

# The Transparent and Predictable Working Conditions Directive (TPWCD) and potential exclusion of public service workers

EPSU/EUROMIL/EuroCop project on Trade union rights

**3rd regional seminar 25-26 January 2022**

Denmark, Finland, Sweden, Latvia, Lithuania, Estonia,  
Poland, Norway, Iceland, Armenia, Ukraine and Georgia

EUROPEAN PUBLIC SERVICE UNION

# The directive

- The [TPWCD](#) was adopted in Dec 2019, deadline for transposition at national level is **1 August 2022**
- Rationale: Some workers get no or incomplete or out-of-date information on their working conditions (2-3 million); weak enforcement; more precarious and unpredictable jobs (part-time, temporary, on demand and platform work)
- It updates the Written Statement Directive providing new rights to information in a shorter time i.e. 7 days (2-3 million workers), and adds new rights– chapter III (200 million workers)

## Chapter III- new minimum requirements

8. Maximum duration of probationary period -6 months
9. Parallel employment
10. Minimum predictability of work – to know in advance working time slots
11. Complementary measures for on-demand contracts
12. Transition to another “more stable” employment
13. Cost-free mandatory training to count as working time and if possible during working hours
14. Collective agreements to differ from articles 8-13

## Potential to exclude from Chapter III-

- last minute change during codecision phase (Council, Parliament and EC)-opposed by EPSU, Euromil and EuroCop, to no avail
- Unprecedented scope for possible exemptions
- Article 1.6. MS may provide, on objective grounds, that the provisions laid down in Chapter III are not to apply to civil servants, public emergency services, the armed forces, police authorities, judges, prosecutors, investigators or other law enforcement services.
- Recital (9): It should be possible for Member States to provide, where justified on objective grounds, for **certain provisions** of this Directive not to apply to **certain categories** of civil servants, [...] , given the **specific nature** of the **duties** that they are called on to perform or of their **employment conditions**.

# Objective grounds 1

Recital (9) provides guidance on objective grounds

- **Concerns certain provisions** of this Directive (material scope) and
- **certain categories** of civil servants, [...] , (personal scope)
- be linked either to the **specific nature** of the **duties** that they are called on to perform or of their **employment conditions or both**

Art. 9(2) on parallel employment: “[...] *on the basis of objective grounds, such as **health and safety**, the **protection of business confidentiality**, the **integrity of the public service** or the **avoidance of conflicts of interests***”

## Objective grounds 2

### EU case law (see EC expert group report for more details)

- *CJEU in C-410/18 Aubriet* parag. 29 (case on free mvt of persons, university grant):
    - “In order to be justified, [indirect discrimination] must be **appropriate** for securing the attainment of a **legitimate objective** and must **not go beyond** what is necessary to attain that objective.”
  - C-428/09, para. 40, French union Union Syndicale Solidaires. “As exceptions to the [EU] system for the organisation of working time [...], those derogations must be interpreted in such a way that their scope is limited to what is **strictly necessary** in order to safeguard the interests which those derogations enable to be protected”
- **Starting point of any derogations** (EC expert group’s report)

## Exclusions must also take account of

- EU charter of Fundamental Rights Articles 31 – health, safety, dignity- and 52 -limitations on the rights and freedoms must respect the essence of those rights
- European Pillar of Social Rights, Principles No 5 – secure and adaptable employment, fair and equal treatment and No7 – protection in case of dismissals
- **EC expert Group report: these principles must be kept in mind when assessing any exceptions from the Directive**

# Objective grounds - Recap

- *unequal treatment must be justified by*
  - the presence of *precise* and *specific* factors, characterising the employment condition to which it relates
  - in the *specific context* in which it occurs and
  - on the basis of *objective* and *transparent* criteria,
  - in order to ensure that unequal treatment responds to a *genuine need*
  - is *appropriate* for the purpose of attaining the objective pursued and
  - is *necessary* for that purpose
  - Is in line with fundamental workers' rights and EU caselaw



# Civil servants, armed forces, police

## Civil servants

- No EU definition of this term as such
- The term “civil servant” is essentially for MS to define in national law
- However, being a civil servant is not sufficient to be exempt from Chapter III – the provision requires “objective grounds”

## Armed forces, police authorities etc...

- For MS to define

# Public emergency services

- No all-encompassing EU definition – for MS to define
- Directive (EU) 2018/1972 (EU Electronic Communications Code) and Commission Delegated Regulation (EU) No 305/2013 (Art. 2(39) & 2(a)): *‘emergency service’ means a service, recognised as such by the Member State, that provides immediate and rapid assistance in situations where there is, in particular, a direct risk to life or limb, to individual or public health or safety, to private or public property, or to the environment, in accordance with national law.’*
- ILO Guidelines on public emergency services
- In EC expert group, Business Europe asked about non public emergency services- EC expert group report states it makes no difference

# Transposition

- Art 21.4 : Compulsory involvement of social partners (in accordance with national law and practice)
- In EC expert group on transposition of TPWCD, last June: few member states reported involvement of social partners: Belgium, Sweden, Denmark, Spain (tbc)
- ETUC, EPSU, some national affiliates reiterated opposition to exemptions and if unavoidable they should be negotiated with trade unions (EC Expert group report)
- EU level negotiations on objective grounds?
- EC statement to EP resolution and minutes of EPSCO Council meeting: it will pay particular attention to the application of art 1 in its report on the review of the directive

# Transposition

- Make sure your government does not make use of potential exemptions and if so that they are as limited as possible based on list of objective grounds
- Legal ban on blanket exclusions
- Ask for being involved directly or via your national centre
- EC expert group report available in EN, useful arguments to prevent or at least limit scope of potential exemptions  
<https://ec.europa.eu/social/main.jsp?langId=en&catId=89&newsId=10060&furtherNews=yes&preview=cHJldkVtcGxQb3J0YWwhMjAxMjAyMTVwcmV2aWV3#navItem-1>