

Chapter 4

A new legislative agenda for the EU: putting meat on the bones after all?

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Introduction¹

The European Pillar of Social Rights (hereafter EPSR), solemnly proclaimed in November 2017, is in principle to be welcomed. However, its credibility and effectiveness — as is the case with any other international, European or national list of fundamental social rights — will depend on its actual implementation (see also Sabato *et al.* 2018²). Particularly since the European Pillar is (still) a non-legally binding instrument, its added value will only become visible when (a) it is accompanied by tangible, legally binding initiatives; (b) once implementation of these at national level is regularly monitored; and (c) it is used as an authoritative interpretation/reference instrument by European and national courts.

The European Commission has so far³ launched two so-called ‘packages’ of implementation initiatives: the ‘European Pillar Package’ (26 April 2017) and the ‘Social Fairness Package’ (13 March 2018). With the European Commission set to use different tools and instruments for implementing and monitoring the Pillar (including legislative initiatives, soft governance tools such as the European Semester and better/enhanced use of EU funds)⁴, this chapter looks in particular into the different (potential) legislative proposals and/or (social partner) consultations contained in these two packages. Section 1 focuses on the ‘European Pillar Package’: the revision of the Written Statement Directive, legislative initiatives in the area of work-life balance, the consultations on access to social protection for workers and the self-employed (see also Spasova and Wilkens, this volume) and the interpretative guidance on the Working Time Directive. Section 2 takes a closer look at the initiatives proposed under the ‘Social Fairness Package’, which includes the establishment of a European Labour Authority (ELA). Section 3 describes the latest developments in relation to the revision

1. Given the vast number of documents produced under the different initiatives, references to these documents in the following footnotes (as well as in the reference list at the end of this chapter) are not necessarily given (and numbered) in chronological order, but rather following the structure of the content of the chapter.
2. This study on behalf of the Workers’ Group of the European Economic and Social Committee (EESC) analyses the initiatives launched in the first months since the proclamation of the EPSR, several of which are also described in this chapter. Furthermore, the study also provides some concrete policy recommendations to ensure the Pillar’s effective implementation, including proposals for some new legislative initiatives such as a framework Directive on minimum income schemes, a Directive on Effective Enforcement of Workers’ Rights, a Social Progress Protocol (to be annexed to the TFEU) and a ‘Social Rights Test’ for all new policies.
3. Time of writing: late June 2018.
4. For an overview of the various initiatives envisaged/announced as well as the monitoring of their implementation, see *inter alia*: European Commission (2017a and b), European Commission (2018a and b).

of the Posting of Workers Directive, which, while closely related to the ELA, was set in motion before the announcement of the EPSR. The concluding section summarises and looks to the future. Throughout the chapter, particular attention will also be paid to the (diverging) positions of the European cross-industry social partners (ETUC, BusinessEurope, UEAPME and CEEP).⁵

1. The 'European Pillar Package'

As part of the drive to use EPSR implementation not only for 'updating and complementing EU law where necessary' but also 'better enforcing EU law'⁶, the Commission put forward this first package of initiatives on 26 April 2017. It included, in particular, the following four initiatives: 1) a social partner consultation on the revision of the Written Statement Directive (Directive 91/533/EC); 2) a proposal for a (new) Directive on Work-Life Balance for parents and carers; 3) an interpretative guidance on the Working Time Directive (WTD, Directive 2003/88/EC); and 4) social partner (and public) consultations on improving 'access to social protection for all workers and the self-employed'.

1.1 The revision of the Written Statement Directive

Over the last decade, the EU has witnessed — due to economic, societal and digital developments — the emergence of numerous new forms/relationships of atypical/non-standard work (e.g. employee/job sharing, casual work, zero-hours contracts, platform workers, etc.) (Eurofound 2015). This has given rise to manifold problems and challenges in relation to labour law and the social security of these workers, including the transparency and predictability of their working conditions⁷. A Commission REFIT evaluation⁸ showed that the existing *acquis*, in the form of the so-called Written Statement Directive of 1991⁹, had become not only outdated in light of these challenges but was also insufficiently enforced (European Commission 2017d). The Commission therefore decided to launch a two-stage consultation of the European social partners to collect their views on the need for and possible content of a revised Directive. The Commission proposed mainly two alternative ways to amend the Directive: either to extend the matters on which information must be provided, to make the obligation apply earlier than two months after the start of work (as is the case in the 1991 Directive) and to extend it to all workers, irrespective of the type of employment relationship, including those in atypical and new forms of work; or to

5. For the positions and reactions of the European sectoral social partners, readers are advised to consult the respective websites.

6. See in particular European Commission (2017b: 8).

7. For social security protection, see in particular Spasova *et al.* (2017).

8. REFIT is part of the Commission's better regulation agenda. It aims to keep EU law simple, remove unnecessary burdens and adapt existing legislation without compromising policy objectives. For more information see https://ec.europa.eu/info/law/law-making-process/evaluating-and-improving-existing-laws/refit-making-eu-law-simpler-and-less-costly_en

9. Directive 91/533/EEC on an employer's obligation to inform employees of the conditions applicable to the contract or employment relationship.

amend the Directive by providing a minimum floor of rights to ensure fair working conditions for all workers, including the self-employed. It also asked whether the social partners wished to enter into negotiations over a revision within the framework of Articles 154-155 TFEU¹⁰.

In response to this invitation, the European social partners expressed divergent views in their respective replies to the two stages of the consultation. BusinessEurope firstly considered that the consultation went beyond a REFIT revision (i.e. to make a legal text simpler and adapt it where needed), as the Commission suggested not only the introduction of new rights, but also included a new EU definition of a ‘worker’: the employers’ organisation strongly opposed this, saying that it would only lead to more legal unclarity and that definitions should be left to the Member States. The Commission also proposed strengthening the means of redress and sanctions. Before entering into legislative work on any of the issues identified, the European social partners should first be allowed to assess the Written Statement Directive and its implementation (BusinessEurope 2017a and b). A similar view was expressed by UEAPME (UEAPME 2017a). The ETUC demanded that a revised Directive offer the greatest possible protection to all workers by combining the objectives of both proposed options, thus 1) extending the scope of the Directive to cover the broadest possible area; 2) extending the list of mandatory information to be provided prior to the start of the employment relationship; 3) providing a new set of minimum rights; and 4) strengthening enforcement and sanctions (ETUC 2017a and b).

Whereas the ETUC, in its reply to the first consultation, was ready to enter into negotiations, as was CEEP (CEEP 2017a), BusinessEurope and UEAPME were generally only willing to open a ‘dialogue’ or ‘exploratory talks’ to assess the feasibility and appropriateness of initiating a dialogue under Article 155 TFEU. As a counter-offer, the ETUC proposed opening a dialogue for the purpose of providing the Commission with shared inputs; this was also because opening formal negotiations lasting up to 9 months would not give the Commission and Parliament time to finalise the revision of the Directive before the end of their current legislative term. Though this offer was rejected by the peak-level employer organisations, they nevertheless called for negotiations, but only on a limited number of issues. The ETUC was unable to accept this conditional offer and thus urged the Commission to come up with a legislative proposal as soon as possible.

The Commission did this on 21 December 2017, launching a proposal for a Directive of the European Parliament and of the Council on transparent and predictable working conditions in the European Union (European Commission 2017f)¹¹. The proposal suggests changes to Directive 91/533, particularly in relation to the type of information to be provided, the deadline for its provision and the way it is provided, but also new material rights and strengthened enforcement. More importantly, however, the

10. A summary of the replies received as well as an analysis of the problems and challenges posed, can be found in European Commission (2017e).

11. The launch of the proposal was accompanied inter alia by an impact assessment (European Commission (2017g).

Commission proposes an EU definition not only of ‘worker’, but also of ‘employer’ and ‘employment relationship’¹². For an overview of the main changes, see Table 1.

During the consultation, the reactions of the European social partners to the Commission proposal unsurprisingly diverged greatly. BusinessEurope completely opposed the proposal. In their view, it is imbalanced and key aspects of the proposal do not respect the principles of subsidiarity and proportionality. In its view, the proposal firstly introduces a number of costly bureaucratic elements (in particular in relation to time, means and amount of information to be provided); secondly, it introduces too broad a definition of worker (which would cover, for instance, self-employed consultants and freelancers) and will create fundamental legal uncertainty; thirdly, it proposes several new minimum rights, and will introduce restrictions concerning often highly-paid, highly-skilled key company staff. Moreover, BusinessEurope is of the opinion that the proposal fails to take into consideration the specific nature of certain sectors, such as mobile work or road transport (BusinessEurope 2018a).

Similarly, the UEAPME, the official voice of associations of SMEs, also expresses serious concerns about the ‘red tape’ and complexity likely to be introduced by this new proposal, which, by introducing new rights, goes far beyond just informing workers of their working conditions. It also criticises the overly broad definition of ‘worker’ and of the notions ‘employer’ and ‘employment relationship’ (UEAPME 2018a and b).

The ETUC considers the proposal in general a ‘first major step forward but weaker than expected’ (ETUC 2017c). Although the proposal, if adopted, will provide greater protection especially to vulnerable workers in precarious and atypical working relationships, the current text still contains numerous loopholes and will need to be significantly amended to actually meet the aims it hopes to achieve. Thus, the proposal still allows too many exceptions from its scope (for instance the exemption for ‘employment relationships equal or less than 8 hours a month’). It does not clearly resolve the situation of the self-employed, nor is it clear whether it also covers public-sector workers. Furthermore, in the view of the ETUC, (a) the list of information requirements should be genuinely open; (b) the text contains no ban on the use of zero-hours contracts; and (c) some of the provided (new) forms of redress are optional (ETUC 2018a).

This proposal is now in the ‘trialogue negotiations’ between Commission, Parliament and Council. The main stumbling block will surely be the definitions of ‘worker’ and ‘employment relationship’, in particular since the Council, in its negotiating position adopted on 21 June, rejects the definitions put forward in the Commission proposal and wants to leave it completely to Member States to decide who should benefit from the Directive’s protection. Furthermore, the Council also proposes excluding seafarers,

12. Article 2 ‘Definitions’ reads:

‘1. For the purposes of this Directive, the following definitions shall apply:

(a) ‘worker’ means a natural person who for a certain period of time performs services for and under the direction of another person in return for remuneration;

(b) ‘employer’ means one or more natural or legal person(s) who is or are directly or indirectly party to an employment relationship with a worker;

(c) ‘employment relationship’ means the work relationship between workers and employers as defined above; (...).

Table 1 Main changes envisaged by the proposal for a Directive on Transparent and Predictable Working Conditions

	Current rules	New rules
Type of information offered by employer	Identity of parties; place of work; specification of work; starting date; duration (for temporary contracts); paid leave; notice period; amount and components of remuneration; length of working day or week; applicable collective agreements; additional information for expatriate employees.	In addition to current elements, information on: probationary period (if any); training provided by employer; arrangements and remuneration for overtime; information on working time for workers on very variable schedules; social security institution to which contributions are paid.
Deadline to provide the information	Within 2 months following the start of the employment relationship	At the latest on the first day of work
How the information should be provided	Written contract, letter of appointment or one or more written documents	A written document, in paper or electronic form. Member States are obliged to provide templates and accessible information to reduce burden on employers.
Material rights	None	Limit the length of probationary periods to 6 months, unless a longer period is objectively justified; the right to work for other employers, with a ban on exclusivity clauses and restrictions on incompatibility clauses; the right to predictable work: workers with variable working schedules determined by the employer (i.e. on-demand work) should know in advance when they can be requested to work; the possibility to request a more stable form of employment and to receive a justified written reply (within 1 month; for SMEs within 3 months and orally for repeated requests); the right to free-of-charge mandatory training.
Enforcement	Member States provide the necessary measures to enable employees to pursue claims through a judicial process after recourse to other competent authorities. This may be subject to notification of the employer by the employee, and failure of the employer to reply within 15 days.	Introduction of two alternative procedures to tackle missing information: positive presumptions (if no relevant information supplied, no probationary period, permanent and/or full-time employment relationship); administrative procedure to issue injunction to employer to supply missing information. In addition, provisions are introduced based on existing social acquis on compliance, right of redress, prevention of adverse treatment, burden of proof on dismissal, and penalties.

Source: European Commission (2017h).

certain public service workers such as members of the armed forces and the police, as well as workers with an employment relationship equal or less than 8 hours in a reference period of one month from the Directive's personal scope. These positions are naturally welcomed by BusinessEurope but firmly rejected by the ETUC (Planet Labour 2018a, BusinessEurope 2018f and ETUC 2018d).

1.2 A proposal for a directive on Work-Life Balance for parents and carers (WLB)

Following a long and unsuccessful debate among and between the various EU institutions as well as the European social partners, the Commission finally withdrew its 1992 proposal for a revision of the Maternity Leave Directive¹³. However, it announced its intention to come up with a new and broader proposal on work-life balance, taking into account developments in society over the past decade (European Commission 2015).

In preparation of this new initiative, the Commission conducted, in 2016-2017, both a two-stage consultation of the European social partners and an open public consultation to seek the views of citizens and stakeholders on amending/complementing the existing EU acquis¹⁴. Proposed amendments/additions concern an increase in the existing parental leave rights contained in the Parental Leave Directive (Directive 2010/18/EU)¹⁵, which incorporates a (revised) framework agreement between ETUC, BusinessEurope, UEAPME and CEEP. Moreover, the Commission would like to introduce new paternity and carers' leave rights, as well as offering parents and carers greater rights to request flexible working arrangements. Protection against dismissal and unfavourable treatment would be enhanced. Finally, the European social partners were also asked whether they would be willing to enter into a social dialogue over these different aspects within the context of Articles 154-155 TFEU.

Whereas the ETUC, in its replies to both the first- and second-stage consultation, generally welcomed the various (new) legislative initiatives and expressed a willingness to engage in negotiations (ETUC 2016a and 2016b), the employers' side saw no need to amend the current European legislation on gender equality (and in particular on parental leave), nor to introduce new legislative instruments/forms of leave at EU level. Rather, they wished to focus (EU) actions on ensuring full and comprehensive implementation of existing regulations at national level¹⁶. In particular, the proposal to amend/repeal the existing Parental Leave Directive was strongly opposed as 'ignoring the autonomy of the European social dialogue'. With regard to the willingness to enter into negotiations, for the ETUC this depended on the willingness of the employers to do the same on the widest possible range of aspects of those rights and on the guarantee

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13. Council Directive 92/85/EEC of 19 October 1992 on the introduction of measures to encourage improvements in the safety and health at work of pregnant workers and workers who have recently given birth or are breastfeeding, OJ L 348, 28 November 1992, 1-7; European Commission (2015).
 14. For a summary of the replies received during the various social partner and public consultations, see European Commission (2016).
 15. Council Directive 2010/18/EU of 8 March 2010 implementing the revised Framework Agreement on parental leave concluded by BUSINESSEUROPE, UEAPME, CEEP and ETUC and repealing Directive 96/34/EC, OJ L 68, 18 March 2010, 13-20.
 16. See inter alia BusinessEurope (2015), CEEP (2016), UEAPME (2015 and 2016).

that if the EU social partners would not negotiate or failed to reach an agreement, the Commission would put forward the necessary legislative proposals. However, with the exception of CEEP¹⁷, the employers' side saw no need and had no desire to enter into negotiations on any of the proposed issues.

Based on the input received during the consultations, the Commission, on 26 April 2017, launched its Communication entitled 'An initiative to support work-life balance for working parents and carers' (European Commission (2017i) which, in addition to many guidance, monitoring and funding measures, not only proposes 'in the legal arena' to 1) strengthen the application of the Maternity Leave Directive; but more importantly to 2) upgrade certain existing parental leave rights; and to 3) introduce several completely

Table 2 Main changes in the proposed Work-life Balance Directive compared to existing acquis

	Current EU legislative framework	Proposed Directive
Paternity leave	No paternity leave at EU level	10 working days of paternity leave when the child is born
Parental leave	4 months of parental leave: Non-paid Guideline on uptake until the child reaches the age of 8 1 month cannot be transferred between the parents Possibility of flexible uptake to be decided by the Member States	4 months of parental leave: Paid at sick pay level To be taken by the time the child reaches the age of 12 4 months cannot be transferred between the parents Possibility of flexible uptake
Carers' leave	No carers' leave at EU level beyond time-off on grounds of force majeure	Right to 5 days of carers' leave per year per worker, paid at sick pay level, to take care of seriously ill or dependent relatives ¹⁸
Flexible working arrangements for parents and carers	Currently at EU level, the right to request this exists only for parents coming back from parental leave	Right to request flexible working arrangements for parents of children up to 12 years old and workers with caring responsibilities
Protection against dismissal and unfavourable treatment	Currently at EU level, protection against dismissal and/or unfavourable treatment exists for maternity, parental, paternity and adoption leave (in those Member States which have paternity or adoption leave). There is no EU-level protection against dismissal and/or unfavourable treatment for carers' leave and for workers requesting flexible working arrangements (except for part-time work).	Protection against discrimination and/or dismissal in cases where workers choose to take or apply to take leave or request flexible working arrangements.

Source: European Commission (2017c).

17. In the view of CEEP, the decision of (certain) social partners not to enter into negotiations put the European social dialogue in danger. (CEEP 2017b).

18. According to the Commission proposal 'relative' means a worker's son, daughter, mother, father, spouse or partner in civil partnership, where such partnerships are envisaged by national law; and 'dependency' means a situation in which a person is, temporarily or permanently, in need of care due to disability or a serious medical condition other than serious illness.

new rights to paternity and carers' leave¹⁹. In conjunction with this Communication, the Commission also launched its proposal for a Directive on work-life balance for parents and carers (see also Bouget *et al.* 2017), repealing Council Directive 2010/18/EC (on parental leave) (European Commission 2017j). The most important changes to be brought about by the new Directive are summarised in Table 2 (see previous page).

In their first reactions to this new proposal for a directive, and faithful to their previous observations/positions, the employers' side strongly opposed the proposal, mainly for financial, organisational and competitiveness reasons²⁰. For its part, the ETUC 'broadly welcomed the Commission's package and mixed policy approach and in particular the new Directive proposal' (although some weaknesses in the text were identified and need to be overcome) (ETUC 2017d)²¹.

The proposal is now also in the so-called triilogue negotiations between Commission, Parliament and Council. These are proving to be difficult in particular given the negotiation position adopted by the Council on 21 June which not only opposes the introduction of 10 days of paternity leave but leaves the (level of the) payment of it up to Member States. Similarly, with regard to the payment of parental leave, the Council only considers that at least one-and-a-half months (out of the four months) should be paid at an "adequate level". The decision as to whether workers will have the right to carers' leave is completely left up to Member States. While accepting the principle of being able to request flexible working arrangements, the Council makes it conditional by requiring amongst others that the workers should have at least six months of service (Planet Labor 2018b)²².

1.3 The interpretative guidance on the Working Time Directive

Given the high (and growing) volume of case law of the Court of Justice of the European Union (CJEU) on the Working Time Directive²³, the Commission considered it necessary to publish, as part of the Pillar package, an 'Interpretative Communication on Directive

19. A carer is a worker providing personal care or support in case of a serious illness or dependency of a relative. In the context of the work-life balance proposal, a relative is the son, daughter, mother, father, spouse or partner in civil partnership (where such partnerships are envisaged by national law), of the carer. A dependent relative is a person who is temporarily or permanently in need of care due to a serious medical condition or disability. The self-employed are not explicitly covered by the proposal but the decision on whether the self-employed should also benefit from this initiative is left to the Member States.

20. See, *inter alia* BusinessEurope (2017c), CEEP (2017b) and UEAPME (2017b).

21. ETUC considered it e.g. necessary to ensure the Directive would apply to all atypical workers (including the self-employed) and warned against introducing specific exemptions for SMEs. It also regretted the fact that the Commission had failed to propose a revision of the Maternity Leave Directive and had opted for (only) non-legislative actions to ensure better implementation and application of the Directive at national level.

22. Whereas BusinessEurope considers the Council position as a sign of realism, preventing making leave too expensive for the economy and welcoming in particular that it rightly remains a Member State responsibility to define the nature and level of compensation of such leave (BusinessEurope 2018f). For its part, the ETUC regrets that important elements such as the payment of parental leave at sick-benefit level or the non-transferability of leave between parents have been weakened (ETUC 2018d).

23. Directive 2003/88/EC of the European Parliament and of the Council of 4 November 2003 concerning certain aspects of the organisation of working time, OJ L 299, 18 November 2003, 9-19. Since 1993, more than 50 judgments and orders of the Court have referred to the Working Time Directive and interpreted its provisions, including the scope and limitations of the flexibility it affords.

2003/88/EC of the European Parliament and of the Council concerning certain aspects of the organisation of working time' (European Commission 2017k).

Combining in a single document the provisions of the Directive and the CJEU interpretations thereof, the Communication aims to contribute to the effective application, implementation and enforcement of the existing EU legislation. Its specific objectives are: 1) to offer greater (legal) certainty and clarity to national authorities, legal practitioners and social partners when applying and interpreting the Directive; 2) to help better apply the Directive's provisions in the context of new and flexible work arrangements; and 3) to ensure the effective enforcement of existing EU minimum standards contained in the Directive and thereby better protect workers' health and safety against risks associated with excessive or inappropriate working hours and inadequate rest periods, to the benefit of all parties.

More questionably, however, the Communication also sets out its own view/interpretation on certain points not yet ruled upon by the CJEU²⁴. Aware of the risk of guiding or even pre-empting future CJEU case law, the Commission hurries to clarify that 'the Communication is not binding and does not intend to create new rules. The final competence to interpret EU law lies with the Court which ensures in the interpretation and application of the Treaties that the law is observed. This is why the additional aspects for which case-law is limited or does not exist and where the Commission presents its position are clearly identified through side lined paragraphs'.

In addition to this Communication, the Commission also presented an Implementation Report, as well as a Staff Working Document, in which it reviews the implementation of the Working Time Directive by Member States (European Commission 2017l and 2017m).

1.4 Consultations and Recommendation on 'access to social protection for all workers and the self-employed'

Even during the public consultation on the EPSR itself, many stakeholders expressed concerns that workers in atypical (or non-standard) forms of employment and the self-employed face obstacles to their access to social protection. To accommodate these concerns, the Commission launched a European social partner consultation under

24. Although the ETUC considers the Communication to be helpful, it deems it premature to take a position on it, as it is not yet possible to establish how the Communication will work out in practice (also because this is the first time the Commission has published such an interpretative Communication). The ETUC has nevertheless encouraged its affiliates to examine it (as well as the Commission's Implementation Report), in order to determine whether changes to working time legislation or practice are necessary in their country or whether there is scope to call on the Commission to launch infringement proceedings on issues which the Commission has identified as cases of wrong or insufficient implementation (ETUC 2017e). CEEP, on the other hand, finds it hard to understand the logic behind the Communication, in terms of its content and methodology. In CEEP's view, there is a risk that the interpretative communication will complicate – and not simplify – the operations of the public service providers who are most affected by the various court cases addressed by the interpretative communication. From a methodological point of view, it feels that the Commission went ahead in disregard of the views of the social partners, especially CEEP, which is always committed to finding a negotiated solution (CEEP 2017c).

articles 154-155 TFEU, a public consultation, as well as dedicated consultations with fora representing the views of the self-employed²⁵. It also carried out an impact assessment (European Commission 2018e).

In sum, in both its replies to the two-stage consultation, the ETUC welcomed the initiative and largely agreed with the views developed by the Commission in the consultation documents. However, it criticised, firstly, the lack of an explicit reference to *adequate* social protection (in particular in the 2nd stage consultation document). Secondly, the ETUC was of the view that, in its definitions (in particular of ‘worker’), the initiative should be as comprehensive as possible, covering all forms of non-standard work and self-employment and allowing no restrictions or possible circumvention. Thirdly, the ETUC felt that social security contributions should be mandatory (but that the share paid by workers should be lower than that paid by employers) and that the initiative should thus not opt for voluntary or differential contribution rates. Fourthly, in particular since the initiative covers non-standard forms of work (with different types and durations of contracts and working time), it must ensure that benefits are adequate. Finally, in the view of the ETUC, the Commission should opt for a legislative initiative in the form of a Directive (ETUC 2017f and 2017g).

BusinessEurope, however, reminds the Commission that social protection is a Member State competence. It is therefore in favour of non-legislative EU action focusing on reinforcing mutual cooperation, including peer learning and exchanges of good practices, or the development of benchmarks in the context of the European Semester (in particular on how to achieve greater effectiveness and efficiency in spending and how to support the sustainability of social protection systems). Mandatory coverage is not appropriate as it might deter employers from using different forms of work (BusinessEurope 2017d and 2018b). A very similar argumentation/view is provided by UEAPME in its replies to the consultations (UEAPME 2017c and 2018c).

Unlike the ETUC, all three employers’ organisations saw no scope for and were unwilling to enter into social dialogue negotiations.

Based on all this input to the different consultations, the Commission, in the context of the Social Fairness Package (see Section 2), launched a proposal for a Recommendation on access to social protection for workers and the self-employed on 13 March 2018 (European Commission 2018f and 2018h). Although the Commission had initially envisaged both legislative and non-legislative initiatives in this area, it limited itself to a Recommendation as it considered that ‘at this moment of time’ this was the most appropriate instrument, since the EU has no competence to intervene in the functioning of national social security systems. Compared to a Directive, which would impose binding outcomes, a Recommendation responds to the need to act at EU level, while taking into account the lack of political consensus, at this point in time, on the direction of the reforms (for a further discussion, see Spasova and Wilkens, this volume).

25. For a summary report on the responses received to these different stakeholder consultations, see European Commission (2018d).

The main objectives the Commission intends to achieve via this Recommendation are that all non-standard/atypical workers and the self-employed in comparable conditions can:

- have access to equivalent social security systems (closing formal coverage gaps);
- build up and claim adequate entitlements (adequate effective coverage);
- easily transfer social security entitlements from one job to the next;
- and have transparent information about their social security entitlements and obligations.

The proposal encourages Member States to provide access to social security coverage to all workers and self-employed persons and, given the wide diversity of so-called non-standard forms of employment, opts for very broad definitions of worker, employment relationship, type of employment relationship and labour market status²⁶.

It furthermore would apply to the branches of social security that are more closely related to the employment situation, rather than to citizen or resident status, namely: (1) unemployment benefits; (2) sickness and healthcare benefits; (3) maternity and equivalent paternity benefits; (4) invalidity benefits; (5) old-age benefits, including pensions; and (6) benefits in respect of accidents at work and occupational diseases.

The ETUC is of course clearly disappointed that the Commission opted for a Recommendation rather than a binding legislative instrument. Nevertheless, it welcomes the text, while at the same time calling for it to be made more substantial through specific linked measures (ETUC 2018b). Firstly, it should spell out more clearly that social protection, as a universal human right, should primarily be ensured via public schemes established by Member States and that occupational and private schemes, although very important, should only be complementary. Secondly, it questions whether the broad definition of workers (the same as in the proposal for the Directive on Transparent and Predictable Working Conditions, see above Section 1.1) ensures that the Recommendation will apply to non-standard workers. It also regrets the lack of a definition of ‘self-employed’. As for the material scope, the ETUC regrets that the Recommendation is not aligned to the scope of ILO Convention No.102 (which, for instance, also covers survivor benefits and child and family allowances)²⁷. It is also of the view that the proposed transferability principle lacks references to cross-border situations, and that the proposed definition of an overall adequacy principle is incomplete and ambiguous.

26. Article 7 ‘Definitions’ states that:

‘For the purposes of this Recommendation, the following definitions apply:

(a) ‘worker’ means a natural person who for a certain period of time performs services for and under the direction of another person in return for remuneration;

(b) ‘employment relationship’ means the work relationship between a worker and employer(s);

(c) ‘type of employment relationship’ means one of the various types of relationships between a worker and employer(s) that can differ regarding the duration of employment, the number of working hours or other terms of the employment relationship;

(d) ‘labour market status’ means the statuses of a person as either working in the framework of an employment relationship (worker) or working on their own behalf (self-employed); (...).’

27. Convention 1952 (No.102) concerning Minimum Standards of Social Security, adopted at 35th ILC session (28 Jun 1952), entry in force: 27 Apr 1955.

BusinessEurope, however, welcomes the non-legislative approach taken (including its implementation via the European Semester and the Open Method of Coordination, OMC). However, it still considers that some parts of the Recommendation are overly prescriptive and could interfere with the functioning of national social security schemes. Their main criticism is that the EU should not interfere, through this recommendation, with Member States' definitions of 'workers'; Member States should have the choice of how to extend coverage, to which groups of workers and regarding which branches of social protection (BusinessEurope 2018c). Similarly, UEAPME emphasises that, although social protection for the self-employed must be improved in Europe, Member States should, remain free to decide which branches of social protection should be compulsory or voluntary, and should facilitate real access, with tailored offers and at a reasonable cost (UEAPME 2018c and d). CEEP also welcomes the non-legislative approach, considering the implementation of the recommendation via the European Semester and the OMC as the right way forward. Furthermore, Member States should indeed be offered 'sufficient margins of manoeuvre' (CEEP 2018).

2. The 'Social Fairness Package'

On 13 March 2018, the Commission put forward a second 'package' of both legislative and non-legislative measures to implement a number of the principles set out in the EPSR, with the main objective of increasing social fairness for both (mobile) workers and the self-employed. The package comprises two main initiatives: firstly, a proposal for a Regulation establishing a European Labour Authority (see Section 2.1), and secondly, a proposal for a Council Recommendation on access to social protection for workers and the self-employed (discussed in Section 1.4). In addition, the Commission announced a legislative proposal, in principle before 1 July 2018, with rules for a European Social Security Number to be used across policy areas where appropriate²⁸.

2.1 The European Labour Authority

To ensure better implementation and application of the EU legislation on labour mobility (e.g. the Posting of Workers Directive and rules on social security coordination such as Regulations 883/2004 and 987/2009)²⁹, Commission President Juncker announced the establishment of a European Labour Authority (ELA) in his State of the Union address on 13 September 2017. Following this, the Commission launched a public consultation (between November 2017 and January 2018), dedicated hearings with the European social partners and an impact assessment³⁰.

28. See European Commission (2017n). For some initial European social partner reactions, see BusinessEurope (2018d) and UEAPME (2018e).

29. Regulation (EC) No.883/2004 of the European Parliament and of the Council of 29 April 2004 on the coordination of social security systems, OJ L 166, 30 April 2004, 1; Regulation (EC) No.987/2009 of the European Parliament and of the Council of 16 September 2009 laying down the procedure for implementing Regulation (EC) No.883/2004 on the coordination of social security systems, OJ L 284, 30 October 2009, 1-42.

30. For the results of the public consultation, see European Commission (2018f); for the impact assessment, see European Commission (2018g).

In their initial reactions to the public consultation, the European social partners expressed somewhat mixed feelings about the proposed ELA. The ETUC broadly welcomed it, but stated, as a red line, that it must not interfere with social partner autonomy (i.e. not interfering with collective bargaining nor the right to take collective action), nor undermine national systems involving trade unions in enforcement and inspection. Rather, the ELA should help and support trade unions in pursuing cross-border cases. The main objectives of the ELA, in the view of the ETUC, should be to: 1) promote effective enforcement of EU labour and social security rights; 2) combat unfair competition; 3) enable better prevention, detection and monitoring of cross-border social fraud and undeclared work; and 4) serve as a signalling function for non-compliance or ineffective enforcement of EU labour and social security law. To carry out its transnational activities, the proposed Authority should also be able to rely on effective tools such as a European register of companies carrying out transnational activities, making it possible, for instance, to better track down letterbox companies, the abusive use of temporary work agencies, etc. But there should also be effective access by the ELA to national databases on labour law, social security and tax law (ETUC 2017h).

BusinessEurope, on the other hand, expressed doubts as to the added value of creating such a new Authority, considering it more opportune to streamline and improve cooperation between existing structures and ensure better use of existing (information and advice) tools. It certainly sees no need to create any additional structures for resolving disputes between Member States and, should such a structure nevertheless be established, its use should remain voluntary for Member States and should not replace formal infringement procedures. Finally, and in agreement with the ETUC, any such Authority should respect social partner autonomy (BusinessEurope 2018e), a call similarly voiced by UEAPME and CEEP. UEAPME in addition considered that the ELA should have no regulatory power, interpretation capacity or EU legislative competence, basically operating as a one-stop-shop for sharing information and supporting the better functioning of the network of social security institutions. Bureaucracy and a multiplication of EU bodies, particularly by adding an additional layer, is to be avoided (UEAPME 2018e and f).³¹

Based on the input received from the consultations and the impact assessment, the Commission presented a proposal for a Regulation establishing a European Labour Authority on 13 March 2018 (European Commission (2018 c, d and e).

According to the proposals, the main aim of the ELA is to support Member States in matters relating to cross-border labour mobility, including rules on the free movement of workers, the posting of workers and the coordination of social security systems. As for its tasks and scope, the ELA is in particular intended to: 1) facilitate access to information by individuals and employers and exchange of information between national authorities to ensure the effective enforcement of EU law; and 2) support enforcement of EU law (via e.g. concerted and joint inspections, mediation in disputes between Member States).

31. For an interesting analysis on the envisaged ELA, reflecting also the views of other stakeholders, see Fernandes (2018).

As for its scope, the ELA will cover all economic sectors and mainly serve workers. However, as it will also be responsible for monitoring the application of rules on social security coordination, which cover all persons regardless of their status (e.g. jobseekers, third-country nationals), the latter will also benefit from the ELA to the extent that they are covered by the relevant EU rules.

What the ELA will in principle *not* do:

- it will not organise inspections on its own initiative; the right to launch and to carry out an inspection, whether national or cross-border, remains a national competence. However, the ELA may suggest a joint inspection to Member States if it identifies a (possible) case of fraud or abuse;
- the ELA will also not function as a forum for settling disputes between individuals or employers and Member State authorities. It will, at the request of the parties, provide mediation exclusively in cases of disputes between national authorities regarding the application of EU law in the areas of labour mobility and social security.

The ELA will be established in the form of an EU agency and should be up and running in 2019 and fully operational in 2023³². Currently, a temporary European Advisory Group, also made up of representatives of the Commission, Member States and EU social partners, is being established to advise and assist the Commission on the ELA's establishment and functioning. This group will also reflect on the best ways for the ELA to cooperate with and benefit from other EU agencies working in/on the area of employment policy such as the European Foundation for the Improvement of Living and Working Conditions (Eurofound), the European Centre for the Development of Vocational Training (Cedefop) and the European Agency for Safety and Health at Work (EU-OSHA). The same will be true for those agencies working on issues related to criminal activities (such as Europol and Eurojust).

The ELA is intended to replace seven existing EU bodies and to pool their operational tasks into one permanent structure³³.

In its first reaction to the proposed ELA, BusinessEurope repeated its doubts concerning the added value of such a new agency as an efficient and cost-effective way of combatting fraud in cross-border situations. Neither does it agree that the ELA should be able to intervene in the case of suspected violations related to working conditions, health and safety or the employment of third-country nationals staying illegally in a country.

32. In his opening address to the Social Dialogue Committee on 28 June 2018, Mr. Joost Korte, the new DG EMPL Director General, indicated that the ELA would not be a 'normal' EU agency (like e.g. Eurofound) but would function instead as an 'operational' EU agency (like Europol or Eurojust). As a consequence, he saw no need for its tripartite governance. In his view, the success of establishing (and operating) the ELA would largely depend on the capacity to 'demystify what the ELA is, what it will do and in particular not do'.

33. The Technical Committee on the Free Movement of Workers, the Committee of Experts on Posting of Workers, the European Platform to enhance cooperation in tackling undeclared work, the EURES Coordination Office and three bodies attached to the Administrative Commission for the Coordination of Social Security Systems - the Audit Board, the Conciliation Board and the Technical Commission.

These, it states, are matters of national competence and have only a limited cross-border dimension. The ELA, moreover, should not have a role in relation to company restructuring, which should remain a matter for internal company decision-making. Furthermore, any dispute-resolving task should be removed from the scope of the ELA, though a mediation function triggered by a Member State request could be considered as long as it respects national authorities' competences. The mandate and procedures of the envisaged Mediation Board should also be further clarified. BusinessEurope similarly does not agree with the proposal whereby the ELA could, on its own initiative, suggest a concerted or joint inspection to Member State authorities. It sees a need to increase the number of social partner representatives on the Stakeholder Board, as this would better allow proper representation of both European cross-industry and sectoral social partners (BusinessEurope 2018e).

UEAPME firstly regrets that the ELA will not become a genuine tripartite agency, calling for a (bigger) proper management role to be assigned to the EU social partners. The ELA should also, in particular, ensure a level playing field, since SMEs suffer from a lack of protection through cooperation between national authorities to ensure effective implementation of EU rules in the field of social security and labour mobility (UEAPME 2018c, d and e). In a short communication, CEEP mainly welcomed the Commission's aim to increase the quality of information available to employers and workers on applicable labour rules, expressing its belief that the ELA, if properly set up and managed, would have the potential to facilitate fair European labour mobility. The agency should also contribute to more concerted and better cooperation between labour inspectorates, and special attention should be paid to respecting the roles and responsibilities of national social partners (CEEP 2018).

The ETUC, on the other hand, repeated its strong support for the ELA, while insisting that the ELA should not interfere with social partner autonomy. Also, improvements should be made to the proposed Regulation, beefing up the role of the ELA. In this respect, for instance, the sole focus of the ELA should be on protecting all workers in the EU regardless of their nationality or migrant status. Concerted and joint inspections should not be optional for the Member States concerned, and Member States should not be allowed to refuse such joint inspections on their territory. Trade unions, too, should be able to request such concerted and joint inspections. The ETUC is also calling for clarification of the ELA's mediation role, and furthermore considers the proposed role and structure of the Stakeholder Group as insufficient (ETUC 2018c). In accordance with the ordinary legislative procedure, this proposal for a Regulation is, at the time of writing, being examined by the European Parliament and the Council.

3. The revision of the Posting of Workers Directive

The commitment to revise the Posting of Workers Directive (Directive 96/71/EC) was announced in the 2016 Commission Work Programme and hence predated the EPSR. On 8 March 2016, the Commission tabled a proposal for a 'targeted' revision of the Directive, with the main aims of ensuring the principle of equal pay for equal work at the same place and of addressing unfair practices.

Table 3 **Revision of the Posting of Workers Directive: overview of the main elements of the proposals of the EU institutions**

Subject	Commission	European Parliament	Council
Legal basis	Articles 53(1) and 62 of the TFEU	Articles 53(1), Article 62 and Article 153 (1) (a) and (b) in conjunction with Article 153 (2) of the TFEU	Articles 53(1) and 62 of the TFEU
Long-term posting	24 months - Effective or anticipated duration	24 months + upon reasoned request - Effective or anticipated duration - Negative list: conclusion and termination of the employment contract	12 + 6 months upon motivated notification - Effective duration - Negative list: conclusion and termination of the employment contract; non-competition clause; supplementary occupational retirement pension schemes
Core rights	Remuneration; - information on remuneration to be published on a single official national website	Remuneration - publication on the single official national website - information needs to be accurate and up-to-date	Remuneration - publication on the single official national website - gross amount, not individual elements - information in conformity with Art.5 of Directive 2014/67 ³⁴
		Conditions of workers' accommodation – Article 3 (1)	Conditions of workers' accommodation – but not in a core article of Directive only mentioned in a Recital
		Allowances to cover travel, board and lodging expenses for workers away from their habitual place of work	Allowances to cover travel, board and lodging expenses for workers away from home for professional reasons
Subcontracting	included	included	dropped
Temporary agencies	included	included	included
Collective agreements	included	Included, + company-level collective agreements	included
Transposition/application	2-year transposition period	2-year transposition period	3-year transposition period; application review after 4 years
Other elements		- Fundamental rights (Article) - Provisions on non-genuine posting	- Fundamental rights (Recital) - exclusion of international road transport

34. Directive 2014/67/EU of the European Parliament and of the Council of 15 May 2014 on the enforcement of Directive 96/71/EC concerning the posting of workers in the framework of the provision of services and amending Regulation (EU) No. 1024/2012 on administrative cooperation through the Internal Market Information System ('the IMI Regulation'), OJ L 159, 28 May 2014, 11-31.

The main elements (of change) of the proposal, which used as its legal basis Articles 53(1) and 62 TFEU (which are internal market policy provisions), were: 1) ensuring the principle of equal pay for equal work between posted and local workers; 2) extending the application of rules set by universally applicable collective agreements to posted workers in all economic sectors; 3) ensuring that the principle of equal treatment between local and posted temporary agency workers is also applied now to posted temporary agency workers; and 4) the application of mandatory host-country labour protection provisions to long-term postings (24 months).

This proposal triggered a heated, sensitive and long discussion between and within the different EU institutions, as well as with the EU cross-industry and sectoral social partners. On respectively 16 and 23 October 2017, both the European Parliament and the Council were able to agree on a fragile compromise text. For their diverging positions on some of the key changes, see Table 3. In sum, they relate to:

- extending the legal base to also include ‘social policy provisions’ in the Treaty;
- length of the period to be considered as a ‘long-term posting’;
- application of collective agreements (incl. company-level agreements);
- coverage of accommodation costs and other allowances;
- the integration of a provision ensuring that the Directive should not affect the exercise of fundamental rights (in particular collective bargaining and collective action) (known as the Monti clause);
- application of the Directive to international road transport.

Following an intense ‘trialogue’ between Commission, Parliament and Council, a political agreement was reached in March. It contains, inter alia, the following³⁵:

- legal basis limited to Articles 53(1) and 62 TFEU (or internal market provisions), but Article 1 of the Directive states that the Directive’s main subject matter is to ensure the protection of workers;
- a so-called ‘Monti clause’;
- application of the principle of equal pay for equal work, in particular in relation to rates of pay;
- the extension of rules set by universally applicable collective agreements, making them applicable to posted workers in all economic sectors, and the recognition of generally applicable collective agreements in the same geographical area and profession/industry;
- maximum duration of 12 months with a possible 6-month extension,
- application of the principle of equal treatment between local and posted temporary agency workers;
- protection in relation to workers’ accommodation;
- the payment of daily allowances and reimbursement of travel, board and lodging expenses;
- protection in case of ‘fraudulent or fake postings’;

35. See Council of the European Union (2018). For a short analysis of the history as well as the final achievements of this revision, see Picard and Pochet (2018).

- a two-year transposition period and a clause on a possible review of the Directive 5 years after transposition (in particular for sub-contracting and road transport);
- exclusion of international road transport: the revised rules on posting only apply to drivers in the transport sector as from the date of entry into force of a sector-specific approach.

This agreement was then incorporated in EU Directive 2018/957 of 28 June 2018, amending EU Directive 96/71/EC concerning the posting of workers in the framework of the provision of services³⁶.

Conclusions: a new legislative agenda for the EU after all?

A first strong conclusion from the discussion above is that, with the launch of the first two ‘implementation’ packages and in particular the legislative initiatives contained therein, the Commission is moving from ‘rhetoric to action’ in its commitment to deliver on the European Pillar of Social Rights. In several areas, significant steps forward have been taken: these include the revision of the Written Statement Directive, a proposal for a Directive on Work-Life Balance for parents and carers, the proposed revision of the Posting of Workers Directive. And yet, there is certainly still a need for improvement and clarification in several of these proposals, if they are to meet their declared objectives.

In other areas, promises have not really been delivered upon: for example, there is ‘only’ a proposal for a Recommendation on access to social protection for workers and the self-employed, rather than the hoped-for legal protection. Other initiatives look promising, but it is too early to say how they will be used and/or function: this is the case for example with the interpretative guidance on working time and the proposed European Labour Authority.

Some important first hurdles have been overcome and this should be welcomed. But we must also remain realistic and vigilant. What is most worrying is that – perhaps with the exception of the revision of the Posting of Workers Directive – the ‘legislative’ route for most of these initiatives is still very long and risks being ‘bumpy’. This makes it very unpredictable and unclear what the final outcomes will look like and what their added value will be with regard to protecting the rights of workers and the self-employed. And what if the end result cannot be achieved within the current legislative mandate of the relevant EU institutions? What will be the stance of a new Commission and Parliament on probable ‘left-overs’?

A second clear finding of this chapter is that several of the initiatives launched in the context of the EPSR have caused serious collateral damage in the field of European social dialogue, impacting the relationship of trust between the European cross-industry social partners. Within a very short period, there have been several refusals to enter into negotiations, albeit for a variety of reasons. This has also resulted in the

36. OJ L 173, 9 July 2018, 16-24. For a short analysis of the history as well as the final achievements of this revision, see Picard and Pochet (2018).

envisaged negotiations on a new joint work programme for 2019-2021 being put on hold; although these negotiations resumed in late May 2018, one can question how the already weakened European social dialogue will be able to overcome this serious setback.

In conclusion, the European Union is starting to put meat on the bones of the EPSR. A high price seems however to be paid in the field of European social dialogue. The proof of the pudding will be in the eating: it remains to be seen whether Member States will follow the Commission's ambitions. But, in view of the European elections in 2019, failure is no option and the EPSR must be translated into concrete measures to deliver tangible results within this new legislative social agenda.

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