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REFIT Evaluation of the ‘Written Statement Directive’ (Directive 91/533/EEC)

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Section 1: Executive summary

Directive 91/533/EEC, commonly known as the Written Statement Directive, has been in force for over 25 years. In that time the EU labour market has experienced fundamental change. In this context, we need to determine whether the Directive is achieving its overarching goal for every employee to have a written document containing information on the essential elements of his/her contract or employment relationship and whether employees and employers find the Directive useful and fit for purpose.

The Directive has mainly a social goal. It explicitly intends to provide employees with improved protection against possible infringements of their rights. Indeed, having information about his/her own rights is a pre-requisite for an employee to be able to enforce them. The Directive also seeks to achieve greater transparency on the labour market by ensuring easy identification of the working conditions applicable to specific categories of employees.

The Commission has conducted a REFIT evaluation of the Directive. On top of the general REFIT objective (i.e. make EU law simpler and less costly, the evaluation offered a good opportunity to **verify whether the Directive was still well suited to the EU labour market, where fundamental changes have occurred over the last 20 years.**

The findings of the evaluation are as follows:

- **Compliance**

Compliance with the Directive in Member States and across sectors is medium to high. In national legislation, some apparently minor/medium transposition gaps or inaccuracies have been identified and are being clarified by Commission services. The main issues on implementation are associated with the ‘grey’ area between self-employment and subordinate employer-employee arrangements.

- **Relevance**

The Directive is considered as relevant by all stakeholders, in particular public authorities and both sides among the social partners. This is a striking finding. Although the Written Statement Directive is very modest in its approach – based exclusively on providing information – it is seen as an important piece of EU law. The evaluation also highlighted the relevance of the Directive in a modern labour market where the use of new and atypical forms of employment is growing.

- **Effectiveness**

There is strong evidence that the Directive has been effective in reaching its objectives of protecting workers and achieving greater transparency on the labour market to a significant extent.

Nevertheless, **the evaluation has identified several factors hampering full effectiveness.** In particular, the scope of the Directive is somewhat problematic. It does not cover all workers in the EU as it allows some noteworthy exemptions and gives Member States the

possibility to define whom they consider as ‘a paid employee’ (i.e. to whom the Directive applies).

There is also a significant lack of clarity in practice whether the Directive covers some categories of workers (e.g. domestic workers) or some new forms of employment (e.g. on-call work or ICT-based mobile work). In addition, the enforcement of the Directive could be improved by rethinking means of redress and sanctions in cases of non-compliance. For example, the possibility for an employee to claim compensation if he or she does not receive the written statement is not really used in practice.

Furthermore, the two-month deadline in which notification of information must take place was highlighted by some of the legal experts and stakeholders consulted as an aspect of the Directive that is not supporting the objective of increasing transparency. Moreover, having this deadline may increase the potential for undeclared work or abuse of employee rights.

- **Efficiency**

Regarding efficiency, **the transposition of the Directive does not appear to have increased costs for companies to a significant extent.** In general, the compliance costs are assessed by surveyed employers as appropriate. The assessment of administrative burden caused by the Directive did not reveal any significant differences related to the enterprise's size. The share of SMEs stating that they would still comply with the obligations even in the absence of minimum requirements was in fact slightly higher than the average and for micro enterprises it was only slightly lower than the average. No particular aspects of the obligations stood out as particularly onerous or complicated to comply with.

- **Coherence**

The Directive globally satisfies the test of coherence. On internal coherence, the evaluation showed that there is some discrepancy between the stated goal of the legislation in its preamble i.e. the requirement that every employee must be provided with a written statement except in limited cases and the operational scope of the Directive, which actually allows more than just limited exceptions. On external coherence, the Directive fits well within EU policies and legislation. There is scope for further convergence with the rules covering posted workers, temporary agency workers and trainees.

- **EU added value**

Finally, the Directive brings clear EU added value. **Having minimum standards at EU level on information to employees is essential as it increases certainty for both employers and employees and prevents a detrimental race to the bottom between Member States in terms of working conditions.** It also increases predictability for businesses and facilitates the mobility of workers within the internal market.

Section 2: Introduction

[Directive 91/533/EEC](#) on an employer's obligation to inform employees of the conditions applicable to the contract or employment relationship was adopted in October 1991. This Directive, commonly known as the '**Written Statement Directive**', states that each employee must be provided with a written document containing information on the essential elements of his/her contract or employment relationship, no later than 2 months after the commencement of employment.

Each employee should therefore know in a timely manner for whom he/she works, where he/she works and what the basic conditions of his/her job are.

The present staff working document summarises the findings of the evaluation of the Directive.

- *Justification of the evaluation*

The present evaluation was justified due to two types of considerations.

Firstly, it is justified by **the Commission's evaluation policy**. Indeed, the Directive has not been properly evaluated since its adoption in 1991¹, thus an evaluation was appropriate. The Commission should proportionally evaluate all spending and non-spending activities addressed to third parties².

The evaluation work started before the adoption of the 2015 Commission Better Regulation Guidelines. Nevertheless, these Guidelines do apply to the present evaluation. As they define it, an evaluation is '*an evidence-based judgment of the extent to which an intervention has been (i) effective and efficient (ii) relevant given the needs and its objectives (iii) coherent both internally and with other EU policy interventions and (iv) achieved EU added-value*'.

In addition, the Directive was identified in 2013 as requiring a REFIT evaluation³. The general aim of REFIT is to make EU law simpler, fit for purpose and to reduce regulatory costs, thus contributing to a clear, stable and predictable regulatory framework supporting growth and jobs⁴. Regarding the aim of simplification, the High-Level Group on

¹ Its implementation was, however, scrutinised for each Member State (except Croatia), either by the Commission itself or by means of a study commissioned by the Commission, see report and studies under the Commission webpage 'Working Conditions — Individual Employment Conditions' <http://ec.europa.eu/social/main.jsp?catId=706&langId=en&intPageId=202>.

² Communication of the Commission 'Focus on results: strengthening evaluation of Commission activities', SEC (2000)1051.

³ 'Communication on Regulatory Fitness and Performance (REFIT): Results and Next Steps', COM (2013) 685, annex p. 11. See also the Commission Work Programmes 2015 and 2016, respectively Annex 3 REFIT action No 26 and Annex 2 REFIT initiative No 23.

⁴ For more information follow: http://ec.europa.eu/smart-regulation/refit/index_en.htm.

Administrative Burdens⁵ stated that ‘*the Commission should consider extending the deadlines [contained in the Directive] in combination with giving companies the choice of means on how to inform their employee in the meantime. Furthermore, the Commission should examine the possibility to exempt micro entities from the written obligation following the principles of the Small Business Act without damaging the protection of employees*’⁶.

The second justification for the evaluation concerns the **fundamental changes that have occurred both on the labour market and in EU law over the last 20 years**.

The variety of employment relationships in the labour market has continued to increase. On top of fixed-term and part-time work, **new and other atypical forms of employment have been developed or have become more prevalent**, such as telework, temporary agency work, freelance contracts, on-call contracts or zero-hours contracts, employee sharing, job sharing, voucher-based work, interim management, ICT-based mobile work, crowd employment, portfolio work and collaborative models of employments⁷.

It is therefore appropriate to examine whether these new forms of employment should be considered as falling within or outside the scope of Directive 91/533/EEC and whether amendments to its provisions are required in the light of its objective to protect workers.

In parallel, in the field of EU law, several new Directives related to labour law have been adopted since the entry into force of Directive 91/533/EEC — for instance the Posting of Workers Directive (96/71/EC) and the Directive on Temporary Agency Work (2008/104/EC). Some initiatives were also taken, such as Decision 2016/344/EU to establish a European Platform to strengthen cooperation in tackling undeclared work. These Directives and initiatives have changed the EU legislative and social policy context; the evaluation has therefore reviewed them and assessed their consistency with the Written Statement Directive.

- Scope of the evaluation

The analysis covered the both legal and socioeconomic dimensions and was conducted across a range of different economic sectors.

The scope of application starts for each country at the date on which the Directive was transposed or became mandatory for each Member State, with the earliest of these dates being chosen⁸. For the 12 Member States of the EU in 1991, the transposition deadline was 30 June 1993.

⁵ This High-Level Group, chaired by Mr Edmund Stoiber, was set up in late 2007 to advise the Commission on the Action Programme for reducing administrative burdens for businesses in the EU. Its main task is to provide advice on administrative burden reduction measures. See http://ec.europa.eu/smart-regulation/refit/admin_burden/high_level_group_en.htm.

⁶ Fifth opinion of the High Level Group on Stakeholders’ suggestions of 12 November 2009, see http://ec.europa.eu/smart-regulation/refit/admin_burden/docs/enterprise/files/hlg20091112_offline_opinion_fifth_batch_en.pdf.

⁷ These atypical forms of employment are defined precisely in Annex 7 to the Study.

⁸ See *Timeline and milestones in the life of the Directive*, Study p. 5.

The geographical scope of the Study is the European Economic Area comprising 31 countries, i.e. the European Union in its present composition of 28 Member States plus Norway, Liechtenstein and Iceland⁹. Where the present document refers to Member States, it should be understood as covering Norway, Liechtenstein and Iceland as well.

- Sources of the evaluation

The evaluation relies firstly on a study carried out by an external consultant in close cooperation with the Commission ('the Study', available online¹⁰). The Study is a source of useful background information but does not represent the Commission's views. The Commission only endorses the findings and conclusions presented in the following sections, which might be different from those presented in the Study.

The Commission also launched an open public consultation on the Directive. The consultation ran between 26 January and 20 April 2016, receiving 147 replies.

Finally, broader discussions and expertise acquired by the Commission, in particular on the European Pillar of Social Rights¹¹, also feed into the evaluation.

- Terminology (employee, worker, self-employed)

One important element of the present evaluation is that it questions the meaning and definition of what an 'employee' is within Member States. Indeed, the Directive 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'* (cf. Article 1 of the Directive).

Nevertheless, in this report the term 'employee' is generally used without referring specifically to the national contexts. It also uses the term 'worker' as a synonym of the term 'employee', with the meaning predominantly given at EU level, derived from the case-law of the Court of Justice of the European Union ('the Court') on the free movement of workers¹²: *'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'*.

Consequently, a self-employed person, both at EU level and in this report, is generally understood as *'any person on the labour market who cannot be considered as an employee/worker'*. In principle the Directive does not cover self-employed people at all.

⁹ A special focus was given to the situation in eight Member States. See explanation below under section 5 'Method'.

¹⁰ See under <https://bookshop.europa.eu/en/refit-study-to-support-evaluation-of-the-written-statement-directive-91-533-ec--pbKE0416282/> or <http://ec.europa.eu/social/main.jsp?catId=738&langId=en&pubId=7941&type=2&furtherPubs=yes>.

¹¹ See the presentation of this initiative in Communication COM (2016)127 final; see also the dedicated website http://ec.europa.eu/priorities/deeper-and-fairer-economic-and-monetary-union/towards-european-pillar-social-rights_en.

¹² Case 66/85, *Lawrie-Blum*, 3 July 1986.

Section 3: Background

This section provides a short description of the content and objectives of the Directive and its ‘intervention logic’.

- Content of the Directive

The Directive gives employees the right to be notified in writing of the essential aspects of their employment relationship. This information must be provided to employees at some point in the first 2 months of their employment. It also mentions that additional information must be provided to expatriate employees before their departure.

Article 1 and Article 2 are important provisions of the Directive. Article 1 defines the scope of application of the Directive. Article 2 sets out the principle that employers are obliged to inform employees of the essential aspects of the job and give a list of such essential aspects. Although not exhaustive, this list is a key provision as it comprises the standard ‘package of information’ required.

Table 1: Presentation of key articles of the Directive

<p>Article 1</p> <p>Scope</p>	<p>Article 1 determines who should receive information on his/her working conditions: every paid employee having a contract or employment relationship. It is up to the Member States to apply their own definition of what is an employee.</p> <p>Member States may exclude people working less than 8 hours a week or whose employment relationship will last less than 1 month. It is also possible to exclude employment of a casual and/or specific nature, provided, in these cases, that it is justified by objective considerations.</p>
<p>Article 2</p> <p>Obligation to provide information</p>	<p>Article 2 sets the principle that employers are obliged to notify employees of the essential aspects of their employment relationship. These essential elements are (at least):</p> <p><i>‘(a) the identities of the parties;</i> <i>(b) the place of work; where there is no fixed or main place of work, the principle that the employee is employed at various places and the registered place of business or, where appropriate, the domicile of the employer;</i> <i>(c) (i) the title, grade, nature or category of the work for which the employee is employed; or</i> <i>(ii) a brief specification or description of the work;</i> <i>(d) the date of commencement of the contract or employment relationship;</i> <i>(e) in the case of a temporary contract or employment relationship, the expected duration thereof;</i> <i>(f) the amount of paid leave to which the employee is entitled or, where this cannot be indicated when the information is given, the procedures for allocating and determining such leave;</i> <i>(g) the length of the periods of notice to be observed by the employer and the</i></p>

	<p><i>employee should their contract or employment relationship be terminated or, where this cannot be indicated when the information is given, the method for determining such periods of notice;</i></p> <p><i>(h) the initial basic amount, the other component elements and the frequency of payment of the remuneration to which the employee is entitled;</i></p> <p><i>(i) the length of the employee’s normal working day or week;</i></p> <p><i>(j) where appropriate;</i></p> <p style="padding-left: 40px;"><i>— the collective agreements governing the employee’s conditions of work;</i></p> <p style="padding-left: 40px;"><i>or</i></p> <p style="padding-left: 40px;"><i>— in the case of collective agreements concluded outside the business by special joint bodies or institutions, the name of the competent body or joint institution within which the agreements were concluded.’</i></p> <p>This list is not exhaustive: all the essential aspects of the employment relationship should in principle be notified, not solely those listed in the Directive. In practice, however, this list is a key provision as it constitutes the standard package of information required.</p>
<p>Article 3</p> <p>Means of information</p>	<p>Article 3 spells out that the employee should receive the relevant information in writing no later than 2 months after the start of employment. It can be done through a written contract, a letter of engagement or other documents (a written declaration signed by the employer may suffice).</p>
<p>Article 4</p> <p>Expatriate employees</p>	<p>According to Article 4, additional information is to be provided to employees required to work abroad for more than 1 month. These employees should be informed of:</p> <ul style="list-style-type: none"> • the duration of the employment abroad; • the currency to be used for the payment of remuneration; • where appropriate, the benefits in cash or kind linked to the employment abroad; • where appropriate, the conditions governing the employee’s repatriation.
<p>Article 5</p> <p>Modification of essential aspects</p>	<p>If there is any change in the items of information mentioned under Articles 2 and 4, Article 5 obliges the employers to inform the employees in writing within a month.</p>
<p>Article 6</p> <p>Form and proof</p>	<p>Article 6 confirms that the Directive only ensures information is provided. It does not standardise the forms of employment nor does it intend to attach an evidential value to the information provided. Nevertheless in the <i>Kampelmann</i> case (C-350/99) the Court ruled that ‘written statements’ enjoy the same presumption as to their correctness as would be attached, in domestic law, to similar documents drawn up by the employer and communicated to the employee.</p>

- Objectives of the Directive

The Directive has two principal objectives:

- **improved protection of employees** against possible infringements of their rights. Having information about their rights is, indeed, a pre-requisite for employees to be able to enforce them.
- **greater transparency on the labour market** by ensuring easy identification of the working conditions applicable to a specific category of employees (e.g. the general working conditions of employees in the health sector or in the construction sector in a particular EU region). Improved transparency is useful not only for employees but also for public authorities (in their efforts to reduce undeclared work), for employers and for potential investors who may need legal certainty concerning working conditions.

In addition, the Directive aims to improve the operation of the internal market in the EU. Indeed, the Directive sets minimum requirements on the information to be provided individually to employees on the main terms of their employment relationship, therefore reducing differences between Member States' legislation. Also, the Directive spells out the information obligations for workers required to work abroad, which should in principle help the free movement of workers (or of services in the case of a 'Posting' covered by Directive 96/71/EC).

The Directive is to be read in conjunction with Article 9 of the Community Charter of the Fundamental Social Rights of Workers¹³ according to which: *'The conditions of employment of every worker of the European Community shall be stipulated in laws, in a collective agreement or in a contract of employment, according to arrangements applying in each country'*.

- The intervention logic for the Directive

The intervention logic below (under Figure 1) shows the purpose of the Directive for the EU.

It has proven difficult to demonstrate what the baseline scenario (i.e. the situation before the intervention) was in all Member States. However, the available data¹⁴ suggests that the legislation of the 12 Member States (in 1991, when the Directive was adopted) already contained some provisions similar to those of the Directive, although with varying degrees of uniformity. A country with existing (quasi-)similar labour regulations was Luxembourg with its law of 24 May 1989 on employment contracts, which was amended to fit the Directive's provisions in 1995.

¹³ Adopted at the meeting of the European Council held at Strasbourg on 9 December 1989.

¹⁴ See pages 6-7 of the Study.

According to a scientific publication of 2005¹⁵ covering the EU-15 (i.e. Member States before the enlargement of 1 May 2004), four other countries than Luxembourg had detailed rules on written information on the aspects of the employment relationship. In Ireland, UK, Italy and France, workers were entitled to a written statement (or similar documents) of the main terms and conditions of their job.

The legislative changes needed to comply with the Directive were deeper for the 11 other Member States and the legal and policy impact was at its highest level in Greece, Portugal and Austria¹⁶. In the latter, only white-collar workers had written employment contracts spelling out their working conditions. Blue-collar workers could therefore clearly benefit from the transposition of the Directive¹⁷.

The changes brought by the transposition of the Directive have also been significant for Member States joining the EU as from 1 May 2004.

In Poland, for instance, there were no similar provisions in its legislation before joining the EU in 2004, and the provision of the Directive was, instead, fully transposed all at once by the Law of 20 April 2004, which adapted Polish legislation to European Law.

In Cyprus, prior to transposition, *‘the obligation to provide information about the terms and conditions of employment to employees was not regulated under any legislative or instrument having the force of law in Cyprus’*.¹⁸ Nevertheless, in Hungary, given that the Hungarian Labour Code *‘had been in line practically with all the major stipulations of the Directive’* well before its transposition, the transposition required only few amendments¹⁹.

In Bulgaria, the transposition clearly represented progress for national labour legislation. The progress consisted of *‘the inclusion of new obligations of the employer and new rights of the employee under his/her individual employment relationship. This results in the employee’s being informed of the actual state of his/her employment relationship throughout the period of the existence thereof — from the very beginning, when it is concluded, and during the course of its existence — with all the changes effected in it, including his/her work within the country and abroad. This creates greater legal security for the employee’*²⁰.

In Romania, national labour legislation already partially contained the provisions of the Directive. Nevertheless, the full transposition represented progress compared to the legislation previously in force, as the new Labour Code provides for the complete list of elements for which information must be given²¹.

¹⁵ FALKNER, G. et al., *The Employment Contract Information Directive: a small but useful social complement to the internal market*, Complying with Europe, 2005, pp. 56-72.

¹⁶ FALKNER, G. et al., *The Employment Contract Information Directive...*, p. 60.

¹⁷ FALKNER, G. et al., *The Employment Contract Information Directive...*, p. 62.

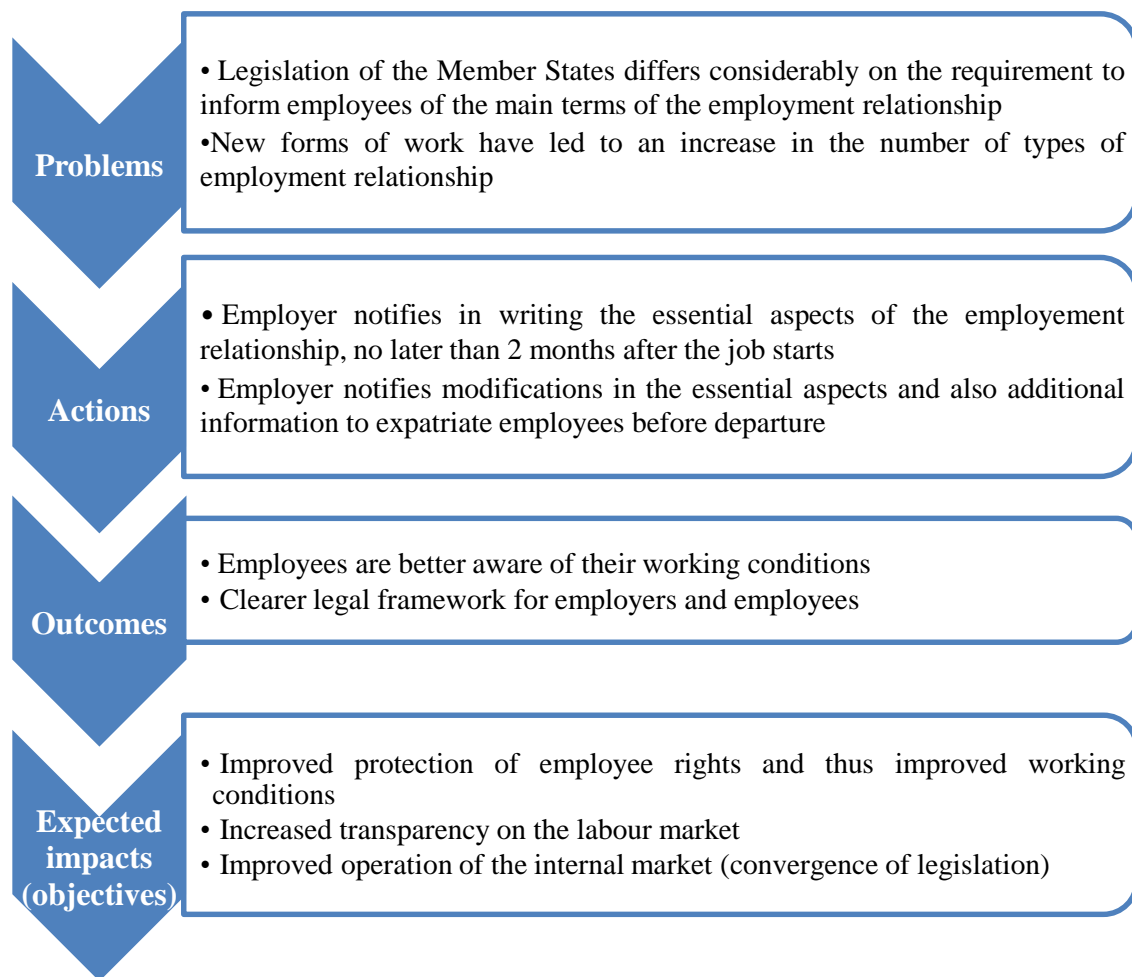
¹⁸ Implementation Report for Cyprus (2007) — by Labour asociados.

¹⁹ Implementation Report for Hungary (2007) — by Labour asociados.

²⁰ Implementation Report for Bulgaria — Executive Summary 2009 by Milieu Environment Law and Policy.

²¹ Implementation Report for Romania — Executive Summary 2009 by Milieu Environment Law and Policy.

Figure 1: Intervention logic for the Directive²²



²² Simplified version of the intervention logic developed in the Study, p. 5.

Section 4: Method

This section describes in more detail the two main sources of information used in the evaluation.

- *The Study*

The Study was carried out between 21 April 2015 and 21 February 2016 (10 months).

As there is limited literature on the Directive, its implementation²³ and its effects, and as the Directive does not set up any monitoring arrangements, data had to be collected through the following activities:

- an expert legal review in 28 EU Member States, Norway, Liechtenstein and Iceland;
- qualitative interviews with key EU level stakeholders and experts²⁴;
- in eight selected Member States (BG, DE, FR, HU, IT, PL, SE, UK):
 - an electronic panel survey to employers with a total of 2 052 respondents (the target sample was 250 respondents in each Member State);
 - qualitative interviews with key stakeholders. 4-5 interviews per Member State across a range of stakeholders, such as relevant government bodies (e.g. labour inspectorates), trade unions and other employee representatives, business associations and other employer representatives, relevant NGOs and academic experts;
- a workshop with key stakeholders and experts in Brussels on 7 December 2015. Some 14 participants were present, representing EU employee associations, EU employer associations, government bodies, academic and legal experts, and the European Commission²⁵. The aim was to validate and qualify the preliminary conclusions of the Study and provide input to its recommendations.

²³ The legal implementation was scrutinised for each Member State (except Croatia), either by the Commission itself or by means of a study commissioned by the Commission, see report and studies under the Commission webpage ‘Working Conditions — Individual Employment Conditions’ <http://ec.europa.eu/social/main.jsp?catId=706&langId=en&intPageId=202>. However, these documents offer limited critical insight.

²⁴ See list of interviewees in Annex 4 to the Study.

²⁵ See Annex 5 to the Study for a full participants’ list.

The Commission services are aware of the existence of limitations concerning methods and data used in this evaluation. These limitations concern on one hand, the fact that findings on the degree of observance of the Directive (i.e. the degree to which the Directive is respected in practice) and the benefits brought by the Directive are based on qualitative assessments only, due to lack of data and, on the other hand, that conclusions on the whole EU are based on extrapolations from data coming from eight Member States only. These issues relating to data reliability and limitations are described in details in the Study²⁶.

In the Commission’s view, the robustness of the findings is not prejudiced by these limitations. Interviews with stakeholders and comparisons with secondary data sources were used to ‘triangulate’ (i.e. cross-check) and assess the statements given by the national experts, as illustrated below.

The sample of the eight Member States for the employers’ survey and national level interviews was made on a basis of a balanced selection taking into account geographic location, as well as different sizes and types of labour markets (models of industrial relations systems). Furthermore, the selection took into account particularly interesting cases related to the development of new and atypical forms of employment relationships²⁷. The calculation of the costs related to the Directive (see the section on ‘Efficiency’) is therefore much more robust if only these eight Member States are considered. The calculation of the costs for the whole EU relies on extrapolation from these eight Member States.

Indeed, where precise observations (e.g. regarding incorrect transpositions) or precise figures (e.g. costs calculation) were needed, the data sources base can be considered as being based on analysis or mere reporting (e.g. in the legal review or the panel survey). For the other observations, the subjectivity of respondents in interviews cannot be reduced but is balanced by the fact that they came from public authorities or from ‘on the ground’ actors such trade unions, employers’ organisations or labour inspectorates.

Figure 2: Illustration of the principle of ‘data triangulation’



²⁶ See pages 9-22 of the Study.

²⁷ See more detail on pages 13-14 of the Study.

- *The public consultation*

The Commission launched an online open public consultation²⁸ on the Directive in all official languages of the EU on 26 January 2016. The consultation ended on 20 April 2016. All completed responses were published online, except where the respondent did not authorise the Commission to do so.

The questionnaire had 15 questions and space for comments under six headings²⁹. A seventh heading presented ‘Additional questions for specific stakeholders’ if the respondent had self-identified under one of the four following groups: employee, worker / employee’s organisation or employees’ representative / employer / employers’ organisation.

A total of 147 replies were received from 7 public authorities, 26 employees’ organisations or employee representatives, 27 employees or workers, 43 employers’ organisations, 27 employers, 3 self-employed persons, 5 citizens, and 9 respondents who defined themselves as ‘others’. One additional public authority, the Government of Aragon, did not reply to the questionnaire but provided short comments. A summary of the responses to the public consultation is annexed to the present document.

When assessing these replies for the purpose of the evaluation, the general limitations to public consultations must be recalled. A public consultation does not normally faithfully represent EU citizens’ views in general. Indeed, statistical requirements for representativeness could only be met by exceedingly high numbers of respondents across all sectors and categories of stakeholders. In addition, where percentages of opinions are given, it should be borne in mind that this gives all respondents the same weight, whatever their role. An individual counts the same as a representative organisation (public authority, social partners...), which is a significant limitation. Therefore, it is also important to use a qualitative approach in parallel and, where appropriate, highlight the replies of important representative organisations.

Nevertheless, the outcome of the public consultation represented a useful source for the evaluation. The consultation also provided stakeholders with the opportunity to officially and, if desired, publicly assert their positions regarding the Directive.

²⁸ See <http://ec.europa.eu/social/main.jsp?catId=333&langId=en&consultId=18&visib=0&furtherConsult=yes> .

²⁹ There headings are: 1. How much do you know about the Written Statement Directive? 2. Are the objectives of the Written Statement Directive still relevant? 3. Is the package of information for employees satisfactory? 4. Who is protected by the Written Statement Directive? 5. Has the Written Statement Directive had any benefits? 6. Does the Written Statement Directive generate burdens?

Section 5: Answers to the evaluation questions

The main findings of the evaluation are set out below.

5.1. State of play: transposition, observance, exemption possibilities and sanctions

In this section the extent to which the Directive is properly transposed and respected by Member States is assessed, with particular focus on:

- potential incomplete or incorrect transposition rules;
- existence of repetitive or systematic infringements of the principles of the Directive;
- how Member States used margins of discretion or options allowed by the Directive;
- whether sanctions were effective, proportionate and dissuasive.

a. Transposition

The review of national legislation revealed gaps or inaccuracies in the transposition of the Directive in nine Member States (Austria, the Czech Republic, France, Croatia, Italy, Latvia, Lithuania³⁰, Malta and Slovakia). At first glance, the seriousness of these infringements ranges from low to medium³¹. No Member State can be considered as having seriously breached its duties, as all provided for at least a basic obligation of written information to employees about working conditions. In five countries there is an issue related to Article 4 of the Directive, which imposes the obligation to provide additional information to expatriate employees. Such employees may suffer as a result of not receiving the required information before they start working abroad. Residual problems generally related to the completeness of the standard package of information required i.e. a few items were missing.

b. Observance

The collected evidence³² indicated that there is medium to high observance among employers of the Directive as transposed into national law. The main issues surrounding observance by employers are associated with the ‘grey’ area between self-employment and subordinate employer-employee arrangements and new and atypical forms of employment (for more on the latter see the section below on ‘Relevance’).

Circumventing obligations towards employees by abusing self-employed arrangements where in reality a subordinate relationship exists is a significant breach of the principles of the Directive. Non-compliance with the obligation to provide a written contract or statement to the employee is not only symptomatic of falsely declared employment in the case of bogus self-employment, but is also sometimes an indicator of undeclared work. Multiple sources

³⁰ The issue has been solved in Lithuania meanwhile.

³¹ The details can be found in Annex 8 to the Study.

³² See pp. 32-36 of the Study. The evidence came from the literature review, legal expert review and qualitative interviews with key stakeholders at national level.

(desk research, legal review, interviews) suggest that cases of non-compliance are more likely to occur in certain sectors such as agriculture, construction and the catering sector.

c. Exemption possibilities under Article 1

Member States may exclude from the benefits of the Directive people working less than 8 hours a week or whose employment relationship will last less than 1 month. It is also possible to exclude employment of a casual and/or specific nature. However, in such cases this must be justified by objective considerations.

- The first exemption (duration not exceeding 1 month) has been used in 18 Member States³³.
- The second (working week not exceeding 8 hours) has been used in seven Member States³⁴.
- The exemption for employment of a casual and/or specific nature has been used in 15 Member States³⁵.

d. Means of redress and sanctions

Article 8 of the Directive spells out that employees who consider themselves wronged by an employer's failure to comply with the obligations arising from this Directive should be able to pursue their claims by judicial process. Member States may also establish two steps that would come before judicial process: (i) possible recourse to a competent authority such as a labour inspectorate or an administrative body; (ii) a formal notice given to the employer calling on it to issue the written statement within 15 days³⁶.

The evaluation has showed that all Member States provide for access to the relevant domestic jurisdiction (in general, the Labour Court)³⁷.

In most Member States, a competent authority has the power to intervene in order to identify or impose a non-judicial remedy. This intervention is not necessarily a pre-condition for further judicial recourse. The competent authority is generally, but not always, the labour inspectorate. In Ireland, for instance, employees may submit their complaints to a 'Rights Commissioner'. Trade unions also play an important role. They can help employees to fill in a complaint and are sometimes members of the competent authority. In Sweden, a dispute resolution mechanism is available involving negotiation between the employer and the trade union. However, this is subject to the employee being a member of a trade union.

³³ AT, CY, CZ, DK, EE, FI, DE, EL, HU, IS, IE, IT, LI, LT, MT, ES, SE, UK.

³⁴ CY, DK, HU, IS, IT, LI, MT.

³⁵ AT, CY, DK, EL, ES, IS, IE, IT, LI, LT, LU, MT, NL, SK, UK.

³⁶ This mechanism is not allowed in the case of information being provided to expatriate employees, neither for workers with a temporary contract or employment relationship, nor for employees not covered by a collective agreement or by collective agreements relating to governing the employment relationship.

³⁷ See Annex 10 to the Study: 'Overview of enforcement mechanisms at national level'.

Only three countries (Estonia, Croatia and Slovenia) have opted for a ‘formal notice mechanism’. However, in Slovenia, the employer has only 8 days (and not 15) starting from the employee notification in which to comply. In Italy, under the national decree transposing the Directive, an employee may ask the Territorial Office of the Ministry of Labour (‘DPL’) to order the employer to comply within 15 days if it fails to meet the obligations set out in the decree, delays fulfilling them or fulfils them in an incomplete or inaccurate manner. In this case, the labour inspectorate formally notifies the employer and imposes an economic sanction if the order is not complied with within 15 days.

One desired outcome of these forms of redress is of course that the employer issues a written statement. However, sometimes this written statement is never issued or issued too late. The evaluation therefore examined the sanctions that national legislation currently imposes on employers who fail to comply with the requirement³⁸. It seems possible to distinguish between: (i) a majority of Member States where financial compensation can be granted only to employees who prove that they have suffered damage; and (ii) a minority of Member States where sanctions such as lump sum penalties or loss of permits can be imposed in addition on the employer for failure to issue the written statement.

³⁸ See pp. 37-38 of the Study and its Annex 10.

5.2. Relevance

Relevance is the extent to which the Directive's objectives (protection of employees and transparency of the labour market) meet the needs of the stakeholders (employers, employees, public authorities) in a social market economy.

On protection of employees, the evaluation assessed the link between: (i) the individual information given to employees on the essential elements of their employment contract or employment relationship; and (ii) protection against possible infringements of their rights. The evaluation also collected and assessed stakeholders' views on the necessity and usefulness of this type of information.

On labour market transparency, the evaluation assessed the need to maintain or even increase the level of transparency in the EU economy.

It is also important to examine under the relevance assessment: (i) whether the new and atypical forms of employment³⁹ are covered by the national rules transposing the Directive; and (ii) if the Directive was of relevance against the background of these new and atypical forms.

a. The objectives of the Directive are still relevant

Making written information on the conditions of employment available and accessible to employees was considered as relevant, or highly relevant, by all stakeholders involved (e.g. employers, labour inspectorates, public authorities, trade unions), not only employees.

On the objective of **improved employee protection**, the Directive was found to make an important contribution to ensuring that employees are aware of their rights and protected against possible infringement of those rights (this was supported by employee associations at both EU and national level). This is considered as a strong finding as it was supported by data from multiple sources (literature review, legal review, EU interviews) and statements from all types of stakeholders⁴⁰.

As a protection mechanism, the obligation to provide information was found to be particularly relevant *in conjunction* with other types of protection, such as membership of trade unions and the activities of labour inspectorates, which monitor and enforce working conditions and rights.

On the objective of **improving transparency on the labour market**, views collected from all types of stakeholders and several legal experts showed that written information available to both employers and employees makes a vital contribution towards improving labour market transparency and reducing information asymmetries between Member States. The necessity of such written information on working conditions is even more apparent in the context of facilitating free movement of labour, as it helps to reduce social tensions, improve transparency (on pay rates, proper holidays etc.) and can help workers to integrate and become more aware of their rights in other countries, given that they usually have less

³⁹ These atypical forms of employment are defined precisely in Annex 7 to the Study.

⁴⁰ See Study p. 55.

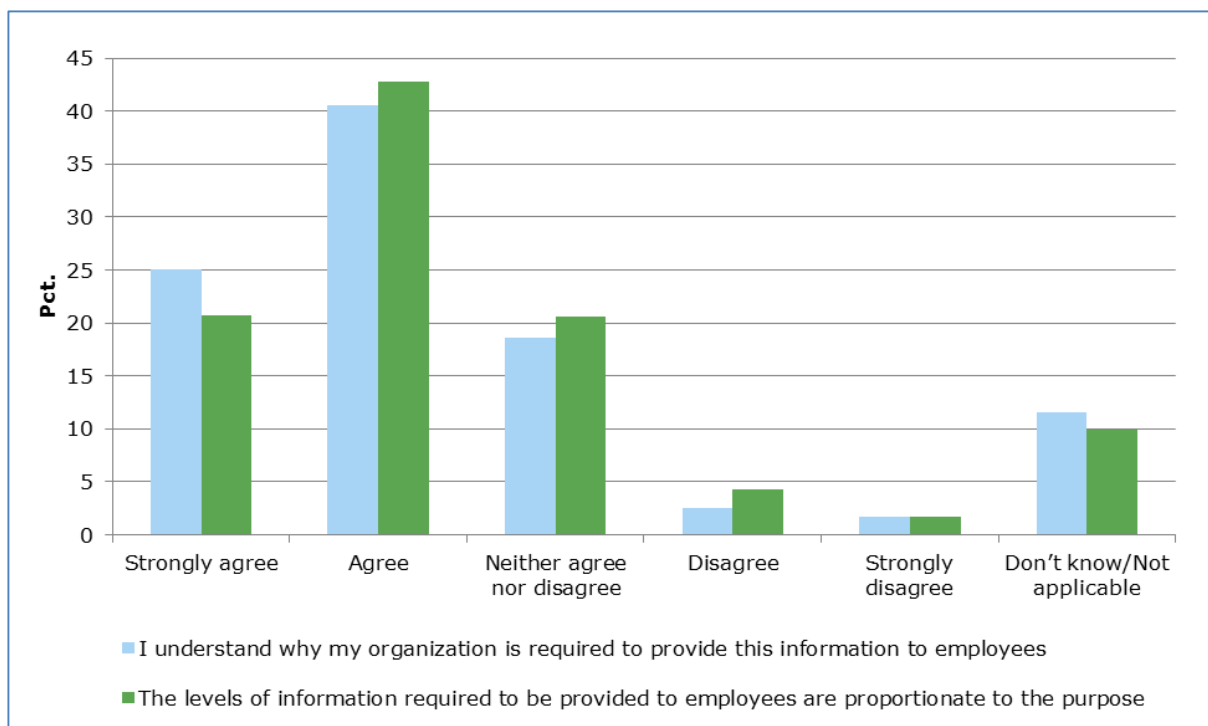
knowledge than locals of the conditions that apply there. Nevertheless, although employer representatives supported the need for transparency on the labour market, they generally saw no particular lack of transparency or need to increase it.

b. Employers generally do not find the Directive controversial

The Directive is generally supported by employers. This is confirmed by EU and national interviews⁴¹ as well as by the survey carried out in eight Member States (BG, DE, FR, HU, IT, PL, SE, UK).

As the figure below shows, a total of 66 % of employers answered that they (strongly) agree with the statement that they understand why their organisation is required to provide this type of information, and 64 % also found the level of information required to be provided to employees as proportionate/necessary. Only 4 % (strongly) disagreed with the former and 6 % with the latter.

Figure 3: Survey, Employers’ satisfaction with the minimum requirements guaranteed by the Directive, across the respondents from the eight Member States selected (N=2052)



In the public consultation, 18 out of the 27 employers who responded agreed that it is necessary to protect employees against possible violation of their rights by imposing an obligation on employers to provide information on the basic elements of the employment relationship. Contrary to the opinions of employers’ organisations collected during the Study (who generally consider the Directive as being relevant), a majority of employers’

⁴¹ See list of interviewees in Annex 4 to the Study.

organisations (26 out of 43) in the public consultation considered the Directive to be irrelevant. This result, which is strongly at odds with EU-level employer representatives' views, reflects a 'campaign' initiated in Germany, which was hostile towards the Directive⁴².

c. The Directive could play an important role for new and atypical forms of employment

Needs in society are changing, and as a result we are seeing a growing number of atypical employment relations⁴³. Therefore it is part of the relevance analysis to assess whether the Directive is of relevance to tackling those changing needs.

The evaluation assessed in each Member State how the national law provisions transposing the Directive cover the following new and atypical forms of employment other than fixed-term and part-time work: telework, temporary agency work, freelance contracts, on-call contracts or zero-hours contracts, employee sharing, job sharing, voucher-based work, interim management, ICT-based mobile work, crowd employment, portfolio work and collaborative models of employment⁴⁴.

The legal analysis performed at Member-State level revealed high levels of variation and uncertainty over whether the new and atypical forms of employment listed above fall within the scope of the Directive⁴⁵. This depended mainly on different national approaches to defining what is meant by an employment relationship.

The Directive's objectives of employee protection and transparency of the labour market were considered by the stakeholders as relevant for many new or atypical forms of employment. It was generally found that new or atypical forms of employment could and should be covered by the Directive where they constitute an actual employment relationship. If there is a dependent or subordinate relation between the employer and the worker, the latter should be considered an employee for the purpose of the Directive.

Some 56 % of respondents to the public consultation wanted the Directive to cover new forms of employment.

- **5.3. Effectiveness**

Effectiveness is the extent to which the Directive had a positive impact on the objectives it is intended to reach.

The analysis under this heading will therefore include the following questions:

- To what extent has the Directive provided employees with improved protection against possible infringements of their rights?

⁴² See details in Annex 3. If we put aside German employers' representatives, only 3 out of the 19 remaining respondents consider the Directive to be irrelevant.

⁴³ Eurofound study 2017 'Recent evidence on the labour situation of workers in new types of employment, precarious employment the self-employed'.

⁴⁴ See pages 40-46 of the Study and in particular "Table 5: Assessment made by legal experts on the extent to which new forms of employment exist and are covered by the national legislation transposing the Directive".

⁴⁵ See section 5.1.7 of the Study.

- To what extent has the Directive created greater transparency on the labour market?
- Did anything hamper the full impact of the Directive?

a. Positive impact brought by the Directive

The evaluation found that the Directive had a positive impact in terms of achieving its objectives. This positive impact benefited employees first and foremost but also, to a lesser extent, employers, public authorities and society at large. This impact has been felt specifically in the following areas;

- increased awareness and understanding among employees of the essential aspects of their working conditions and rights, including the possibility to seek redress if one's rights are violated. This has led to improved enforcement and protection of employees' rights;
- increased certainty and clarity for both employers and employees on what has been agreed. This is particularly useful for avoiding disputes and litigations;
- reduced information asymmetries between employers and employees because the practice of employers normally holding this information and employees seeking it is now more evenly distributed. As a result, the Directive can be said to contribute to increased transparency in the labour market;
- the written statement also serves as a tool that can be used by labour inspectorates and trade unions to monitor working conditions and detect undeclared work.

These benefits show that the Directive has been effective to a substantial extent in terms of achieving its objectives. These findings are assessed to be strong, as they are supported by all data sources and all types of stakeholders (employer representatives, employee representatives, labour inspectorates etc.)⁴⁶.

Especially in countries with no legal requirements for written employment contracts, providing this information in writing was found to be particularly beneficial. Moreover, the increased transparency was considered particularly beneficial in the context of trans-national work and the free movement of workers.

During the public consultation, 64 % of respondents stated that the Directive has improved the protection of employees and 63 % stated that employers can also benefit from complying with the Written Statement Directive.

b. Quantification of the positive impact

It has not been possible to quantify the Directive's positive impact in monetary terms. The benefits of the Directive are multidimensional and it is not possible to establish to what extent they can be attributed to the Directive and/or to other regulatory or organisational factors.

⁴⁶ See Study, pp. 63-67.

For example, for employees, the positive impact might indeed lead to better financial conditions but may also just manifest itself in better (non-financial) working conditions, work atmosphere and wellbeing. For employers, it is not possible to quantify employee satisfaction (that could lead to better productivity) or the savings from having fewer legal disputes.

For public authorities, an estimate of the costs of undeclared work exists in each Member State⁴⁷ but again the boost given by the Directive towards reducing such costs cannot be measured.

Although the positive impact of the Written Statement Directive has certainly a financial dimension, only the qualitative aspect can be fully described in this evaluation.

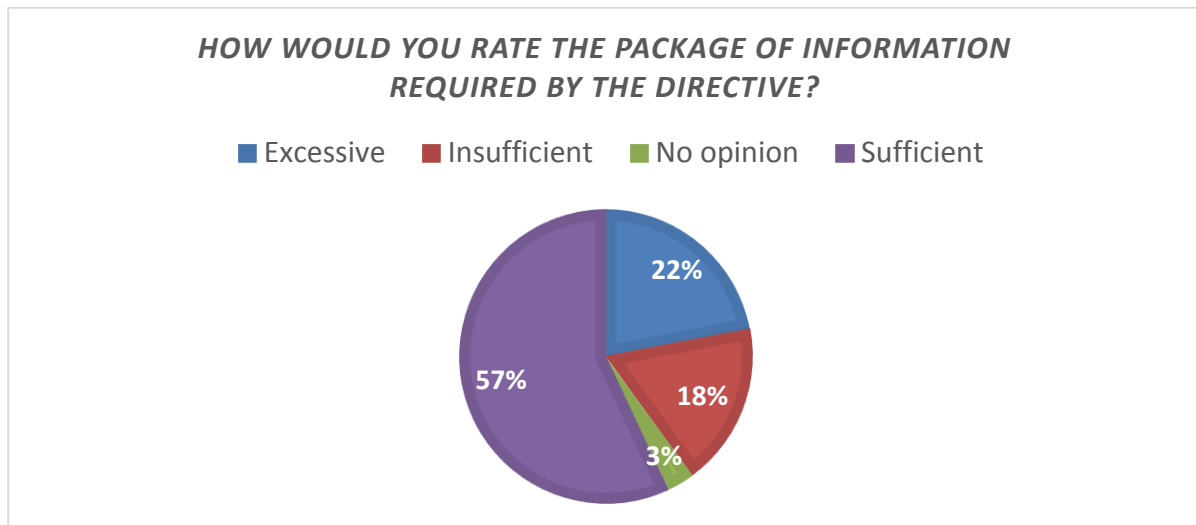
c. How effective is the ‘information package’ in ensuring that sufficient information is provided to employees

The list of ‘essential aspects’ in Article 2(2) of the Directive — the standard package of information — is the core provision contributing to the Directive reaching its objectives. It was assessed by most stakeholders (employees, employers, government bodies) as being sufficient as a minimum standard. While there were some suggestions to add elements to the list from employees’ organisations, the majority of stakeholders considered the list in the Directive adequate, with any changes to be made at national level.

This was confirmed by the public consultation, in which there was no strong call from stakeholders to increase the required information package, except from employees’ organisations. Nearly 6 out of 10 respondents deemed the current information package to be sufficient. Only 1 out of 5 respondents, mostly employers’ organisations, regarded the current information package as excessive.

⁴⁷ See figures provided under 'European Semester: Thematic factsheet – Undeclared work – 2016', available under https://ec.europa.eu/info/files/european-semester-thematic-factsheet-undeclared-work-2016_en

Figure 4: Public consultation, How would you rate the package of information required by the Directive? (N=147)



Among the respondents who viewed the current package as insufficient, several expressed the wish that employers would inform workers about the social security systems to which they contribute, especially during posting situations.

Another common concern is the need to provide more substantial information about working times, instead of simply indicating the length of the employee's normal working day or week. For instance, the European Trade Union Confederation (ETUC) recommended that employers provide information on minimum and maximum working times, length of breaks, daily rest, weekly rest and the quantity of work to be offered per day or per week.

The Austrian Government⁴⁸ requested that for postings abroad, more detailed information should be given on transfer of remuneration, working hours and working conditions, travel and subsistence expenses. A Belgian employee suggested the compulsory inclusion of a brief but exhaustive job specification. This would protect employees from performing certain tasks outside the remit of their job.

Another set of respondents deemed it useful for employees to be informed in writing about the duration of the probation period (if any) and about dismissal rules. The current Directive only requires information to be provided on the length of notice periods to be observed by the employer and the employee.

22% of stakeholders found the requirements of the information package excessive. However, in qualitative replies to the question they criticised redundancies in the interrelation between the requirements of the Directive and the legal framework in a single Member State, which however do not apply in all other Member States.

⁴⁸ The Ministry of Labour, Social Affairs and Consumer Protection.

d. Obstacles to effectiveness

The positive effects of the Directive only materialise if the national implementation of the Directive serves and supports its objectives, if it is clear to employers and if employers are aware of and actually comply with the information obligation in the Directive (as transposed).

In this area, the evaluation identified four points of concern:

- 1) the scope of its application in general and to atypical forms of employment in particular;
- 2) the relatively long deadline for providing the written information;
- 3) the enforcement framework (means of redress/sanctions) in some Member States.
- 4) employers' awareness of the existing obligations.

(1) The scope of the Directive

The Directive 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’*.

The Directive's scope of application may therefore vary among Member States depending on their own concepts of ‘employee’, ‘employment relationship’ and ‘employment contract’. The Study did not carry out an exhaustive comparative analysis of these concepts in individual Member States⁴⁹. Nevertheless, the data gathered confirmed that beyond ‘subordination’ and ‘remuneration’, which are the two basic elements common to most (but not all) national approaches, there is significant divergence⁵⁰.

Coupled with the exclusions permitted by Article 1(2), and the legal uncertainty regarding coverage of new and atypical forms of employment, this diversity of approach can be considered as an obstacle to the full effectiveness of the Directive.

(2) The two-month deadline

Information to employees must be provided to the latest two months after the start of the employment relationship. At the outset of the evaluation, the Commission intended to examine whether the two-month deadline by which the employee must be notified should be prolonged, as suggested by the High-Level Group on Administrative Burdens⁵¹. The evaluation actually leads to the opposite conclusion: no category of stakeholder argued for an extension of the deadline. On the contrary, this already relatively long deadline was

⁴⁹ See, however, the comparative table in Annex 9 to the Study.

⁵⁰ For example, people in a management function are not considered employees in Sweden, and public servants do not fall within the definition of employee for the purpose of the Directive in Lithuania and Austria. In the UK, the category of what are called ‘workers’ (neither self-employed nor genuine employees) does not receive written statements.

⁵¹ This High-Level Group, chaired by Mr Edmund Stoiber, was set up in late 2007 to advise the Commission on the action programme for reducing administrative burdens for businesses in the EU. Its main task is to provide advice on administrative burden reduction measures. See the Fifth opinion of the High-Level Group on Stakeholders' suggestions of 12 November 2009, see http://ec.europa.eu/smart-regulation/refit/admin_burden/docs/enterprise/files/hlg20091112_offline_opinion_fifth_batch_en.pdf.

mentioned by stakeholders as an aspect of the Directive that is not supporting the objective of increasing transparency and that may moreover increase the potential for undeclared work or abuse of employee rights.

When transposing the Directive, 22 countries introduced a more stringent approach (i.e. a deadline of less than two months). Of these, eight Member States have fixed the obligation to provide the information at the inception of the employment relationship (i.e. before start of the job or at least at the end of the first day)⁵².

The recent legislative move made by Poland is worth highlighting. The country recently changed its legislation so that the written statement must now be provided before the start of the employment relationship, and not at the end of the first day, as was the case before⁵³. According to the Polish authorities, under the previous approach, employers faced with an inspection could falsely argue that the worker had just been employed and that he/she would be provided with the written information by the end of the first working day. In practice, this rule tended to favour undeclared work.

(3) Means of redress and sanctions

Member States fall into two categories: (i) those where financial compensation can be granted only to employees who prove they have suffered damage; and (ii) those where sanctions (such as lump sums or loss of permits) can be imposed in addition on employers who fail to issue the written statement.

Evidence⁵⁴ suggests that redress systems based only on claims for damages are less effective than systems that also provide for sanctions such as lump sum penalties. Indeed, as the very limited amount of national case-law shows, most employees are reluctant to use this recourse during their employment relationship. In addition, the written statement is a tool to prevent litigation (thanks to the clarity it brings). Where litigation takes place, it focuses rather on the content of the rights than on the fact that the rights were not notified to the employee.

(4) Employers' awareness of the existing obligations

The evaluation has shown a medium to high level of understanding among employers of their information obligations towards employees, in line with the Directive. On average, 51% of the employers surveyed across the eight selected Member States reported being aware of the information obligations stemming from the EU Directive.

There is scope to improve awareness and, as a result, increase actual compliance with the obligations as the level of awareness seems to greatly vary across Member States and there are also significant variations relative to the size of the employers. Larger enterprises appear to be more familiar with the national requirements related to the Directive, as compared to micro enterprises, where less than 40% reported being aware of relevant national

⁵² BG, HR, LV, LT, LU, PL, RO, SI.

⁵³ The amendment took effect on 1 September 2016, see Article 29(2) of the Polish Labour Code.

⁵⁴ Legal experts and EU and national interviews, see Study p. 38.

requirements. Interviewed stakeholders for the most part linked the lower level of awareness among micro or small companies to the low availability of HR resources and capabilities⁵⁵.

- **5.4. Efficiency**

Efficiency is the extent to which the objectives pursued by the Directive are met in the most cost-effective way, taking into account the regulatory burden it triggers and the benefits it brings.

The efficiency analysis covers questions on:

- the costs and benefits for employees, employers, society and the economy at large;
- effects of the transposition on companies' costs and their allocation; also, the extent to which costs stem from national provisions not directly imposed by the Directive;
- the possibility to reduce the costs without reducing the benefits for employees or to increase the benefits for employees without increasing costs;
- national best practices which reduce the burden for undertakings.

a. Costs derived from the Directive

The transposition of the Directive does not appear to have increased costs for companies to a significant extent.

The Study looked at the costs for employers associated with complying with the rules deriving from the Directive. **These costs cover the cost of collecting the correct information required and the cost of (the time for) putting down this information in writing and transmitting it to the employees concerned.** The survey gave the employers the opportunity to assess the costs associated with carrying out these tasks, either as an annual fixed cost for the company or as a 'cost per employment contract' (based on the time required to comply with the Directive).

In general, the compliance costs are assessed by employers as neither high nor low, so can be assumed therefore to be at an appropriate level. The assessment of administrative burden caused by the Directive did not reveal any significant differences related to the enterprise's size. In the survey to employers, the representatives of smaller enterprises actually considered the costs of complying with the requirements to be less burdensome compared with larger enterprises. The share of SMEs stating that they would still comply with the obligations even in the absence of minimum requirements was in fact slightly higher than the average and for micro enterprises it was only slightly lower than the average⁵⁶.

The suggestion from the High-Level Group on Administrative Burdens to examine a potential exemption for micro entities appears to have no justification. In its reply to the public consultation, UEAPME (the employers' organisation representing the interests of European crafts, trades and SMEs at EU level) did not request an exemption and declared that '*Even*

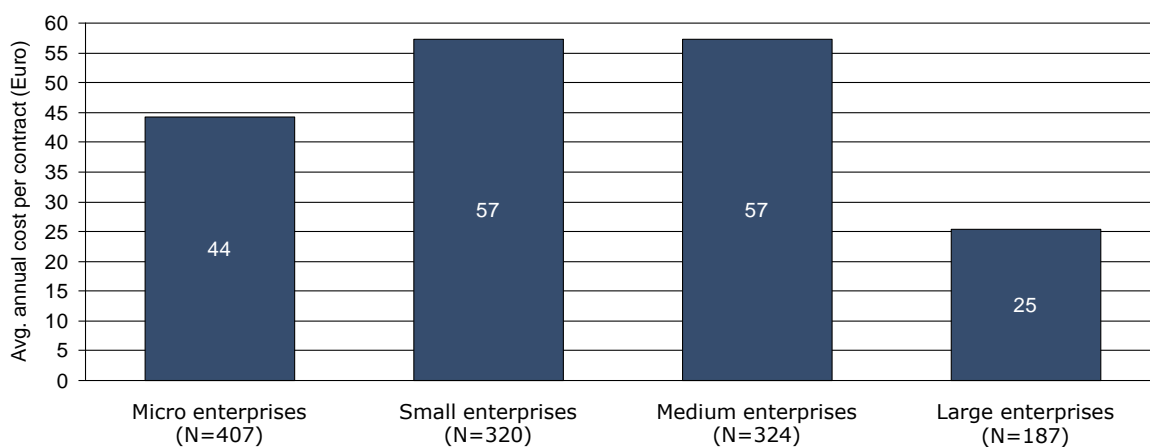
⁵⁵ See the Study pp. 38-40.

⁵⁶ See the Study pp. 96-97.

*SMEs did not complain about the obligations created by the Directive since it has been implemented for more than 20 years; it is fully part of employer's obligation and has not been put into question*⁷. No particular aspects of the obligations stood out as particularly onerous or complicated to comply with.

According to the Study, while averages should be interpreted with care given the characteristics of the sample and some data limitations⁵⁷, across the eight Member States selected for the survey, the total administrative cost⁵⁸ per employed person for a business to comply with the Directive ranges from EUR 25 to EUR 57 annually, depending on the size of the company.

Figure 5: Survey, Average annual total administrative cost per employed person, across eight selected countries, divided by company size; EUR (N=1 238)



b. Burden derived from the Directive

In the context of Commission evaluations, the ‘cost’ heading should differentiate between ‘business as usual costs’ and ‘administrative burdens’. A ‘business as usual’ cost is an expense an employer would still incur in the absence of any obligation⁵⁹ whereas an administrative burden would not have to be borne in the absence of the underlying legal obligation.

On this point, the evaluation found that the Directive is generally not an administrative burden for businesses. Indeed, the majority of the employers consulted considered compliance with the Directive to be part of normal business activity. As shown in Figure 6 a

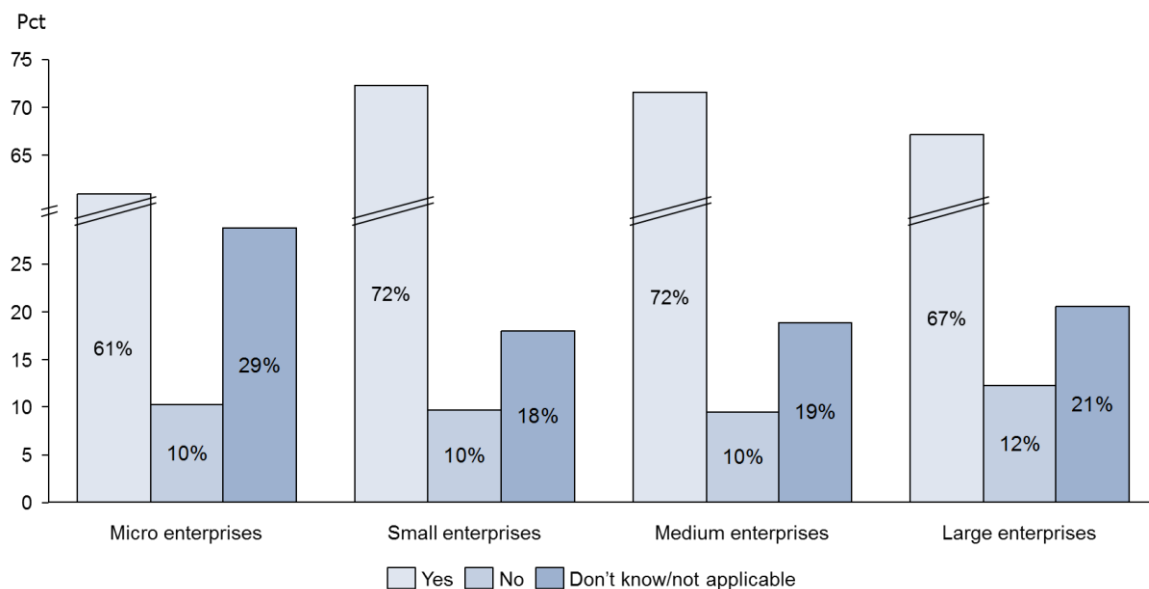
⁵⁷ In the Study it is assumed for example "that the compliance cost for the main employment type in the company is representative for the compliance cost of all employed persons in the company. This assumption is very strict and is likely to overestimate the costs in some cases and underestimate the costs in other cases." For other considerations of data reliability and limitations see the Study, pp. 18-19 as well as its Annex 6.

⁵⁸ Administrative costs are defined as “the costs incurred by enterprises, the voluntary sector, public authorities and citizens in meeting legal obligations to provide information on their action or production, either to public authorities or to private parties”.

⁵⁹ See ‘The Standard Cost Model for Estimating Administrative Costs’ under http://ec.europa.eu/smart-regulation/guidelines/tool_53_en.htm.

majority of the consulted employers would still provide employees with the same information in the absence of the Directive.

Figure 6: Survey, Share of survey respondents who replied that ‘In the absence of any minimum requirements in this area, my organisation would still provide this level of information to its employees’; Percentage across countries, divided by company size (N=2 052).



Employer representatives considered it important to have minimum standards in the area of information to employees. For more details, please refer to section 5.6 on EU added value.

c. Possible cost reductions

The evaluation found limited scope for simplification or cost reductions. However, some good practices were identified, including national templates setting out the information to be provided, and giving both employers and employees access to advisory bodies that could provide advice and possibly arbitration.

As many Member States already provide templates, there does not seem to be a need for a common EU template, particularly given the difficulty of adapting this in a satisfactory way to the different national traditions of collective bargaining, regulation of working time, etc. It seems appropriate rather to promote the exchange of best practices in this area between Member States.

Stakeholders were open to the possibility of making information available using digital formats, but it was not clear that such an information format would be valid (i.e. accepted) in all Member States. Stakeholders (both employer and employee representatives) stressed that such initiatives should be complementary to having written information available on paper, as they considered paper was important to ensure that information was clear and accessible to all employees.

d. Balance between costs and positive impact

Where assessing efficiency of an EU initiative, an evaluation should seek to compare costs and benefits. In this case, as seen above (in the ‘Effectiveness’ section) the positive impact of the Directive could not be measured in monetary terms. The balance between quantitative costs and qualitative positive impact cannot therefore be merely operated on the basis of figures.

Nevertheless, given the relatively low level of costs derived from the Directive, the evaluation does not consider that an imbalance results from comparing these costs against the fundamental benefits the Directive brings to employees and (to a lesser extent) to employers and public authorities.

5.5. Coherence

Coherence is the extent to which the provisions of the Directive are mutually reinforcing (*‘internal coherence’*) and to which the Directive reinforces other related EU acts or policies (*‘external coherence’*). The analysis of external coherence concerned the following:

- Information and Consultation Directive (2002/14/EC);
- Posting of Workers Directive (96/71/EC);
- Temporary Agency Work Directive (2008/104/EC);
- Working Time Directive (2003/88/EC);
- Directive on sanctions and measures against employers of illegally staying third-country nationals (2009/52/EC);
- Directive on Transfers of Undertakings (2001/23/EC);
- Directive facilitating the exercise of rights conferred on workers in the context of freedom of movement for workers (2014/54/EU);
- Decision on establishing a European Platform against undeclared work (Decision 2016/344/EU);
- 2014 Council recommendation on a Quality Framework for Traineeships⁶⁰.

a. Internal coherence

According to the Study, the extent to which the structure of the Directive is coherent and its provisions are mutually complementary is not optimal. This is because some discrepancies exist between the stated objectives of the legislation in its preamble (see recitals) and the results that can be achieved under its ‘operational’ provisions.

Indeed, while the preamble states the necessity to establish at EU level the general requirement that *‘every employee must be provided with a document containing information on the essential elements of his contract or employment relationship’*, the actual material scope of the Directive as defined in Article 1 results in a number of employees being effectively excluded from it.

⁶⁰ Retrieved from: http://www.consilium.europa.eu/uedocs/cms_Data/docs/pressdata/en/lsa/141424.pdf.

The findings of the Study should be interpreted in the light of the statement in the preamble that *‘in view of the need to maintain a certain degree of flexibility in employment relationships, Member States should be able to exclude certain limited cases of employment relationship from this Directive’s scope of application’*.

In this context, an appropriate conclusion on internal coherence would be that, contrary to the statement in the preamble, Article 1(2)(b)⁶¹ of the Directive allows *in practice* more than limited exclusions.

Indeed, for most of the Member States where the exception has been used, it concerns not only employment of members of the employer’s family⁶² but also domestic employment in general⁶³. In several Member States the exemption is not confined to particular types or sectors of employment but excludes sporadic or casual work more generally⁶⁴. The evaluation did not assess the extent to which the workers excluded could receive written information on a basis other than the Directive, nor the content of the objective considerations justifying these exclusions.

The analysis also established that while the preamble recognises the potentially negative impact for the internal market of differing national approaches to information, the margins of discretion left to Member States on how they define the scope, the means of information available and the timelines for providing information have remained rather diverse across the EU/EEA. This can be an obstacle to the free movement of labour.

b. External coherence

The external coherence analysis was performed against a selected number of acts of primary and secondary EU legislation, the European Social Charter⁶⁵, which is a Council of Europe Treaty, and a small number of policy measures related to the Directive’s objectives.

Overall, the assessment did not identify any contradictions between the Directive’s objectives and provisions and any of the selected legislation or policies. However, where other social legislation or policies also make reference to workers or employees, but use different definitions or defer to national ones, this introduces some complexity by creating different scopes of application.

The analysis also identified three instances where the coherence between the provisions of the Directive and other Directives could have been more optimal:

- (1) While the Written Statement Directive and Directive 96/71/EC on the **Posting of Workers** are generally aligned, further mutual reinforcement would have been achieved if:
 - (i) Article 4 of Directive 91/533/EEC had been revised to include an explicit reference to the

⁶¹ Member States may provide that the Directive does not apply to employees having a contract or employment relationship: *‘of a casual and/or specific nature provided, in these cases, that its non-application is justified by objective considerations’*.

⁶² e.g. ES, IT, SE.

⁶³ e.g. IT, NL, SE.

⁶⁴ CY, MT, LI, SK.

⁶⁵ Adopted at the meeting of the European Council held at Strasbourg on 9 December 1989.

list in Article 3(1) of Directive 96/71/EC; or (ii) the Written Statement Directive directly included the requirement in Directive 96/71/EC on the host state rules (points (a)-(c) of the list). The legal review conducted among the Member States revealed that currently none of the Member States requires employers posting workers abroad (in the EU) to notify them *in writing* of the host state rules that will apply to them.

(2) The Study found that the Written Statement Directive could take better account of Directive 2008/104/EC on **Temporary Agency Work**, by having its scope expanded to explicitly cover agency workers and specify that the end-user employer has the obligation to inform the agency worker directly on the conditions of employment. An alternative way would be to amend Directive 2008/104/EC to require the service user to provide the agency worker with written information on the conditions of employment after a certain period of assignment (e.g. 6 to 12 months).

(3) Regarding **trainees**, there is a strong convergence of objectives between the Written Statement Directive and the 2014 Council Recommendation on a Quality Framework for Traineeships⁶⁶. The main element of the Quality Framework is the requirement for a written traineeship agreement, which has information requirements somewhat similar to those laid down in Directive 91/533/EEC. As indicated under the section on ‘Compliance’, many Member States already have rules regulating the provision of written information to trainees or include trainees within the definition of employees in national law, and thus within the scope of Directive 91/533/EEC. Nevertheless, confirmation that the Written Statement Directive covers trainees (at least those that are paid) would give a strong boost towards achieving the objectives of the Quality Framework for traineeships.

Finally, on the Commission’s activities to address **undeclared work**⁶⁷, the Study also confirmed that written statements in some countries serve as a means for detecting undeclared work: where no written statements are issued this is often a good indicator of other irregularities as well. As such, labour inspectorates view the written statement as a useful tool in their monitoring work.

⁶⁶ Retrieved from: http://www.consilium.europa.eu/uedocs/cms_Data/docs/pressdata/en/lisa/141424.pdf.

⁶⁷ Decision (EU) 2016/344 of the European Parliament and of the Council of 9 March 2016 on establishing a European Platform to enhance cooperation in tackling undeclared work, OJ L 65, 11.03.2016, p. 12.

- **5.6. EU added value**

EU added value refers to any effects which, it can reasonably be argued, are due to EU intervention rather than any other factors.

European added value may result from different factors: coordination gains, legal certainty, greater effectiveness, complementarities, etc. In social policy, EU added value also results from instituting minimum standards, thus preventing a detrimental race between Member States to the lowest working conditions.

Against this background, both employee and employer representatives considered it important to have minimum standards in the area of information to employees to ensure that employees have access to certain minimum rights and to ensure increased certainty about the working relationship. Although some countries had legislation in place before the transposition of the Directive, many did not, and a number of stakeholders pointed to the value of: (i) having more harmonised rules in this area; (ii) increasing legal certainty for all parties on the essential aspects of the employment relationship; and (iii) helping achieve a basic floor of minimum rights for employees.

Given national variations in the way such information is delivered (e.g. some countries do not require a written contract of employment to be provided), an EU Directive in this area has ongoing added value for employee protection as it reduces disparities between countries and contributes to ensuring that minimum standards of provision of information are maintained.

An important point to recall is that in several Member States labour contracts (all or only some forms) can be concluded orally. In the absence of the Directive, it is very likely that workers in these Member States would receive less/no information in writing about their working conditions.

A framework at EU level on written information was considered by interviewed stakeholders to offer increased standardisation and predictability for businesses. Given the diversity of labour contracts across the EU, evaluation shows that this Directive was also assessed to be important in terms of facilitating the mobility of workers within the internal market. This is because it provides minimum standards of information which reduce national disparities and make it easier for both businesses and workers to operate in other Member States⁶⁸.

The provision of written information seems to be well-integrated into normal business practice. However, according to a number of stakeholders (both employee and employer representatives) the Directive also plays a role in ensuring that minimum standards of transparency are maintained across the EU and in promoting common business practices in this area, thus preventing a downward spiral towards decreased transparency. Most employers welcomed the certainty provided by EU rules, especially in the trans-national context⁶⁹.

⁶⁸ See section 5.6.1. of the Study

⁶⁹ See section 5.3.2. of the Study

Finally, by reducing divergences in Member State legislation governing information obligations to employees, in practice the Directive improves the operation of the internal market of the EU.

Section 6: Conclusion

- REFIT objectives

The present evaluation is a REFIT evaluation. As such, it particularly seeks confirmation that the legislation is fit for purpose, minimises associated costs and burdens and does not offer significant scope for simplification.

The evaluation confirmed that the Directive is fit for purpose. Indeed, as shown under the ‘Effectiveness’ section, the Directive fulfils its objectives (i.e. protection of workers and greater transparency on the labour market) to a significant extent. Moreover, the obstacles to effectiveness identified by the evaluation are an argument for strengthening the Directive rather than softening or repealing it.

Costs deriving from the Directive are modest and no evidence was presented that cheaper ways of fulfilling the same objectives with the same effectiveness were available. Again, simplifying the Directive would lead more to strengthening it (by removing some or all the exceptions and options it currently provides) than softening or repealing it.

- Evaluation criteria

Compliance with the Directive in Member States and across sectors is medium to high. On national legislation, the evaluation identified some minor/ medium transposition gaps and inaccuracies. The latter are currently being clarified by the Commission services, Member States concerned will be contacted where appropriate. The main issues on implementation are associated with the ‘grey’ area between self-employment and subordinate employer-employee arrangements.

The Directive is considered as **relevant** by all stakeholders, in particular public authorities and both sides among social partners. This is a striking finding. Although the Written Statement Directive is very modest in its approach — based exclusively on providing information — it is seen as an important piece of EU law in a social market economy. It spells out concrete basic information requirements — ‘*verba volant scripta manent*⁷⁰’ — relating to the content of the employment relationships. The evaluation also highlighted the Directive’s relevance in a modern labour market where the use of new and atypical forms of employment is growing.

The major messages of the evaluation relates to **effectiveness**. There is strong evidence that the Directive has been effective in reaching its objectives (i.e. protection of workers and greater transparency on the labour market) to a significant extent. Nevertheless, the evaluation has identified several factors hampering full effectiveness:

- In particular, the scope of application the Directive is somewhat problematic. It does not cover all workers in the EU as it allows some noteworthy exemptions and gives Member States the possibility to define whom they consider as ‘a paid employee’.

⁷⁰ ‘Spoken words fly away, written words remain’.

- There is also a significant lack of clarity in practice 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 or not.
- In addition, the enforcement of the Directive could be improved by rethinking the means of redress and sanctions in cases of non-compliance (the possibility for the employee to claim for damage compensation where the written statement was not received is not really used in practice).
- Furthermore, the two-month deadline was highlighted by stakeholders as an aspect of the Directive that is not supporting the objective of increasing transparency and which may in fact increase the potential for undeclared work or abuse of employee rights.

Regarding **efficiency**, the transposition of the Directive does not appear to have increased costs for companies to a significant extent. In general, the compliance costs are assessed by surveyed employers as neither high nor low, so can be assumed therefore to be at an appropriate level. The assessment of administrative burden caused by the Directive did not reveal any significant differences related to the enterprise's size. The share of SMEs stating that they would still comply with the obligations even in the absence of minimum requirements was in fact slightly higher than the average and for micro enterprises it was only slightly lower than the average. No particular aspects of the obligations stood out as particularly onerous or complicated to comply with.

The Directive globally satisfies the test of **coherence**. On internal coherence, the evaluation showed that there is some discrepancy between the stated goal of the legislation in its preamble i.e. the requirement that every employee must be provided with a written statement except in limited cases and the operational scope of the Directive, which actually allows more than just limited exceptions. On external coherence, the Directive fits well within EU policies and legislation. There is scope for further convergence with the rules covering posted workers, temporary agency workers and trainees.

Finally, the Directive brings clear **EU added value**. Having minimum standards at EU level on information to employees is essential as it increases certainty for both employers and employees and prevents a detrimental race to the bottom between Member States in working conditions. The Directive brings particular added value in Member States where labour contracts (all or only some forms) can be concluded orally. The Directive also increases predictability for businesses and facilitates the mobility of workers within the internal market.

Annex 1: Procedural information

Lead DG and steering group

The lead Directorate-General (DG) for this REFIT evaluation was DG Employment, Social Affairs and Inclusion (DG EMPL). Representatives of other relevant DGs or departments were invited to give their input as part of an inter-service steering group.

The following DGs or departments took part in the evaluation: the Secretariat-General, DG GROW, DG JUST, DG MOVE, the Legal Service.

The steering group met on five occasions:

Kick-off meeting	11.5.2015
Inception report meeting	25.6.2015
Interim report meeting	22.10.2015
Draft final report meeting	14.1.2016
Draft staff working document meeting	8.12.2016

Roadmap / work programme references

The roadmap for this evaluation was published on 14 January 2016 and was made available for comments for 4 weeks (none were received), see http://ec.europa.eu/smart-regulation/roadmaps/docs/2015_empl_021_evaluation_written_statement_directive_en.pdf.

This evaluation was announced in the Communication on Regulatory Fitness and Performance (REFIT): Results and Next Steps, COM(2013) 685, annex p. 11.

The evaluation was also mentioned in the Commission Work Programmes 2015 and 2016 (Annex 3 REFIT action No 26 and Annex 2 REFIT initiative No 23 respectively).

Regulatory Scrutiny Board (RSB)

This evaluation was not selected for presentation to the Commission's Regulatory Scrutiny Board.

Annex 2: Summary of responses to consultations

Summary of responses to the public consultation on the Written Statement Directive — employer’s obligation to inform employees of the terms of their employment (Directive 91/533/EEC)

• **The open public consultation:**

Between 26 January and 20 April 2016, the Commission carried out a public consultation on the Written Statement Directive. The relevant website⁷¹ contained both the questionnaire and the accompanying consultation document in all EU official languages except Irish. The consultation document is still online. The questionnaire as such is closed, but replies are visible online unless respondents did not consent to the Commission publishing them.

147 replies were received in total from 7 public authorities, 26 employee organisations or employee representatives, 27 employees or workers, 43 employers’ organisations, 27 employers, 3 self-employed persons, 5 citizens and 9 respondents defined as ‘other’⁷².

One other public authority, the Government of Aragon, did not reply to the questionnaire, but did propose:

- deleting the exceptions to Article 1(2) of the Directive, in particular the ‘one-month’ exemption⁷³;
- specifying the ‘working hours’ instead of ‘the length of the employee’s normal working day or week’ in the standard package of information.



⁷¹ See <http://ec.europa.eu/social/main.jsp?catId=333&langId=en&consultId=18&visib=0&furtherConsult=yes>.

⁷² The last group of respondents includes three lawyers, a vocational trainer, a civil servant, an employee, an employee from a professional organisation and another from a chamber of crafts.

⁷³ The reason given is that Spain would then have a high number of short-term employment relationships.

Fig. 1: Overview of stakeholders

Submissions were received from 21 Member States. The largest proportion of submissions came from Germany (25 %), Bulgaria (16 %) and Spain (14 %). All other Member States failed to achieve double digits.

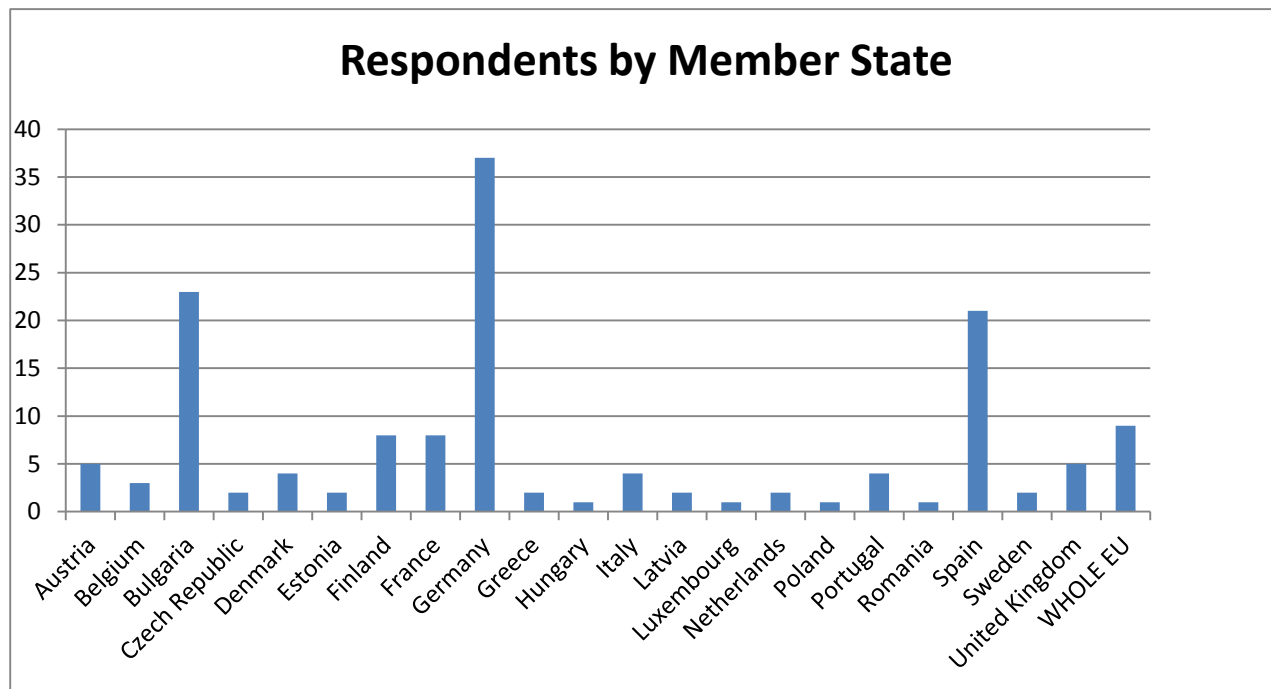


Fig. 2: Overview of respondents by country

We would like to reiterate the general limitations to public consultations. As a rule, a public consultation does not faithfully represent EU citizens' views. In fact, only extremely high numbers of respondents across all sectors and stakeholder categories could meet the statistical requirements for representativeness. Where percentages of opinions are given, this gives all respondents the same weight, whatever their role. An individual is counted the same as a representative organisation (public authority, social partners), which is a significant limitation to remember. As a result, it is also vital to use a qualitative approach in parallel and, where appropriate, highlight the replies from important representative organisations.

A 'campaign' involving German employers' organisations was also uncovered. At least 13 (out of 24) organisations coordinated their answers. These appeared to be the same, with identical or almost identical comments. Although such a campaign should be mentioned and take into account, the replies are still valid.

1. How much do stakeholders know about the Written Statement Directive?

A relatively high number of respondents were aware of the Written Statement Directive. 52 % of respondents were fully aware, with 25 % partially aware. Knowledge of the Directive was particularly high among employers' organisations and employee organisations, with 77 % of them fully aware of it. Knowledge of the Directive was highest among public authorities, with 86 % of respondents fully aware of it.

2. Are the Written Statement Directive objectives still relevant?

3 out of 4 respondents believed that the objectives of the Written Statement Directive are still relevant and that we need to protect employees against possible infringements of their rights.

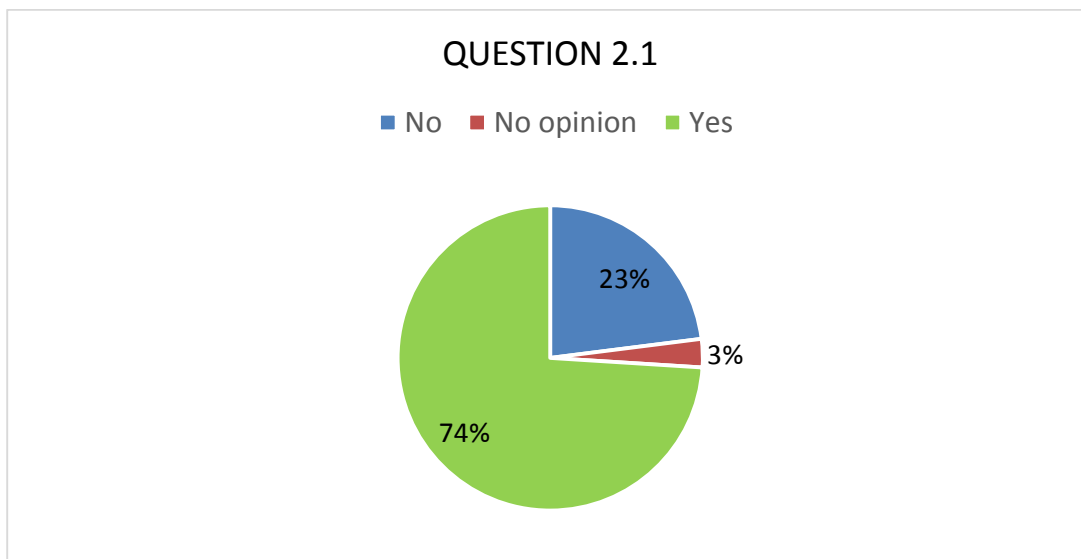


Fig. 3: In your opinion, is it necessary to protect employees against possible ill-respected or violation of their rights through an information obligation on the basic elements of their employment relationship? (total)

Employee organisations and employees were the most positive. They were almost unanimous in affirming the relevance of the Directive with two thirds of employers also echoing this sentiment.

By contrast, the majority of employers' organisations (61 %) did not consider this Directive to be relevant. As stated, the German campaign appears to have affected the result. If we discount German employers' representatives, only 3 out of the 19 remaining respondents found the Directive irrelevant. With this in mind, it is worth mentioning that Business Europe, UEAPME, the Federation of Finnish Enterprises and the Confederation of Danish Employers were all in favour of the Directive and still found it relevant.

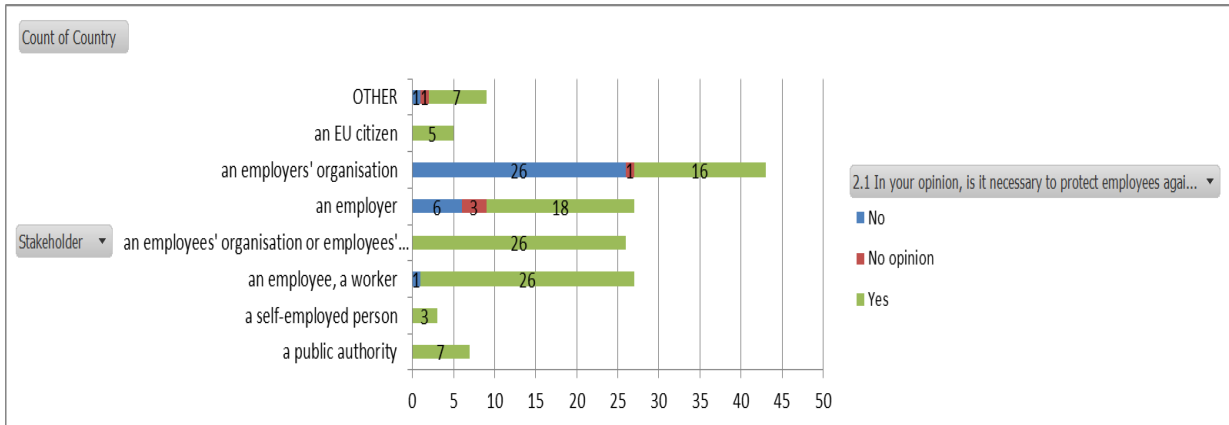


Fig. 4: In your opinion, is it necessary to protect employees against possible ill-respected or violation of their rights through an information obligation on the basic elements of their employment relationship? (stakeholders)

6 out of 10 respondents still believed that the labour market should be more transparent. This feeling was shared by a significant majority in each stakeholder category. Employers' organisations were the exception, with an overwhelming majority of 79 % opposing a more transparent labour market. Again, Business Europe did not share the views of the majority and believed that there might be a need for more transparency in certain Member States.

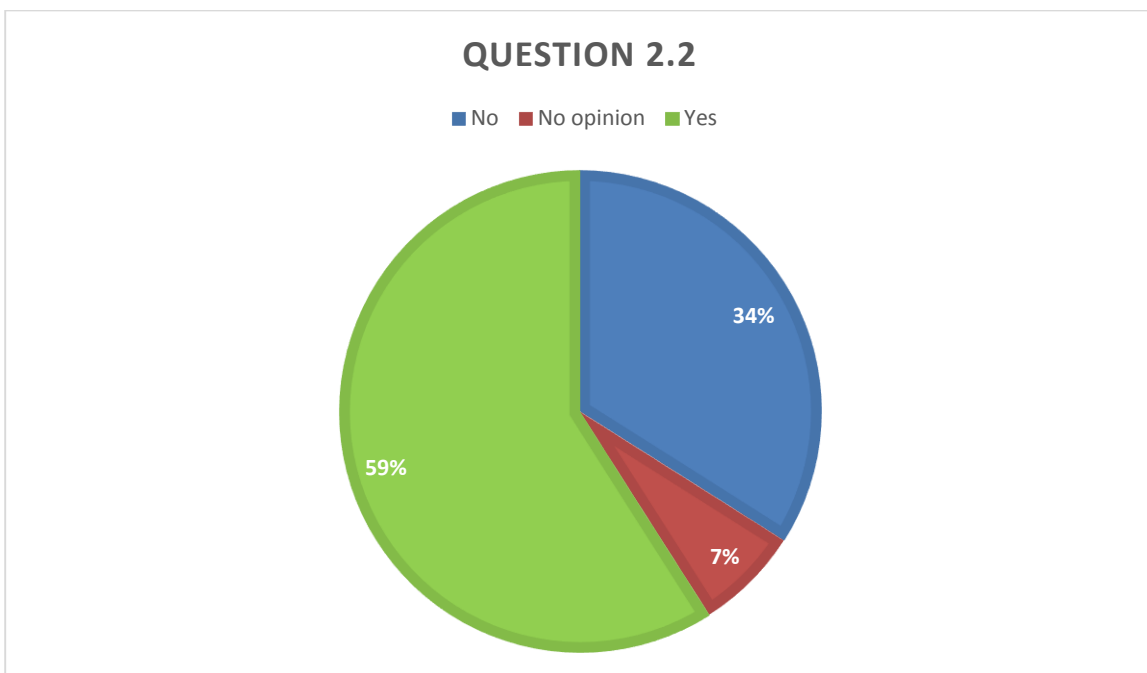


Fig. 5: In your opinion, does the labour market need to be made more transparent?

3. Is the package of information for employees satisfactory?

With the exception of employee organisations, none of the stakeholders wanted to improve the prescribed information package. Nearly 6 out of 10 respondents deemed the current package to be sufficient. Only 1 out of 5 respondents, mostly employers' organisations, regarded it as excessive.

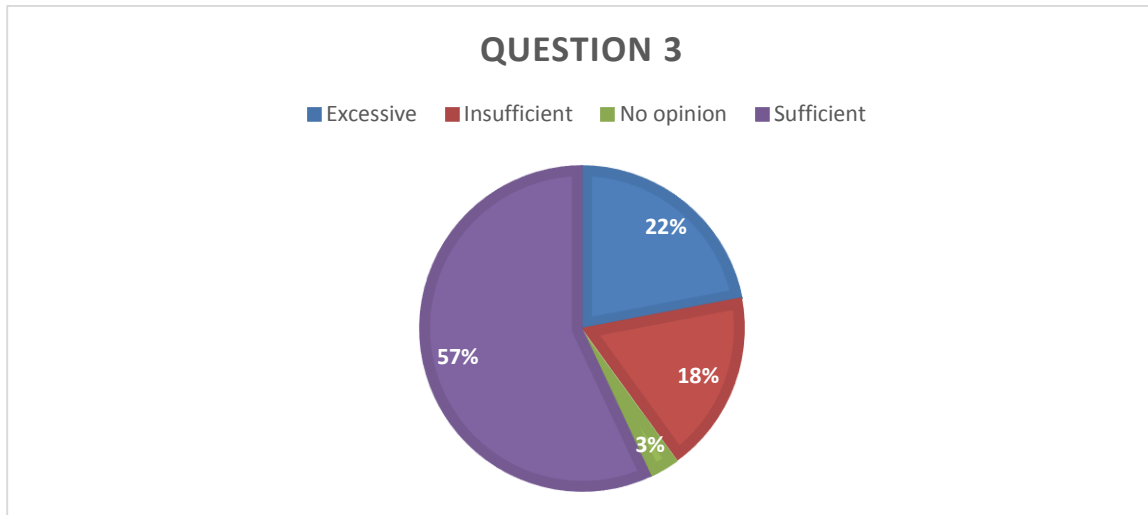


Fig. 6: How would you rate the package of information required by the Directive? (total)

Among the respondents that viewed the current package of information as insufficient, the Austrian public authorities requested that for postings abroad, more detailed information should be provided on the transfer of remuneration, working hours and working conditions abroad, travel and subsistence expenses. One Belgian employee suggested making it compulsory to include brief, but exhaustive job specifications. This would protect employees from performing certain tasks which go beyond their job specification, which would result in them carrying out certain work without being paid.

4. Who is protected by the Written Statement Directive?

The respondents were asked to give their opinion on the fact that the Directive does not contain a definition of 'paid employee' but simply refers to the national definitions of this concept. Nearly half of the respondents were unable to say or simply did not have an opinion on this issue.

The remaining respondents were evenly divided. 28 % believed that the reference to national definitions decreases the effectiveness of the Directive as Member States can exclude some categories of active people from being protected by the Directive. 27 % believed that it increases the effectiveness of the Directive as Member States can have additional categories of active people under the protection of the Directive.

With the exception of the Austrian Ministry of Labour, all public authorities confirmed that it increases the effectiveness of the Directive. The Dutch government explained that it allows Member States to extend the Directive to other forms of employment and therefore implement the Directive in a tailor-made way. The Austrian Government used the same argument to spell out its position, namely that there are different levels of protection in the Member States, which also lead to distortions of competition.

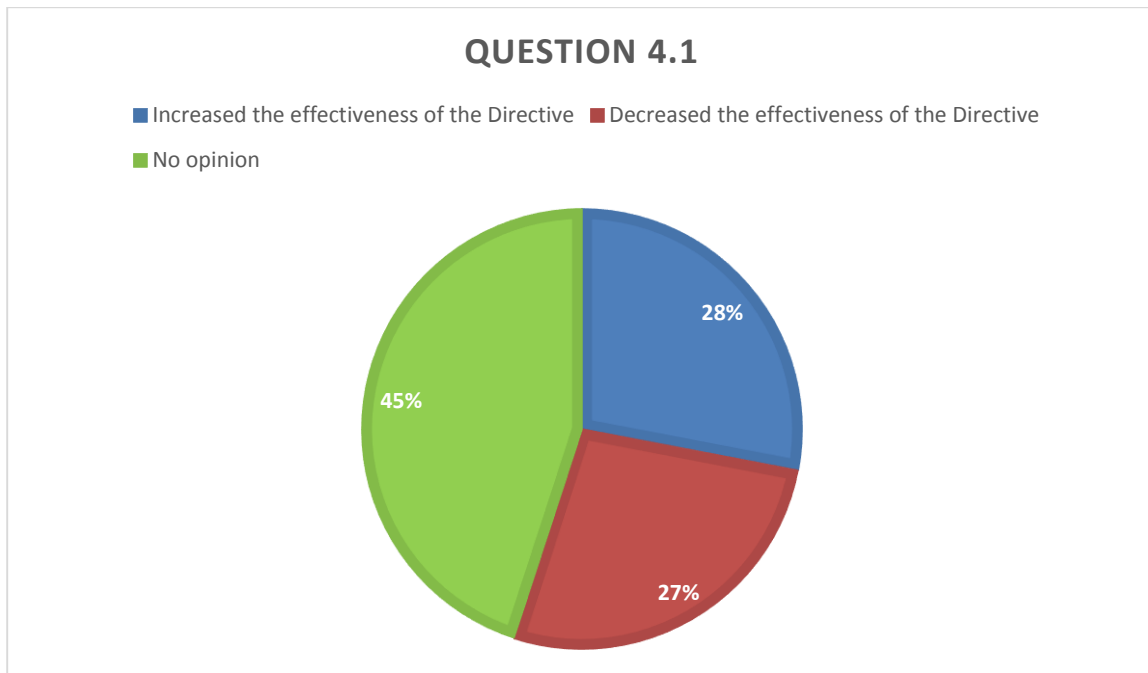


Fig. 7: In your opinion, what was the impact of referring in the Directive simply to the national definitions of a 'paid employee'? (total)

With the exception of employers' organisations, the majority of respondents (56 %) argued that the Directive should cover new forms of employment. Public authorities were in favour of including new forms of employment as long as these are governed by an employment relationship. The Austrian Government (Ministry of Labour, Social Affairs and Consumer Protection) pointed out that the lack of a consistent EU-wide definition leads to distortions of competition.

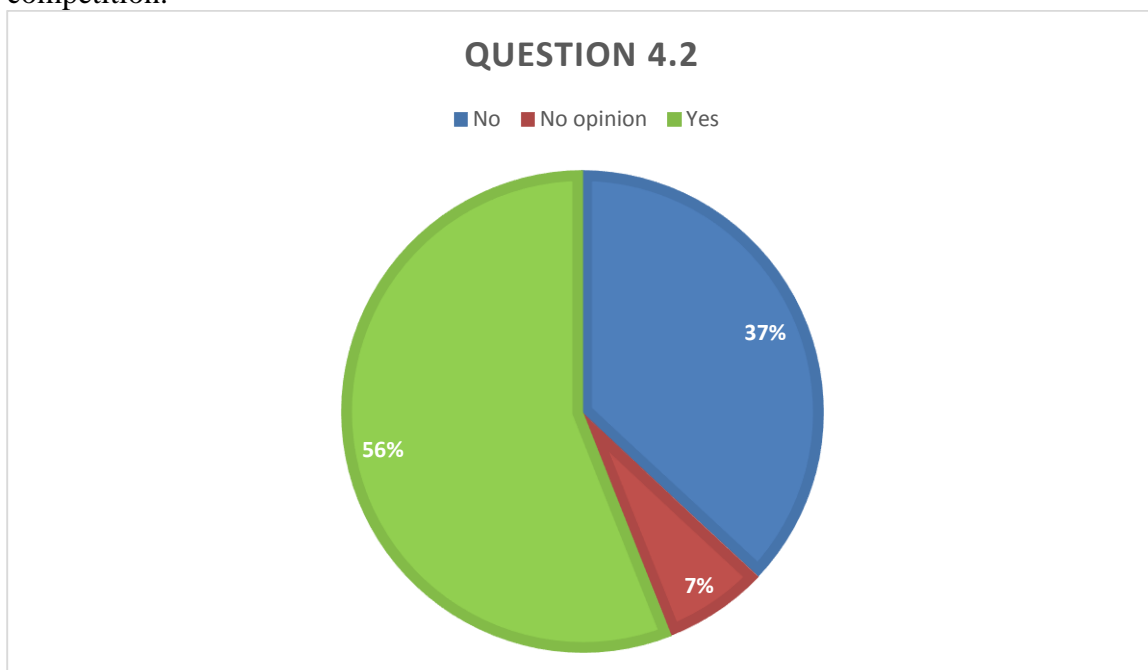


Fig. 8: In your opinion, would it be particularly important for the Written Statement Directive to state that it covers new forms of employment? (total)

5. Has the Written Statement Directive had any benefits?

The respondents were generally positive about the benefits of the Written Statement Directive. Figure 6 shows that almost two thirds of the respondents believed that the Directive has improved employee protection. With the exception of employers' organisations, this view is reinforced by the majority in each stakeholder category. Only 29 %, employers' organisations in the main, disagreed with this assumption.

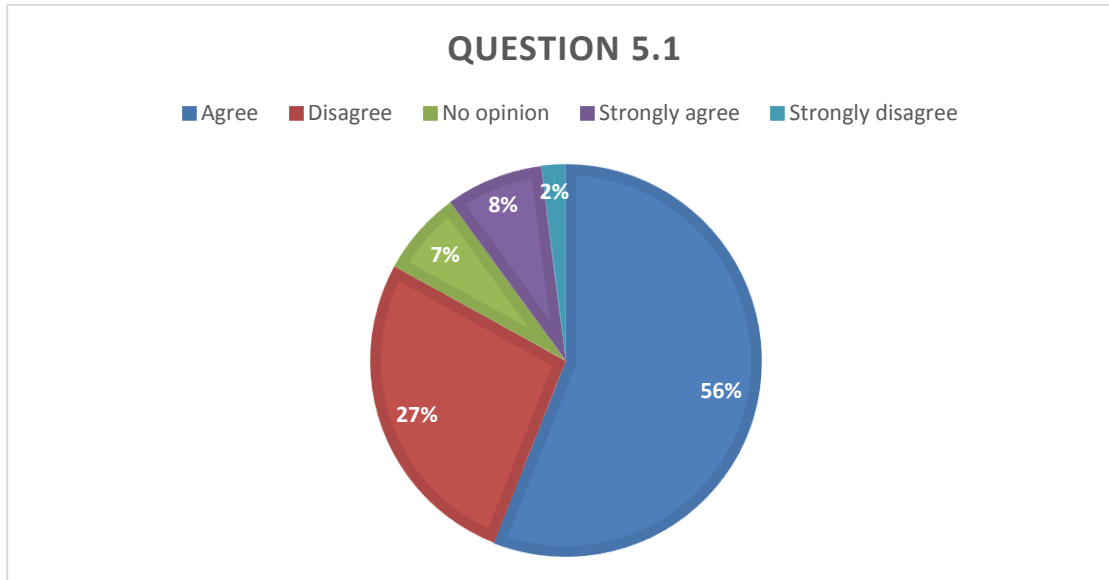


Fig.9: In your opinion, has the Directive improved the protection of employees against possible ill-respect or violation of their rights? (total)

In addition, only a minority disagreed that the Directive has made the labour market more transparent (question 5.2). Employee organisations and employees were particularly satisfied with the impact of the Directive on the labour market (96 % and 59 % respectively). However, this view was not shared by employers' organisations.

Half of respondents believed that the Directive has not improved the protection of expatriate employees, compared to 1 out of 3 respondents who agreed that it had (question 5.3). A large number of respondents did not express an opinion on this (19 %). However, when we analyse the results of question 5.4, we see that two thirds of respondents believed that the Directive has improved employees' working conditions in general. Employers' organisations are the only category where a majority of the respondents went against the trend. Again, it is important to look at the results without the effect of the German campaign.

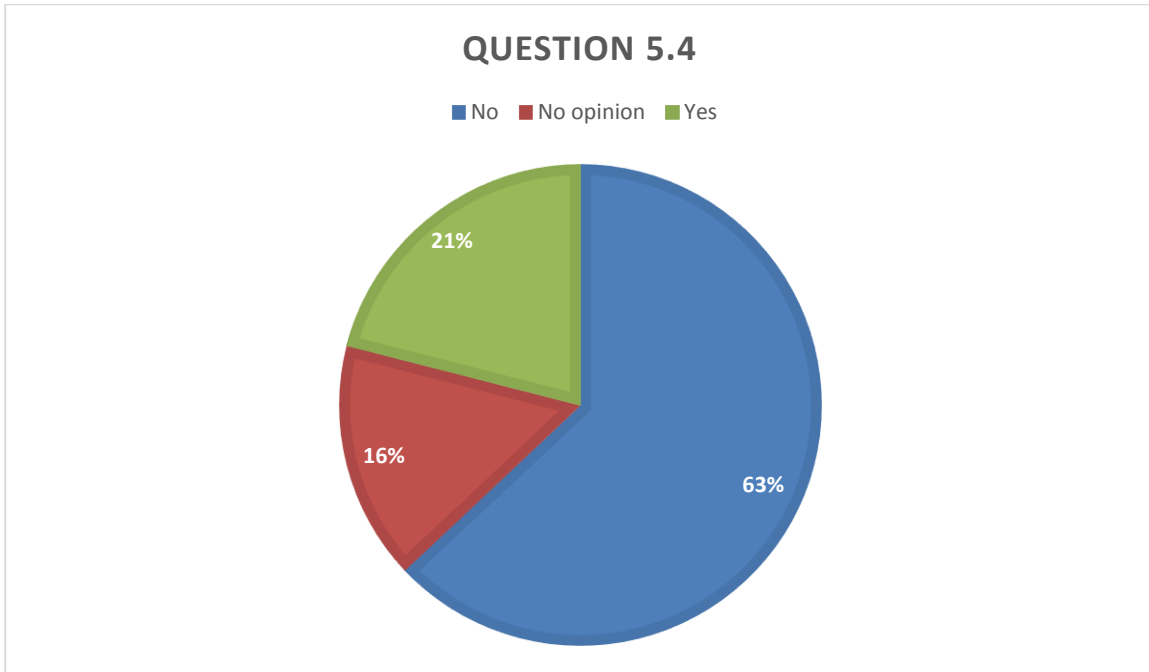


Fig. 10: Would you say that the Directive has improved employees' working conditions in general? (total)

Lastly, 63 % of respondents, including 59 % of employers, said that the Directive has had a beneficial impact on employees (question 5.5). Employers who responded positively explained that the Directive has improved work organisation, which in turn improves productivity and helps to reduce unfair competition. A large number also acknowledged that the Directive has had a positive impact on their businesses. Public authorities also argued that legal clarity and transparency helps avoid disputes, contributes to a better work environment and increases productivity.

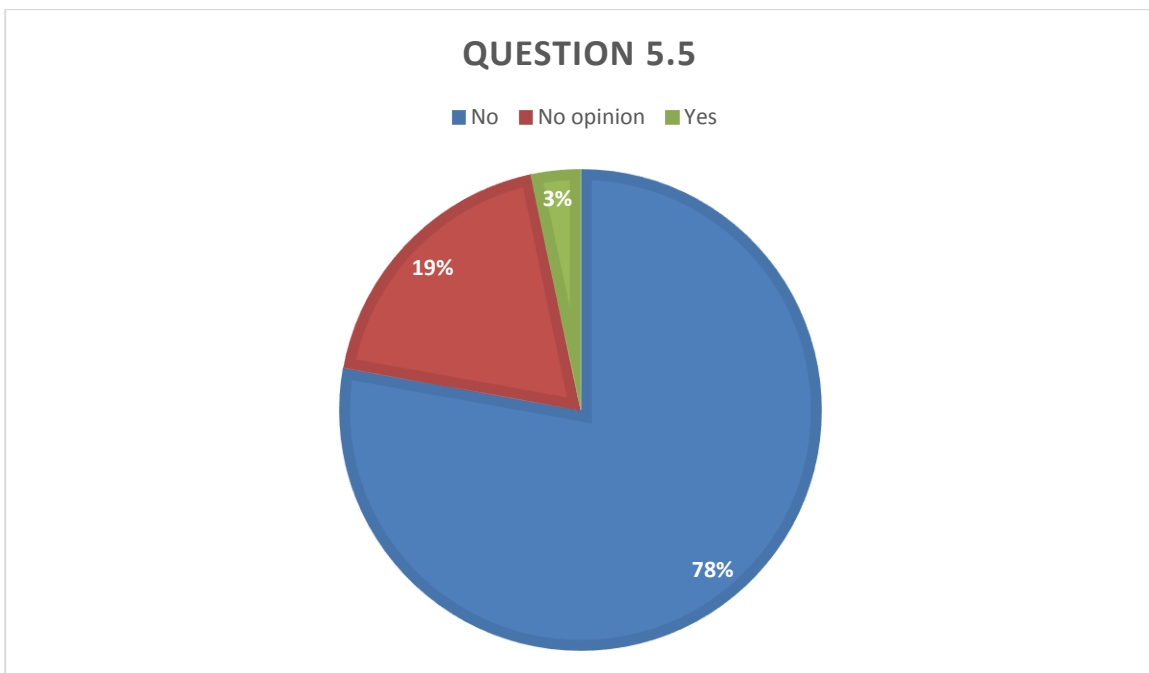


Fig.11: Would you say that employers can also benefit from complying with the Written Statement Directive? (employers)

6. Does the Written Statement Directive generate burdens?

59 % of respondents said that the Directive does not represent a disproportionate burden for employers. The results tended to be more negative among employer stakeholders.

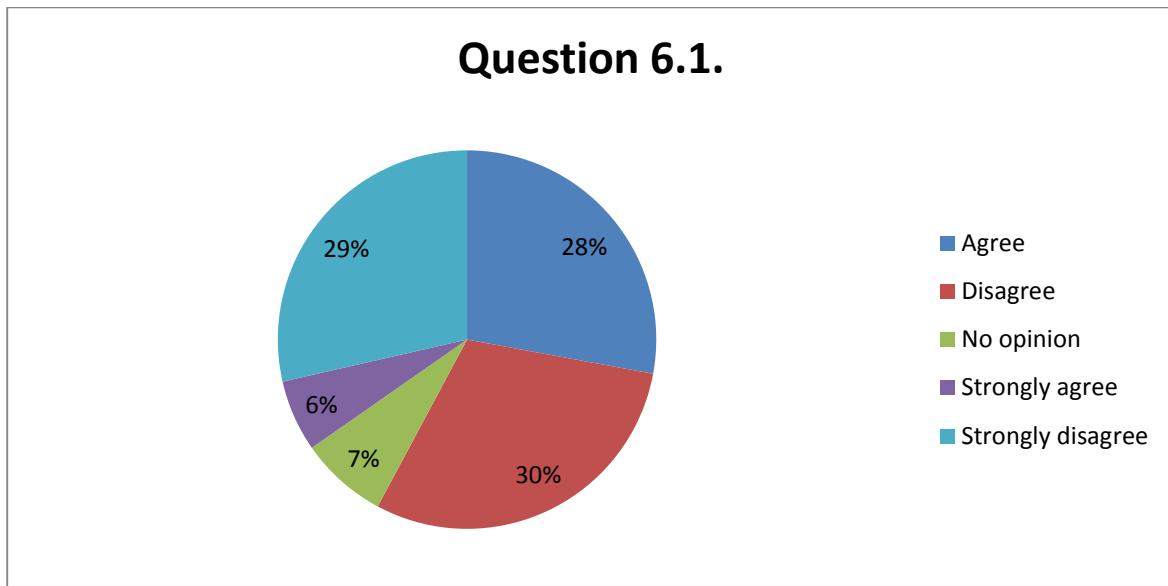


Fig. 12: How far do you agree or disagree with this statement: 'Complying with the Written Statement Directive (more precisely with the national rules transposing it) represents a disproportionate burden for employers when compared with the benefits it brings.'

7. Additional questions for specific stakeholders

7.1 Employees

The Written Statement Directive appears to be applied properly by most employers as 63 % of employees received information that broadly corresponds to the information package required by the Directive. Another 22 % of employees also received information when they started their employment relationship, although it was less than that required by the Directive. However, there is still room for improvement as a minority of employees (11 %) did not receive any or hardly any information.

7.2 Employees' organisations

The response of employees was echoed by employees' organisations, with 75 % of respondents confirming that the employees they represent do receive written information which broadly corresponds to the information package required by the Directive.

7.3 Employers

For 6 out of 10 employers, it takes less than 1 hour per employee to comply with the requirements of the Directive (Fig. 13). Similarly, when employers make changes to an existing employment contract, they do not spend substantially more time on providing the employee with new information (Fig. 14). However, 19 % of employers were unable to estimate the time needed to comply with the requirements or provide new information.

Finally, only 26 % of employers believed that the Directive has had a negative impact on their businesses. Only 8 % said that it has had a negative impact on their employees.



Fig. 13: For your company, please estimate the average amount of time needed for compliance with the requirements of the Directive for each new employment contract/relationship (employer)

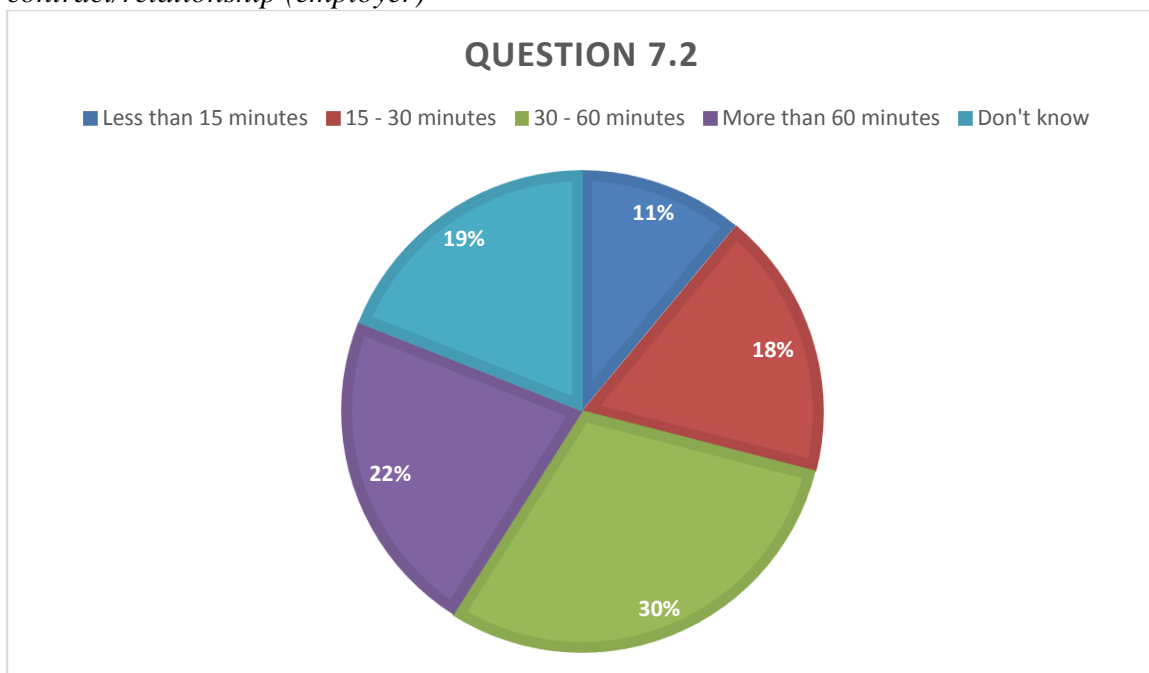


Fig. 14: For your company, please estimate the average amount of time needed for compliance with the requirements of the Directive for each change to the terms of an existing employment contract/relationship (employer)

7.4 Employers' organisations

70 % of employers' organisations believed that complying with the Directive has had a negative impact on the businesses of employers. However, despite the German campaign conducted by employers' organisations, only 5 % considered the Directive to have had a negative impact on employees.

- **The key stakeholder workshop:**

With the aim of consulting and discussing collectively the draft findings and conclusions of the REFIT study, a workshop with key stakeholders was held on 7 December 2015. Organised with the support of the external contractor, it gathered legal experts, EU social partners and Member States representatives (among the 8 target countries).

The workshop allowed to further specify some of the conclusions notably in terms of transposition and its legal effects but it also helped to collect input for the draft recommendations and the various options to be presented in the final report of the Study.
