to any paid annual leave because he had the status of a self-employed worker. Mr. King brought a claim to the Employment Tribunal. The tribunal considered Mr. King to be a 'worker' within the meaning of Directive 2003/88. On appeal, the Court of Appeal of England and Wales expressed its doubts concerning the interpretation of the relevant EU law and decided to refer several questions on preliminary ruling to the CJEU for a preliminary ruling. A ruling on the compatibility of the UK implementation legislation and the WTD was asked on two accounts. Firstly, according to UK law annual leave cannot be transferred to a consecutive year. Secondly, the Employment Tribunal may only hear a complaint if the employer has a) refused an employee to exercise his or her right to annual leave or b) failed to pay remuneration during that period. As mentioned before, Mr. King had in part not exercised his right to annual leave.

The first question wishes to inquire whether Article 7 of Directive 2003/88 and the right to an effective remedy must be interpreted as a meaning that, in the case of a dispute between a worker and his employer as to whether the worker had the right to unpaid annual leave under Article 7, precludes the worker having to take his leave first before establishing whether he has the right to be paid in respect of that leave.

The CJEU emphasizes the importance of Article 7(1). Member States can lay down conditions for the exercise and implementation of the right to paid annual leave, but cannot make the existence of the right subject to any preconditions whatsoever.¹ The right to annual leave and to a payment while on leave are two aspects of one single right. This right has two main purposes. Firstly, the main aim is to make sure that the worker, during such a leave, is in a position which is, regarding salary, comparable to periods of work.² Secondly, it has the goal of enabling the worker to rest and enjoy a period of relaxation and leisure.³ Circumstances as uncertainty about being paid when on annual leave will prohibit the worker to fully benefit from the leave as a period of relaxation and leisure, and might discourage a worker from taking his annual leave. The CJEU concludes that any practice or omission of an employer that can discourage a worker from taking annual leave is incompatible with the purpose of the right.

The subsequent questions, examined together, are about whether Article 7 of Directive 2003/88 must be interpreted as precluding national provisions or practices that prevent a worker from carrying over, and when appropriate, accumulating until termination of his employment relationship, paid annual leave rights not exercised in respect of several consecutive reference periods because his employer refused to remunerate that leave.

The CJEU concludes that for reasons beyond his control Mr. King did not take (paid) annual leave. When workers, for reasons beyond their control, have not been able to exercise their right to paid annual leave before termination of the employment relationship, they are entitled to an allowance in lieu under Article 7(2) of Directive 2003/88. The payment should bring the worker in a situation comparable to that he would have been in had he exercised that right during his employment relationship. Mr. King's situation must be distinguished from situations in which workers were unable to exercise their right to paid annual leave due to sickness. In the latter case unlimited accumulation of entitlements acquired during the absence of work during sickness would no longer reflect the purpose of the right to annual leave.⁴

Derogation from Directive 2003/88 must be interpreted narrowly to what is strictly necessary to safeguard the interests of those protected by the derogation.⁵ In this case, derogation would protect the employer's interests. However, protection of the employer's interests is not warranted and does not justify derogation of a worker's entitlement to paid annual leave. In

¹ *Schultz-Hoff and Others*, C-350/06, C-520/06, EU:C2009:18.

² *Lock*, C-539/12, EU:C2014:351.

³ *Schultz-Hoff and Others*, C-350/06, C-520/06, EU:C2009:18.

⁴ *KHS*, C-214/10, EU:C2011:761.

⁵ *Union Syndicale Solidaires Isère*, C-428/09, EU:C2010:612.

sum, if employers did not allow a worker to exercise his right to paid annual leave, the employer must stand the (financial) consequences.

In sum, in this case the CJEU rules that article 7 of the Working Time Directive precludes national provisions or practices that prevent a worker from carrying over and, where appropriate, accumulating, until termination of his employment relationship, paid annual leave rights not exercised in respect of several consecutive reference periods because his employer refused to remunerate that leave.

Read the full judgment on:

<http://curia.europa.eu/juris/liste.jsf?language=en&jur=C,T,F&num=C-214/16&td=ALL>

Free movement of workers – right of residence

November 20, 2017

ECJ 20 November 2017, (C-442/16), Florea Gusa v Minister for Social Protection and Others

This decision concerns the interpretation of Article 7 of Directive 2004/38/EC on the rights of citizens of the Union and their family members to move and reside freely within the territory of Member States.

Note, as a preliminary remark, that Article 6 of the Directive offers EU citizens the right of residence to stay in another member state for up to three months. To be protected by this Article, the citizen should possess a valid proof of identification and cannot be too much of a burden for the social welfare system. When those three months expire, the regime of Article 7 becomes applicable. This regulation includes that a citizen of the Union is allowed to remain longer in a Member State *inter alia* if he/she works as an employee or self-employed person. When someone loses his/her job as an employee or self-employed person he/she loses his/her right of residence. However, Article 7 lays down four exemptions. In this case, exception sub b is relevant. People fall under the sub b exemption when they were employed for more than one year, they involuntarily lost their job and they are registered as a job-seeker with an employment office.

Mr. Gusa was a Romanian citizen who entered Ireland in October 2007. First, his adult children provided his livelihood. From 2008 until 2012 he worked as a self-employed plasterer and paid tax in Ireland. When he was in need of work in 2012 his children have already left Ireland. Mr. Gusa registered at an employment office and applied for a jobseeker's allowance. This application was refused, on the ground that he had not proved that he still had a right to reside in Ireland. Mr. Gusa argued that he still had the status of a self-employed person and therefore met the conditions to rightfully reside in Ireland. He argued that the facts that he does no longer work as a self-employed person, should not affect his status.

The national judge wishes to know whether article 7(3) sub b is meant to exclusively cover those who had an employment relationship, or whether it also applies to persons like Mr.

Gusa, who are in an equivalent position after having worked as self-employed persons for a certain period of time.

In this ruling, the CJEU discusses the exact meaning of the wording: “After having been employed”, as used in the English version of Article 7(3) (b) of Directive 2004/38/EC. The Court considers that this sentence could be read as to refer to previous work as an employee. However, other language versions of the Directive are formulated in more neutral terms and do not support the narrow English interpretation. Based on the settled case law, one language version cannot serve as the sole basis for the interpretation of that provision. Provisions of EU law must be interpreted and applied uniformly. Where there are differences between various versions, the questioned provision should be interpreted by reference to the general scheme and purpose of the rules of which it forms part.⁶

The purpose of Directive 2004/38/EC is to define the conditions that govern the exercise of the right of free movement and residence. The directive distinguishes between economically active and inactive citizens and students, not between the status of employed or self-employed. It would be an unjustified difference in treatment of both categories, as the objective of the provision is to safeguard the right of residence of persons who have ceased their occupational activity because of an absence of work due to circumstances beyond their control.

In short, in this ruling, the CJEU concluded that also nationals of a Member State retain the status of self-employed person for the purposes of Article 7(1)(a) of Directive 2004/38/EC where, after having lawfully resided in and worked as a self-employed person in another Member State for approximately four years, that national has ceased that activity due to a duly recorded absence of work owing to reasons beyond his control, and has registered as a jobseeker with the relevant employment office of the Member State where he is residing.

Read the full judgment on:

<http://curia.europa.eu/juris/liste.jsf?pro=&lgrc=nl&nat=or&oqp=&dates=&lg=&language=en&jur=C%2CT%2CF&cit=none%252CC%252CCJ%252CR%252C2008E%252C%252C%252C%252C%252C%252C%252C%252Ctrue%252Cfalse%252Cfalse&num=C-442%252F16&td=%3BALL&pcs=Oor&avg=&page=1&mat=or&jge=&for=&cid=437890>

Events of the Project

- The seminar: European Labour Law Perspectives – Enhancing the Social Pillar, took place at the University Carlos III-Madrid on 18 & 19 January 2018, Madrid, Spain.

The recordings of the presentations at this Jean Monet Seminar are available at the following links:

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1. https://arcamm.uc3m.es/arcamm_3/item/show/5fd5d75416103ff3185db4aab0b7c357
 2. https://arcamm.uc3m.es/arcamm_3/item/show/a7262a469e9bff226605a8bc26a9b6b0
-

⁶ *Alo and Osso*, C-443/14 and C-444/14, EU:C:2016:127.

3. https://arcamm.uc3m.es/arcamm_3/item/show/ea080356e304ed054ce60a231b0d7006
 4. https://arcamm.uc3m.es/arcamm_3/item/show/fb3050d315154d8ffe923d28d8107e18
 5. https://arcamm.uc3m.es/arcamm_3/item/show/6220166b54f76e83283bdfd1985bdc04
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Future events:

- Summer Course: *European Labour Law Perspectives – Enhancing the Social Pillar*, 20-22 June 2018 at the Law Faculty - University of Amsterdam, The Netherlands. Venue: Nieuwe Achtergracht 166, 1018 WV, Amsterdam.

For information on this event contact:

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or Hanneke Bennaars – j.h.bennaars@uva.nl

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