Georgia-EU Association Agreement (OJ L 261/4-743 of 30 August 2014) – gradual approximation of legislation – employment, social policy and equal opportunities – Annex XXX – Labour Law (per April 2019)

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This expertise is submitted in a personal capacity, and does not constitute a position of Queen's University Belfast

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I Introduction

This initial expertise is the first of two assessments relating to ten directives in the field of labour law to be implemented under the Association Agreement (AA) between the European Union and Georgia. The following six directives, to be implemented within four years after the AA entered into force (see also Article 431 paragraph 5 AA) form the content of this f expertise:

- Council Directive 91/533/EEC of 14 October 1991 on an employer's obligation to inform employees of the conditions applicable to the contract or employment relationship
- Council Directive 1999/70/EC of 28 June 1999 concerning the framework agreement on fixed-term work concluded by ETUC, UNICE and CEEP
- Council Directive 97/81/EC of 15 December 1997 concerning the Framework Agreement on part-time work concluded by UNICE, CEEP and the ETUC - Annex: Framework agreement on part-time work
- Directive 2002/14/EC of the European Parliament and of the Council of 11 March 2002 establishing a general framework for informing and consulting employees in the European Community - Joint declaration of the European Parliament, the Council and the Commission on employee representation
- 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 (10th individual directive within the meaning of Article 16 91) Directive 89/391/EEC)
- Directive 2006/54/EC of the European Parliament and of the Council of 5 July 2006 on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation (though part of the anti-discrimination acquis, this is also an employment directive due to its competence base – Article 157 TFEU)

Before analysing the (suggested) approximation of Georgian law to these directives, it is necessary to provide some context, explicating the purpose of approximating Georgian labour law to EU Directives, identifying potential challenges, and summarising the short history of the relationship between Georgian labour law and the EU acquis (chapter II). The next chapter provides an overview of each of the directives, its aims and main content, also specifying any completed or planned reform. This is followed by an assessment of the Georgian implementation, offering bullet point summaries aiding those who only have time to skim through the report. These assessments rely heavily on synoptic presentations which were made available during the course of April and May by Nona Gelashlivi (GIZ). I depend on the underlying translation, because I am unable to read Georgian. Where the EU has conducted an impact analysis of its own legislation, either in the framework of the REFIT programme or in order to prepare legislation, a summary is provided (see III 1, 2, 4 and 6). These summaries cannot replace a thorough impact analysis in the national context. Chapter IV summarises the main insights.

This is a document intended for reflective discussion with Georgian experts. It is hoped that the analysis can be fleshed out after this exchange, to which I am very much looking forward.

II. Context

1) Approximating labour law in the EU's Eastern Neighbourhood: [1] Georgia

The 2014 Association Agreements between Georgia and the EU addresses labour law (among other social aspects) in two different Titles. On the one hand, chapter 13 in Title IV on Trade

[1] The three AAs with Ukraine, Moldova and Georgia were all concluded in 2014, and are frequently discussed in context. This is justified in so far as all three countries share the fate of having a land border with Russia, and being

and Trade Related Matters covers Trade and Sustainable Development, which again reaffirms the parties' commitment (among others) to the ILO Declaration on Fundamental Principles and Rights at Work (core labour standards, Article 227), commits the parties to the effective implementation of these standards with the proviso that the core labour standards are not (ab)used in protectionist ways (Article 229), and recognizes that trade or investment should not be encouraged by lowering levels of protection offered by domestic labour law (Article 235). Trade and sustainability chapters feature in most Free Trade Agreements the European Union concludes with non-EU states. These labour clauses were introduced with the intention to strengthen the support for opening up national or regional market for competition from regions with lower standards.[2] Their efficiency has been doubted on the basis of decades of experience.[3]

All the EU's association agreements with Eastern neighbourhood countries contain another chapter on labour law in the context of approximation of laws, here in Title VI, entitled "other cooperation". Title V on economic cooperation and Title VI on other cooperation implement the AA's the objectives to support Georgia's efforts to develop its economic potential through international cooperation by promoting approximation of its laws to EU legislation and to achieve its gradual economic integration into the EU internal market on the basis of sustained and comprehensive regulatory approximation (Article 1 paragraph 2 letters g and h). The latter objective refers explicitly to the Deep and Comprehensive Free Trade Agreement contained in the AA. Approximation of laws under Title VI is dynamic in that the Annexes may be periodically updated in order to reflect evolution of EU law (Article 418 AA).

The Association Agreements thus view labour law as an important element in the regulatory approximation agenda and promote higher regulatory standards because of the assumed overall positive effects. These include the achievement of higher-level socio-economic standards, including higher individual incomes as a means to promote growth. An elaborated system of employment rights is an indispensable element of that development. A country striving to succeed on the basis of a low-standard economy would struggle to retain or attract those people best able to compete in a global information economy. Adapting the economy to the higher standards of developed Western economies will allow Georgia to attract foreign direct investment which is not based on exploiting low wages and long working hours, but which instead aims at generating high-standard goods and services and the equivalent socio-economic environment. As a side effect, both bodies of labour rules also avoid that the EU internal market is subjected to undesirable and ultimately damaging competition on the basis of undercutting standards.

These positive assumptions about the effects of high employment standards in the EU's neighbourhood are not necessarily shared by all stakeholders. According to the official impact assessment provided by ECORYS before the Association Agreement with Georgia was concluded, there were "voices, including from the Georgian economic experts community which point out the apparent trade-off between a competitive economy and workers' rights",

considered as its Western neighbourhood under a strategical perspective. Also, the three AAs are very similar. Unfortunately, due to Georgia's size and specific culture, this also means that aspects specific to Georgia sometimes remain uncovered.

[2] (Bastiaens & Postnikov, 2019)

[3] (Harrison, et al., 2019)

promoting "more room for manoeuvre for the employers to maintain competitiveness" on the basis of withholding labour rights.[4]

2) Potential challenges of approximating national labour law to EU directives

Challenges for implementing the employment acquis in particular could arise from a number of angles. The "transplanting" of labour law legislation from one country to another is considered as challenging in academic literature.[5] Those challenges are based in the differences of industrial relations systems and institutions implementing labour law more generally, because these are results of long-wrought compromises based on national developments.[6] However, this does not prevent approximation of labour laws altogether.[7] The international character of labour law as a subject, which emerged with 19th century industrialization, is epitomized by the harmonization agenda developed by the International Labour Organisation, is testimony to the ability of legal systems to learn from each other.[8] European Union labour law harmonization goes beyond the ILO agenda, in that approximation of laws covers a number of areas in which the ILO standards are more flexible. Thus, European Union labour law approximation is little more challenging. This challenge is alleviated by the fact that the EU only approximates labour laws through directives, and only exceptionally unifies them through regulations. Directives allow for EU Member States to choose the mechanism which could best achieve their objectives to fit the national legal environment. Accordingly, there is sufficient flexibility in the approximation process to match the EU Directives' aims to national legal traditions. When it comes to the EU's Eastern neighbourhood, it is often difficult to discern the national traditions in industrial relations, as national models were submerged in labour law harmonisation in the Soviet era, and many states afterwards were inspired by US style liberalisation, which does not leave much room for industrial relations. This contradictory development can alleviate or intensify challenges of implementing EU Directives. Generally, this needs to be considered in relation to the individual directives, and the national models (if any) they are based upon.

3) Georgian labour law and the EU acquis

Georgian labour law has developed dynamically: the country became one of the constituent republics of the Soviet Union in 1921, when its economy was still dominated by the agricultural sector, rendering employment only one of many forms to earn a living. Nevertheless, the equivalent of a modern employment code, adopted in 1920, was based on the freedom to conclude an employment contract, and introduced basic rules on employment protection, providing reinstatement as a remedy in cases of unfair dismissal. This code was replaced by the Labour Code of the Soviet Socialist Republics in 1973.[9] After independence in 1991, the first changes in the labour code are reported for 1997.[10]

[4] (ECORYS, 2012, p. A52) Access under http://trade.ec.europa.eu/doclib/docs/2012/november/tradoc_150105.pdf
[5] Generally, on the challenges of comparative labour law within the EU Internal Market see (Schiek, 2017)
[6] See (Kahn-Freund, 1974)
[7] See particularly on Georgia (Borroni, 2018)
[8] See on this (Schiek, 2012)
[9] (Shvelidze, 2017, pp. 40-43), for lack of language proficiency, I am unable to verify the information in this source. On preparations for the Soviet Labour Code 1973 see also (Clark Brown, 1973)
[10] (Shvelidze, 2017, p. 43)

The drafting of a new labour code, which entered into force in 2006, occurred in parallel to the implementation of Georgia's Partnership and Association Agreement of 1998, which already entailed an obligation on the part of Georgia to approximate its labour law not only to ILO standards, but also to EU legislation. Accordingly, the drafting of the Labour Code 2006 was consulted upon by the Georgian-European Policy and Legal Advice Centre and became the theme of specific recommendations. These were not reflected in the Labour Code 2006 as adopted.[11] The 2006 Labour Code is widely viewed as mainly based on a narrow view of economic efficiency, promoting economic success by allowing employers to revert to low wage and hire-and-fire employment strategies in order to make short-term gains. It was thus not geared to maintain or establish industrial relations in compliance with ILO conventions, or maintain any protective function typical for labour law in modern capitalist societies, and has been subject to critical CEACR conclusions.[12] While some reports suggest that the labour inspectorate system, abolished with the 2006 code, was dysfunctional,[13] the lack of credible enforcement mechanisms is viewed as problematic, including in the EU Commission's most recent Association Implementation Report on Georgia.[14] The 2006 Labour Code was replaced in 2013 by the Organic Law of Georgia: Labour Code, whose provisions, alongside further planned amendments, are the subject of this expertise. The reform was influenced not only by the process culminating in the Association Agreement with the European Union, but also by the consultations in the framework of the Tripartite Social Partnership Committee, established in 2009 in cooperation with the ILO and the EU (including financial support).

In interim conclusion, the halting and contradictory development of labour law institutions in Georgia to date reflects the challenges of adapting the Georgian legal system to the demands of a fully developed country with a modern western socio-economic model.

III. Expertise on the implementation of six directives (based on submitted "tables of concordance" and the text of the Labour Code)

1) Council Directive 91/533/EEC of 14 October 1991 on an employer's obligation to inform employees of the conditions applicable to the contract or employment relationship (Written Statement Directive)

a) Aim of Directive and its 2019 reform

The written statement Directive was originally intended to provide minimum standards for employment, in particular for new forms of work, e.g. part-time, fixed-term and on-call-work.[15] The result of the legislative endeavour was more limited: employers were subjected to an obligation to provide written information on the essential aspects of the employment relationship within two months after it commences. The scope of application follows the Member States' definition of a contract of employment or employment relationship, with the proviso that Member States may exempt employment relationship of a duration of less than a month and/or

[11] (Kardava, 2016, p. 8)
[12] (ECORYS, 2012) (Shvelidze, 2017)
[13] (Emerson & Kovziridze, 2016, pp. 169-171)
[14] (High Representative of the Union for Foreign Affairs and Security Policy, 2019)
[15] On the notion of non-standard work see below text around footnote 21.

comprising less than 8 hours work in a week, or those of a casual or specific nature. Additional information is to be provide to employees required to work in other countries, and modifications of the contract or employment relationship also require an additional written statement to be provided. Member States are not required to provide for specific sanctions for employers who do not comply, though they must ensure that employees can seek judicial redress in cases of noncompliance. Case law has determined that the written statement constitutes prima facie evidence of the terms of employment.[16]

In spite of this limited ambition, an evaluation of the Written Statement Directive of 2017 in the framework of the REFIT programme found that it is still relevant, and provides some protection for workers affected.[17] A degree of certainty for employees and employers alike on the key elements of the employment relationship is the main advantage identified. The REFIT evaluation also assessed the costs incurred by providing a written statement on employment conditions, concluding that the Directive does not create additional burdens, as the activities required are viewed as part of normal business activity.[18] Because the advantages of certainty and professionalisation of the employment relationship is not quantifiable, the REFIT assessment also did not result in a quantifiable assessment of costs of the Directive. It concluded that it was overall more advantageous than costly.

Overall, the Directive had a medium to high compliance rate as regards Member States' implementing legislation. Application of the rules in practice suffered from a number of shortcomings. Most of these were related to the Directives' limited scope of application: it only encompasses employees as defined by the law of the Member States. As a result, employers would tend to withhold a written statement in borderline cases in order to avoid classification of the relationship as an employment relationship, even if it had to be so classified in objective terms. The incentive to launch litigation for classification merely for attaining a written statement was very low, and since the Member States were under no obligation to provide other sanctions, the duly implemented national provisions were not very effective. Also, employees whose contract lasted longer than one month, but not longer than two months would typically not receive a written statement.

The REFIT assessment has been the starting point for the new directive on transparent and predictable working conditions, which was adopted through congruent decisions of the Council's Permanent Representatives' Committee on 15 February 2019 and in the European Parliament's Plenary Session on 16 April 2019.[19] The Transparency Directive aims to improve working conditions through transparency and predictability, and at the same time ensuring labour market adaptability. To this end it combines obligations in relation to "Information on the Employment Relationship" (Chapter II) with "Minimum Requirements Relating to Working Conditions" (Chapter III). It is assumed that information requirements and minimum conditions ensure that new and adaptable employment relationships gain acceptance instead of inciting

[16] ECJ Kampelmann et al, C-253-258/96, ECLI:EU:C:1997:585
[17] Commission Staff Working Document REFIT Evaluation of the Written Statement Directive (Directive 91/533/EEC) – SWD (2017) 205 final
[18] Ibidem, page 28-29.
[19] Dossier No 2017/355 (COD), EP resolution TA – 8 – 2091 – 0372 [http://www.europarl.europa.eu/doceo/document/TA-8-2019-0379_EN.html, accessed 18 May 2019].

protest. The Directive's scope of application is wider than that of Directive 91/355/EEC in that the definition of the employment contract or relationship under national law must comply with the ECJ case law on these matters, preventing Member States from maintaining large categories of civil law contracts outside the protective scope of the Directive. Further, Member States cannot exempt any workers on the basis of the duration of their employment, and the threshold for discretionary inclusion of part-time employees is lowered from 8 hours working time weekly to an average of 3 hours over a four-week reference period. Member States must not exempt employment relationships without specified minimum hours ("zero-hour contracts") from its scope of application. Further, while under the present Directive Member States have some discretion to specify sectors for which its application would be impractical, the new directive specifies three categories of employees who may be exempted from the obligations in Chapter III, but still have to receive a written statement.[20] That written statement can under certain conditions replaced by an electronic one (Article 3).

The Directive also expands the subjects comprised by the written statement of employment conditions (Article 3, the first Article in Chapter II). The written statement must now include the user company for agency workers and has to specify (and not just mention) unpredictable work patterns, to name the two most prominent ones. Also, the written statement has to be supplied at the 7th working day.

The new minimum requirements under Chapter III comprise the limitation of any probationary period to six months (shorter for fixed term employments), a prohibition to ban parallel work for other employers, the specification of reference hours and days, alongside a minimum announcement period, for any requirement to work (Article 9), with additional requirements for on-demand contracts (provisional Article 9a), rights to transition into more stable employment forms (Article 10), and the requirement that mandatory training takes place within working hours.

Chapter IV enables partners to collective bargaining agreements to deviate from the provisions of Chapter III, and chapter V specifies obligations around legal presumptions against non-complying employers and other aspects of enforcement.

b) Assessing suggested implementation

The suggested implementation of the current Directive 91/355/EEC in Georgia is not fully in compliance with its provisions.

The current directive requires that employees receive a written statement of their core employment condition without the need to apply for such a statement, before the expiry of the second month of employment. Under Article 6 (4) Labour Code, the employee seems under an obligation to request the statement. They synopsis seems to indicate that the requirement for contracts of employment to be in writing is equivalent to the submission of the written statement. This seems to contradict Article 6 (3) of the Labour Code, under which the exchange of written statements indicating the will to contract constitutes a contract of employment. There is no

[20] Article 1 provisional paragraphs 5a, 6 and 7 ((public servants, pubic emergency services, armed forces and police, judges, prosecutors and other law enforcement services, natural persons working in households, seafarer and sea fishermen)

provision (as far as I can see) which requires that the essential terms of the labour agreement (Article 6 paragraph 9) are made available to the employee in writing. If such a provision would be added, that would improve compliance.

However, if the written employment contract and the statement of terms under Directive 91/355/EEC are identical, another breach of the Directive emerges from Article 6 paragraph 1.[1]. While the Directive allows |to exclude employees on short term contracts for less than a month from the protection awarded by the implementing legislation (Article 1 (2)), the suggested change in Article 6 (1) Labour Code uses a two-month period, which does not comply with the directive. Since the exception for short term contracts is going to be abolished in the future, the question arises why those contracts are not included anyway. Article 3 (4) Directive demands that employees whose contract of employment is shorter than two months are still provided with a written statement of the essential terms. This provision seems not implemented.

Further, the list of essential terms in Article 6 paragraph 9 falls short of implementing Article 2 (2) Directive 91/355/EEC properly. The Directive requires to specify the place of business or the employer's address in cases where the employee needs to perform her obligations in several places, while the Labour Code does not require this. Further, Article 6 (9) Labour Code does not require that the notice period is specified, which is demanded by Article 2 (2) (g) Directive. While it is laudable that the procedures of dismissal are also to be contained in the employment contract, the notice period constitutes an important additional bit of information. Finally, Article 2 (2) letter f of the Directive requires that collective agreements, and in specific cases the negotiation board are specified where appropriate. The Georgian implementation states that collective agreements should be made available where their provisions differ from the contract of employment. This provision, however, again lacks in clarity: if the provisions of the collective agreements are more favourable, it seems they determine the content of the employment relationship. However, it is not clear whether this also applies if the collective agreement is less favourable than legislative provisions.

As regards redress, the proposed new provisions omit special consideration for expatriate employees, who in accordance with Article 4 Directive do not need to request a written statement in writing.

Overall, the following adaptations are recommended with a view to compliance with the current directive:

- **Create an obligation for the employer to issue a written statement, without any obligation of the employee to request it, and clarify that the provision of a written employment contract fulfils this obligation**
- **Adapt the essential terms to comply with Art. 2 (2) Directive (notice period, place of business or employers' address)**

With a view to the new Directive on Transparent and Predictable Working Conditions, consultation in the Tripartite Council could be started, in order to streamline the introduction of the suggested changes, which may well be added to the AA. This should in particular include the question how to define the notions of employee and/or worker more precisely. Similar to other

post-socialist states (e.g. Poland), the percentage of self-employed persons among the economic active is particularly high in Georgia. This may be indicative of a large number of persons officially considered as self-employed who might have to be classed as employees under ECJ case law on the matter. Accordingly, instigating a process of consultation with a view to establishing mechanisms to uncover such hidden employment relationships would contribute to preparedness to implement the new directive once it is applied to Georgia as well.

2) Council Directive 1999/70/EC of 28 June 1999 concerning the framework agreement on fixed-term work concluded by ETUC, UNICE and CEEP

a) Non-standard work in EU employment legislation (also relevant for Directive 97/81/EC and 91/383/EEC to be evaluated in phase 2)

This directive is part of a package of three directives addressing "atypical" or "non-standard" employment relationships. The ILO defines non-standard employment relationships as those which are not full time for indefinite duration, protected by the full range of collective rights available in the relevant country and fully covered by social security and health & safety rules.[21] The 1980s saw a surge in such non-standard employment due to diversification of economic activity, with business striving to focus on their core competence and reversing to "outsource" other activities to businesses more specialised. The 1980s also saw the ascent of governments within the then EEC who strove to legitimise such non-standard employment, thus confronting trade union strategies to limit phenomena such as fixed term contracts, part time work and above all temporary agency work. The EC Commission had already tabled legislation on fixed term and part time work in the early 1980[22]. Chances of success emerged when the Social Policy Agreement annexed by Protocol to the Treaty of Maastricht (1993) allowed the then 11 non-UK Member States to proceed with some social legislation without being blocked by the Conservative governed UK. The directives on part time and fixed term work were the second and third one based on an EU level Framework Agreements between management and labour (following the Parental Leave Directive, originally of 1993).

The Commission pursued a differentiated agenda by focusing on equal treatment of those non-standard workers in every dimension except the one defining that specific form of non-standard work. Thus, part-time workers are not entitled to the same working hours as full-time workers, but must not be discriminated in other areas on grounds of their part time work, and fixed term workers do not enjoy full employment protection, but must not be discriminated in other areas. This agenda was taken up by the social partners, who also inserted elements of overcoming non-standard work into the directives. Further, both directives promote the role of employee representatives, who should have a mandate to represent non-standard workers as well. Thus, the Directives implementing the Framework agreements pursue a dual aim: on the one hand, non-standard forms of work should be promoted or at least accepted as a reality, on the other hand, these non-standard forms of work should develop in a socially responsible way

[21] (International Labour Organisation, 2016)
[22] OJ C 1982 C 128, 2 - draft directive on fixed-term work, COM (1981) 77f final -draft directive on part-time work

commensurate with the general approach that labour law in the EU promotes growth on the basis of social inclusion.

Temporary agency work proved too controversial for a European Framework agreement and was only regulated by Directive in 2008[23], and consequently never made it into the preparations of the Eastern Neighbourhood Association Agreements.

b) Structure and Aim of Directive, evaluation of implementation (impact)

Directive 1999/70 consists of two parts: of the Directive itself, containing four clauses concerning the initial implementation, and the Framework Agreement, containing the 8 substantive clauses. Since the implementation period is expired, the Directive's provisions are now obsolete.

The Framework Agreement pursues a **dual aim**: first, fixed-term workers should not be discriminated against in order to improve the quality of their work, and abuse of consecutive fixed term contracts should be prevented (**Clause one**).

Its **scope of application** encompasses all persons considered as employees (on an employment contract or employment relationship) in line with national law, collective agreement and practice. (**Clause 2**) Member States may, after consultation with social partners, exempt workers on initial training contracts or on retraining and integration contracts from its protection. (Clause 2). The wording of clause 2 (1) has led to doubts on whether public sector workers are encompassed in its scope of application. The Court of Justice has consistently applied a wide notion of concept of worker under Clause 2, based on a dynamic interpretation in line with the protective ambition of the Directive: Member States must not be allowed to exclude workers from its ambit by allocating them the status of a public sector worker.[24] The Court has recently implied that civil servants are also included in its scope.[25]

Clause 3 provides **definitions** of the term fixed term worker and the comparable permanent worker. The Commission doubts whether the full effect of the non-discrimination principle (clause 4) can be achieved without transposition of these definition. [26] However, most EU Member States have not introduced a definition of the comparable worker, and the EU Commission has not pursued the action announced in its SWD on that basis. Indeed, any definition of comparable worker may risk narrowing down the scope of protection: as the ECJ case law demonstrates there are numerous factual circumstances which make it difficult to devise an all-encompassing definition which is not so open as to require further interpretation. According to the Court's case law, comparability can be indicated by the workers' tasks.[27] This reasoning is in

[23] Directive 2008/104/EC of the European Parliament and of the Council of 19 November 2008 on temporary agency work OJ L 327, 5.12.2008, p. 9
[24] ECJ C-307/05, Del Cerro Alonso EU:C:2007:509, paragraph 29 with further references; ECJ C-22/13 et al, Mascolo et al EU:C:2014:2401, paragraph 67 with further references.
[25] ECJ C 245/17 Viejobueno Ibáñez, ECLI:EU:C:2018:934, paragraph 39; see also on this point by AG Kokott in the same case (EU:C:2018:365, paragraph 36, with further references)
[26] Commission Staff Working Document National Legislation Transposing Directive 1999/70 on fixed term work in the EU 10, SEC (2008) 2485, p. 37
[27] ECJ C-38/13 Nierodzik EU:C:2014:152, paragraph 33;

line with the Framework Agreement's aim to avoid the replacement of permanent contracts by fixed term contracts, as expressed in recital 6 thereto.

Clause 4 provides that fixed term workers should be treated no less favourably than comparable permanent workers, unless different treatment is justified on objective grounds (**non-discrimination clause**). The second paragraph specifies that in general a pro-rata-temporis principle should apply. This clause has given rise to much case law before the ECJ. In recent years, Spanish courts tried to provoke the ECJ to hold that employees on fixed term contracts should be treated equally with those on permanent contracts even in relation to redundancy. However, the Court's Grand Chamber has consistently refused to agree with this suggestion.[28] Nevertheless, in some cases unequal treatment in relation to redundancies and cost saving measures was viewed as violating the Directive. For example, reducing the contractual hours of persons on fixed term contracts and not those on permanent contracts constitutes unlawful discrimination, even if the first group is less qualified through not having completed their PhD.[29] Also, discrimination contrary to Clause 4 was found present in a statutory provision giving the employer the option to dismiss a fixed term worker before the expiry of her contract with a two weeks' notice period, and without the need to state reasons, while for workers on indefinite contracts longer notice periods apply as well as the obligation to state reasons,.[30] More typical cases of unequal treatment consist of the exclusion of fixed-term workers from benefits, for example bonuses for seniority.[31] Other examples may include access to facilities at the place of work such as canteens or child care, or the access to training opportunities. Clause 4 has direct effect,[32] which is relevant because public employers all over Europe use fixed term contracts extensively.[33] In particular, clause 4 has direct effect, which.

Clause 5 does not establish an absolute priority of permanent employment contracts by requiring a justification for fixed term work. Instead, it requires Member States to take measures **preventing abuse of fixed term work**. They can choose between three options to achieve this: requiring justification for any fixed term contract, limiting the maximum duration of fixed term contracts (whether cumulative or indicative) or limiting the number of extensions available for fixed term contracts. Due to this choice mechanism, clause 5 does not have direct effect according to the Court's case law.[34] Nevertheless, Clause 5 has led the Court to find a number of national implementation measures to be inadmissible. For example, extending fixed term contracts for a period of eight years just before the implementation period for Directive 1999/70 expires is abusive and not permissible under EU law.[35] Further, the individual options, once chosen by a Member State, are binding on the Member State in the interpretation given to them by the ECJ. For example, if a Member State choses to limit the overall duration of successive fixed term contracts, its legislation has to comply with the ECJ's reading of "successive". Thus,

[28] E.g. ECJ Grupo Norte Facility C-576/16 EU:C:2018:390 GRAND CHAMBER ; ECJ C-293/18 19 March 2019 Sindicato Nacional de CCOO de Galicia v Unión General de Trabajadores de Galicia (UGT),
[29] ECJ C-463/17 Rodrigo Sanz EU:C:2017:109
[30] ECJ C-38/13 Nierodzik EU:C:2014:152
[31] ECJ C-307/05, Del Cerro Alonso EU:C:2007:509, see also ECJ C-556/11 Lorenzo Martínez EU:C:2012:67
[32] ECJ C-268/06 Impact EU:C:2008:223, paragraph 59-68
[33] On the more robust defence of the non-discrimination principle by the Court of Justice in comparison to the prevention of abuse under Clause 5 see (De la Porte & Emmenegger, 2016).
[34] ECJ C-268/06 Impact EU:C:2008:223, paragraph 79
[35] Ibidem, paragraph 91

very short periods of interruption between two fixed-term contracts must not be allowed to exclude the successiveness.[36] The court has accepted interruptions of 60 or 90 days as excluding successiveness.[37]

Clause 6 provides that fixed term employees shall have the opportunity to access permanent positions on the basis of being informed of opportunities, and that employers should offer them training opportunities to that end. Clause 7 ensures that fixed term employees are counted in relation to thresholds to be achieved for employee representation,

The first two directives on non-standard work are relatively old, dating from 1997 and 1999 respectively. Consequently, the EU Commission had committed to conduct a REFIT analysis for these directives as early as 2012. In spite of several announcements that the REFIT analysis is nearly there,[38] the REFIT analysis never materialised. However, research on the export of EU employment law to threshold countries in particular has been conducted, and found that obligations to implement EU employment directives has served as a disincentive to create a labour market reliant on short term contracts, which again promotes a more stable labour market and incites workers to remain in the country.[39]

c) Assessing suggested implementation

The suggested implementation is partly reluctant to recognise the potential of the Directive, and to implement its provisions in such ways that its aims are achieved.

As to the **scope of application** of protection against abusive fixed term contracts and discrimination on grounds of being on a fixed term contract, the implementation does not seem crystal clear. Article 6 paragraph 3 Labour Code seems to imply that public servants are excluded from that protection.

- **However, to fully understand this, I would need to know whether Georgian law allows civil servants to be employed on a temporary basis. If that is not the case, there is no need to protect them from abusive or discriminatory fixed term employment. I could not establish this on the basis of the labour code, and the monograph on Georgia in the Encyclopaedia of International and Comparative Labour Law.[40]**

The **implementation of the non-discrimination principle (Clause 4)** gives rise to some concerns. The proposed addition to Article 6 Labour Code refrains from stipulating a clear non-discrimination clause. It is not sufficient that fixed term employees enjoy the same statutory rights as permanent employees, as stated in that proposed addition. Over and above this, employers must be under an obligation not to discriminate against fixed term employees who are in a comparable situation with employees on indeterminate contracts. While a legislative definition of the **comparable situation (Clause 3)** may be expendable, it is necessary to state that

[36] ECJ. C-212/04 Adeneler, EU:C:2006:432, paragraph 82-88 (21 days), confirmed in ECJ C-364/07 Vassilakis et al, EU:C:2008:346 paragraphs 103-104.
[37] ECJ C-362/13 Fiamingo EU:C: 2014:2044, paragraph 71 with further references (interruption of 60 days sufficient if fixed term contracts only allowed for a duration of 78 days maximum).
[38] See for a statement by Commissioner for Employment and Social Affairs, Marianne Thyssen, in the European Parliament of July 2017 http://www.europarl.europa.eu/doceo/document/E-8-2017-002632-ASW_EN.html?redirect.
[39] (Sahadev & Demirbag, 2011, p. 401)
[40] (Shvelidze, 2017)

unequal treatment of fixed-term employees with comparable employees on indeterminate contracts is against the law. In order to ease the application of such a legislative clause in practice, a code of conduct specifying examples of comparable workers would be useful.

Implementation of Clause 5 too gives rise to some concerns. Article 6 1^4 Labour Code definitely constitutes a violation of the Directive 1999/70, because it exempts employees of new businesses from its protection.

For regular businesses, the proposed legislation opts for combining all three modes provided in Clause 5 in order to avoid abuse. Article 6 1^2 requires an objective justification for fixed-term contracts with a duration of less than a year. Such short fixed-term contracts can be justified by the time limitation of the task (at least that is how I interpret the translation), especially in cases of seasonal work, temporary increase of work or the temporary absence of a permanent employee. Article 6 1^3 combines a maximum duration for any fixed-term contract of combinations thereof of 30 months (2.5 years) with a limitation of the number of renewals of temporary contracts. The latter is not sufficiently clear (at least not in the translation provided), in that the legislation refers to concluding a fixed term contract for two or more consecutive times. The legislation should specify whether a fixed term contract can be renewed two or three times.

The sanction for not complying with the provisions on fixed-term employment contracts is the imposition of an employment relationship of indefinite duration. This is viewed as an adequate sanction in literature, and complies with the principle that employment relationships should be of indefinite duration in principle.

Overall, the following recommendations are made

- **Ensure full coverage of all workers, including civil servants on fixed-term positions (if Georgian law allows for these)**
- **Include a provision banning employees' discrimination on the basis of fixed term work, ideally provide guidance on how to apply this provision**
- **Delete the privilege for new business entities (start-up enterprises) in Article 6 14 Labour Code of Georgia**
- **Clarify how frequently a fixed term contract can be renewed.**

3) Council Directive 97/81/EC of 15 December 1997 concerning the Framework Agreement on part-time work concluded by UNICE, CEEP and the ETUC - Annex: Framework agreement on part-time work

a) Aims and main content of the directive

This second directive on non-standard work is also based on a Framework Agreement, and consists strictly speaking, of a Directive and the Framework Agreement itself. As with the previous directive, Directive 97/81/EC **aims** at preventing discrimination on grounds of non-standard employment, which at the same time is meant to improve the quality of non-standard employment. In contrast to fixed-term work, which according to Directive 1999/70 is meant to remain an exception, part-time work is promoted positively as an opportunity to increase flexibility in the organisation of work corresponding to the needs of both employers and employees

(**Clause 1**). This positive vision only applies to voluntary part time work, though, because part time employment may also constitute part time unemployment, and thus a precarious situation.[41]

Clause 2 specifies the **scope of application**. Its paragraph one is identical with that same paragraph in the preceding Directive 1999/70/EC. The 2nd paragraph authorises Member States to exclude part time workers on a casual basis from the Directive's protection.

Clause 3, again similar to Directive 1999/70/EC, provides **definitions** of the notion of part time, and also the term comparable full-time workers.

Clause 4 contains the n**on-discrimination principle**. It specifies that so-called waiting times and other qualifications for accessing particular employment conditions, such as part time work, may be established, but need to be reviewed periodically. The reasoning behind this clause is the assumption that access to part time work can be viewed as a privilege, which should be earned. There is very limited experience with such waiting times in EU Member States, according to the only report on implementation of this Directive.[42]

Clause 5 paragraph one requires Member States and social partners to r**eview barriers for voluntary part time**, and to eliminate them. In spite of the provisions vague wording ("should"), the Court of Justice has held that Clause 5 in conjunction with Clause 1 establishes an obligation of Member States to review and reduce barriers to voluntary part time employment.[43] Clause 5 also state that an employee's refusal to transfer from part time to full time or vice versa "should" not constitute a reason for dismissal. In relation to this provision the Court held that it does not exclude a statutory provision allowing the transformation of a part time post into a full time post without the employee's consent.[44] Clause 5 further suggests that it should be recommended to employers to give consent to requests to transfer from part time to full time and vice versa if the opportunity arises, to provide information on the availability of transfer option generally, and to employee representation, as well as to take measures to facilitate access to part time work at all levels, including managerial ones.

b) Assessing (suggested) implementation

The implementation of Directive 97/81 again is not fully compliant with the requirements of the Directive in some cases, while in other instances the proposed implementation approximates a maximum not achieved in many Member States.

In relation to **Clause 2**, the table of compliance lists some specific provisions related to public employment, which seem to limit opportunities for part time by requiring specific reasons for part time, and demand a minimum of 50% part time. I was wondering whether these limitations will be reviewed as demanded by Clause 2 (2).

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[41] See on this opinion AG Jääskinnen in case C-313/10 Jansen EU:C: 2011:593, paragraph 57
[42] Accessible from https://ec.europa.eu/social/main.jsp?catId=706&langId=en&intPageId=203
[43] ECJ C-55, 56/07 Michaeler et al EU:C:2007:221 (in relation to a statutory obligation on an employer to submit a paper copy of any employment contract in part time to the authorities within 30 days of signature)
[44] ECJ C-21/13 Mascellani EU:C:2014:2286, paragraph 24

Clause 3: as in implementation of Directive 1999/70, there is no definition of a comparable full-time worker. As specified above, such a definition is not necessarily required. However, in order to ease implementation of the non-discrimination clause by employers, a code of conduct would be advisable.

Clause 4: this clause must be implemented specifically, in order to establish an obligation of employers not to discriminate against part time workers. It is not sufficient to state that all the rights established by the Labour Code are also enjoyed by part time workers. In addition, a provision must be created which clarifies that different treatment of a part time worker with a comparable full-time worker is against the law.

Clause 5: There is no indication that the barriers to part time work in the public service sector are going to be reviewed, as required under paragraph one of this clause. On the other hand, paragraph 2 is correctly implemented. As regards paragraph 3, the implementation approximates a maximum level by creating an individual obligation of employers to allow transfer from fulltime to part time and vice versa, to provide information on opportunities and to facilitate access to training and professional mobility of part time employees. As regards the obligation to make transfers available, it may be suggested that this should be balanced with entrepreneurial necessity.

Overall, the following recommendation are made

- **Include a ban of discrimination on grounds of part-time, ideally accompanies by a code of conduct clarifying notions such as comparable full-time worker**
- **Undertake to review barriers to voluntary part-time work, in particular in the public service**
- **Consider balancing the employers' obligation to make part-time available by allowing refusal or modification in line with business necessity**

4) Directive 2002/14/EC of the European Parliament and of the Council of 11 March 2002 establishing a general framework for informing and consulting employees in the European Community - Joint declaration of the European Parliament, the Council and the Commission on employee representation

a) Workers' representation at the place of work in European Union Law, impact assessment

Again, this directive is part of a larger field of EU labour law: the law pertaining to workers' representation in the workplace. The EEC first started legislating on matters of employee information and consultation via employee representatives in a group of directives aiming to address consequence for employment matters of structural changes of business resulting in collective redundancies (Directive 98/59/EC), takeover of companies (Directive 2001/13) and insolvencies of employers (Directive 2008/94). In 2002, the EC complemented these selective rules by Directive 2002/14/EC, which remains part of EU law. It does not supersede the rules in the other directives, two of which are also part of this mandate. Workers' representatives are also mentioned in Directive 1999/70/EC (counting fixed-term workers in the relevant thresholds)

and Directive 97/81/EC (providing information in relation to part time work to employees' representatives).

As mentioned initially, introducing any measure relating to industrial relations into national legal orders is more difficult than adapting individual labour relations, due to the entrenchment of industrial relation in national legal systems and the vast differences of systems. When it comes to representing employees' interests at the place of work, comparative labour law and industrial relation literature typically distinguishes between two different models, the dual channel and the single channel model. In countries operating the dual channel model, legislation provides for election of representative bodies, for example works councils (elected channel), while trade unions retain a role in representing their members at the place of work (collective channel). In countries operating a single channel model, representation of employees at the place of work is provided by trade unions. These are ideal types, and mixed forms are possible. For example, a collective agreement may provide for elections of representatives at enterprise level, and even allow for non-unionised workers to participate in elections and stand as candidates. Any dual- or mixed channel model needs to address the question how to safeguard collective bargaining as a prerogative of trade unions.[45]

The initial directives which provided for information and consultation of workers' representatives did not take account of these differences, which led to some frictions in the UK, Denmark and Ireland as countries which did not know elected employee representatives. As a consequence, Directive 2002/14/EC carefully avoided any fixation on the representation model. The provisions on information and consultation of employees in today's EU law are thus not free from contradictions. A **fitness check** conducted by the EU Commission in 2013[46] provided a **cost-benefit analysis** of information and consultation procedures and bodies.[47] It found that information and consultation of employees has positive effects on the enterprise in a number of ways. For example, employee representatives pool and convey information on the work process which can be utilised to maximise efficiency or even initiate cost-cutting exercises, the structures promote trust and the smooth running of work processes, improve health and wellbeing of employees and enhance their skills. There are also costs involved for employers, mainly through time off work and providing resources for representative bodies. However, overall, the impact was assessed as positive. This also applied to small and medium enterprises.

b) Main content of Directive 2002/14/EC

Directive 2002/14 does not mention any constituted form of employee representation, leaving maximum discretion to Member States as to which model of employee representation they view as adequate. However, employee representatives are mentioned at several instances, which suggests that implementing the Directive without creating any of these institutions would not be sufficiently compliant. This is further underlined by the declaration referring to the ECJ rulings in cases C-382/92 and C-383/92 (COM v UK), which established that today's Directive 2001/23 and 98/59 required that Member States establish employee representatives at enterprise level in addition to mere trade union representation.

[45] See on this (Schiek, 2007, pp. 309-311), 4th edition in preparation
[46] SWD (2013) 293 final Fitness check on EU law ion the area of Information and Consultation of workers
[47] Pages 18-32

The Directive starts with **definitions (Article 2)** and a flexible **scope of application (Article 3)**, offering Member States a choice of requiring information and consultation at the level of undertakings (in which case the threshold of employees is 50) or at the level of the establishment (in which case the threshold of employees is 20). **Article 4** provides a list of **issues to be covered by information and consultation** (paragraph one) and requires **timely and complete information** (paragraph 3). It also defines the **notion of consultation**, which goes beyond information and should be conducted with a view to reaching agreement (paragraph 4). Further, Member States may provide that information and consultation may be established or modified by collective agreement **(collectively agreed information and consultation rights, Article 5**). They must secure **confidentiality** of information provided (**Article 6**), and **protect the employees' representatives (Article 7**). Standard provisions ensure that employees' representatives and employers can take **recourse to judicial procedures** in cases of non-compliance, and that **adequate sanctions** in cases of infringements are available (**Article 8**).

c) Assessing suggested implementation

The suggested implementation of the directive is not reflective of the differences between information and consultation on the one hand and industrial relations on the other hand, which may impact the practicality of the provisions.

The proposal is to add the implementation to the chapter on freedom of association. This does not quite seem the correct place, since information and consultation are not directly related to association. It is suggested that creating a specific chapter would be more adequate.

The proposal is unclear on the exact role of employee representatives. The first few paragraphs provide for direct information and consultation of employees, who then should consult with the trade union (paragraph 6 sentences 1 and 2) or elected representatives (paragraph 6 subsequent sentences). The provisions for the election process are impractical. For example, there is no indication on how many representatives are elected. Next, if there are several competing trade union, information and consultation are transformed into negotiations, which are to be conducted between employer and representatives directly (paragraph 7)

There is also little reflection on the relation of collective bargaining agreements and the agreements proposed as the result of consultation. It should be mentioned that the Directive does not require the provision of agreements. This reluctance protects such industrial relation systems which do not know elected representatives, and do not provide for agreements outside the trade union – employer channel. It would be open to Georgia to omit the competence of employees and employers to conclude agreements directly (proposed Article 40 [4] paragraphs 4 and 5) It also falls short of some of the obligations contained in the Directive.

It seems that Article 5 of the Directive has been misunderstood. This provision enables Member States to introduce collectively bargained rules for establishing employee representatives instead of creating a legislative solution. This provision does not have to be implemented, as the verb "may" indicates.

The implementation of Article 7 likewise seems impractical.

Overall, it is recommended to consider

- **Drafting a special subchapter in the Labour Code (or specific legislation) on information and consultation in the work-place**
- **Specify role of employee representatives, their election (if this option is maintained), the role of trade unions in their establishment**
- **Detail the protection of employee representatives**
- **Adequately phrase the role of collective bargaining (if any) in establishing employee representatives**
- **If maintaining agreements as a result of information and consultation, ensure that collective bargaining is adequately safeguarded**

d) Limitations

The allocated time of 9 working days for the first part of this expertise does not suffice to develop legislation on information and consultation in Georgia. It is suggested that a discussion on the principles of employee participation in Georgia is held, in order to consider how a more adequate implementation of this directive might be achieved.

5) Directive 2006/54/EC of the European Parliament and of the Council of 5 July 2006 on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation

a) Aims and main content of the directive

This Directive genuinely belongs to the anti-discrimination acquis, although it is based on Article 157 TFEU, and thus also constitutes an employment law directive. The Directive builds on its earliest predecessor, Directive 76/207/EEC, and its partial revision by Directive 2002/73/EC. Directive 76/207/EEC did not cover equal pay, which was addressed separately in Directive 75/117/EEC, complementing Article 119 EEC (now: Article 157 TFEU). Directive 2006/54/EC merges these two fields of law, creating one instrument addressing sex discrimination in employment. Social security, beyond occupational social security as an element of pay, is regulated in Directive 79/7/EEC, which is still awaiting revision. Directive 2006/54/EC also continues to complement Article 157 TFEU, which applies directly to all employment relationships in the EU. This creates a specific dilemma for the EU employment acquis in the EU's Eastern Neighbourhood, which omits Article 157 TFEU, although it is a central plank in the EU's law on sex equality.

Directive 2006/54/EC has become much more detailed in the last revision. Nevertheless, it basically **bans four forms of discrimination** in all matters related to employment, including the establishment and termination of the employment relationship, professional development during the employment relationship, access to and specification of occupational social security and all other matters of remuneration. The Directive does not apply to general social security, which is regulated by Directive 79/7. The four forms of discrimination prohibited are (Article 2)

Direct discrimination

Indirect discrimination

Harassment

Incitement to discriminate

Article 2 further clarifies that different treatment on grounds of pregnancy constitutes discrimination on grounds of sex, and that positive action is justified under certain circumstances. The extent of Directive 2006/54 is mainly owed to detailed provisions specifying what the non-discrimination principle means in different areas. Going beyond the other anti-discrimination Directives, this directive also contains elements of **proactive measures** to prevent and remedy structural discrimination. Thus, according to **Article 26** Member States shall encourage employers and providers of training to take proactive measures to prevent discrimination, and Under **Article 21 paragraphs 3 and 4,** Member States shall encourage employers to promote equal treatment in a planned and systematic manner, which includes providing information, also of a statistical nature, to employees and their representatives on the state of equal treatment between women and men.

The directive also contains provisions which it shares with the other anti-discrimination directives. Thus, Member States must provide **effective and deterrent sanctions** in case of discrimination, which must also entail the **compensation for any damage caused** by discrimination, and outlaw victimization effectively (**Articles 23-25**), and install **equality bodies** with a mandate to provide independent assistance to victims of discrimination in pursuing their rights, conduct independent surveys, publish independent reports and make recommendations, and exchange information with equivalent bodies and the European Institute for Gender Equality (**Article 20**). It is assumed that another contract on implementation of the anti-discrimination acquis has looked into those overarching provisions, for which reason the comments on this part are kept reasonably short.

b) Assessment of implementation

The implementation is mainly unsystematic and contradictory. It seems that there are three pieces of legislation addressing sex discrimination in employment: The Labour Code, the Law on the Elimination of all Forms of Discrimination, and the Law on Gender Equality. The latter two acts faithfully repeat the definitions provided in the EU anti-discrimination directives, while the Labour Code contradicts these acts by providing incompetent definitions of discrimination. It seems that the deficiencies of the Labour Code in this respect have already been the subject of several CEARC reports,[48] which have not resulted in changes.

In order to comply with Directive 2006/54/EC, **the Labour Code must define direct discrimination, indirect discrimination, harassment and sexual harassment separately**, as these are different institutions. Presently, Article 2 paragraph four only seems to address harassment, both as direct and indirect harassment. Direct and indirect discrimination are not defined.

Further, Article 2 paragraph 5 seems to introduce a very **wide-ranging option to justify direct discrimination. This goes over and above the genuine and determinative occupational requirement exception** specified in Directive 2006/54/EC Article 14. This exception also only applies to the field of access to specific posts, whether via initial employment, training or

[48] (Shvelidze, 2017), marginal number 173 with further references.

promotion. It cannot be used to justify differences in pay, or other working conditions, while Article 2 paragraph 5 seems to generate a more wide-ranging justification.

The proposed addition of paragraph 9 to Article 5 Labour Code was not comprehensible to me, which probably is a problem of translation.

As regards implementation of Article 15 (return from maternity leave), the obligation to let the mother benefit from any improvement in working conditions which occurred during her absence is not implemented in the proposed revision of Article 30.

As regards the implementation of the equal pay principle, the new phrases proposed for Article 31 paragraphs 4 and 5 are a useful starting point. It should be noted that the EU has found that just introducing the adequate definitions does little to overcome entrenched pay discrimination on grounds of sex. As a first step to address this problem, the pay transparency recommendation 2014/124/EU had been introduced.[49] Its limited success after four years of experiments[50] had led to the inclusion of the equal pay principle in an extended version into the European Pillar of Social Rights, and the expectation that the recommendation will be transformed into binding legislation.

As a summary assessment of the generic provisions on defence of rights, it seems that these are implemented correctly.

As regards equality bodies, I am assuming that these are assessed in specific expertise on anti-discrimination provisions.

Overall, the following **recommendations** are made, with the proviso that a full assessment would require another extensive set of working days to consider the full non-discrimination acquis in context:

- **Define the four forms of discrimination specifically in the Labour Code**
- **Scale down the justification of direct discrimination in line with Article 14 Directive 2006/54**
- **Implement Article 15 Directive 2006/54**

These recommendations do not address defence of rights and equality bodies (see above).

[49] OJ L 69, 8.3.2014, p. 112–116

[50] EU Commission, Report on the implementation of Commission Recommendation on strengthening the principle of equal pay between men and women through transparency, COM (2017) 671 final

6) 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 breast-feeding (10th individual directive within the meaning of Article 16 91) Directive 89/391/EEC)

a) Main aims and content

This directive constitutes a genuine health and safety directive, requiring Member States to take a number of measures to ensure health and safety of a group of workers who is exclusively female: women who are pregnant, have recently given birth and/or are breastfeeding. In summary, it provides for maternity leave of at least 14 weeks, of which at least 2 weeks must be compulsory, requires that pregnant women are allocated less dangerous work or relieved from their work obligation altogether if this is medically necessary, and demands that breastfeeding women are given special breaks, which can also be cumulated to achieve a shorter working day. The directive further requires that during the period of maternity leave the mother receives maternity payment, without specifying the amount in much detail. It also bans dismissal on grounds of pregnancy, having given birth or breastfeeding, without excluding the dismissal of pregnant women, those having given birth recently or breastfeeding mothers.

b) context: from maternity protection to the work-life balance directive

While it is obvious, that such special rules in favour of an exclusively female group of workers will be the source of discrimination against those workers, and may even be referred to as justification to discriminate against all women, such discrimination is not addressed by Directive 92/85/EC, but instead by anti-discrimination directives (Directive 2006/54 in the main). There is extensive critique in literature in relation to maternity leave and its duration generally, and to the lack of equivalent leaves for fathers.[51] However, it is undisputed that pregnant and breastfeeding women require reasonable adaptation of their working environment to enable them to continue working and to bear healthy children without endangering their own health, and that this adaptation must include a period of leave. The challenge is to effectively address discrimination on grounds of necessary maternity protection, while at the same time address the overburdening of women with unremunerated care work, inter alia by inducing fathers to contribute to childcare.

In order to address this conundrum, the EU Commission had initially proposed a thorough revision of Directive 92/85 in 2008.[52] Next to the generally well known extension of maternity leave to 18 weeks, the proposal also entailed an absolute ban on dismissing women who are pregnant, have recently given birth or are breastfeeding to replace the ban of dismissing them on the grounds of these issues, a change in burden of proof in proceedings to enforce the rights under the directive, a ban of victimisation and the inclusion of the supervision of the Directive into the mandate of equality bodies. While the proposed directive had to be withdrawn for lack of agreement in the Council, the extensive impact assessment of more than 170 pages is still an instructive document.[53] It concludes that, while maternity leave constitutes a cost factor, its

[51] See for example, with ample references, (de la Corte Rodrıguez, 2018)
[52] COM (2008) 600/4
[53] SEC (2008) 2596

extension and better protection of mothers and pregnant women from specific discrimination and victimisation were necessary to combat the professional detriments of women. Instead of proceeding with the maternity leave reform, the Commission then started the process to adopt a directive on work life balance for parents and carers, which again contains an impressive impact assessment.[54] The Directive, which was adopted in April 2019,[55] provides for paternity leave, parental leave and carers leave. In order to nudge fathers into taking parental leave, two of the four months of parental leave shall not be transferable, and parental leave shall attract an allowance, while paternity leave shall attract compensation of the lost income in that period. Obviously, the extent to which the impact assessment is realistic will only be seen in time.

c) Assessment of implementation

In so far as the implementation is completed, and not delegated to subordinate acts, it is in line with Directive 92/85/EEC. I refrain from commenting on provisions demanding state supervision of breastfeeding mothers, assuming that there may be a translation problem.

IV. Overall Conclusion

As has expired from the foregoing considerations, the materials provided seem to indicate two main barriers for implementing the EU employment law acquis adequately.

First, there is a limited comprehension of the principles of anti-discrimination law, mirrored in the incomplete and at times contradictory implementation of anti-discrimination clauses. This not only affects the implementation of Directive 2006/54, but also the implementation of the less stringent discrimination clauses in Directives 1999/70 and 97/81. It will be interesting to learn during the first visit what exactly is the basis for this reluctance, and whether targeted measures related to training in anti-discrimination law (as opposed to gender equality policy) might be a suitable follow-up programme, for which funding should be applied for. Possibly, there are already plans to improve this implementation.

Second, the profound difficulty to adequately implement Directive 2002/14/EC may indicate that the approach to collective labour relations in Georgia is still in development, and that sufficient reflection on the nature of employee representation at the place of work has not been possible. The difficulty is probably enhanced by the considerable vagueness of Directive 2002/14/EC in relation to the collective dimension of information and consultation. Directives 98/59/EC and 2001/23/EC contain more specific obligations of Member States to create employee representatives in undertakings and at workplaces. As suggested by the EU Commission's REFIT analysis of employees' information and consultation, these directives should be streamlined in the future. Accordingly, taking a more coherent approach to this specific aspect would seem to avoid adaptation work emerging from changes to be expected in the future.

I am happy to expand or specify the expertise after discussion of this paper in Tiblisi, and look forward to the discussion.

[54] SWD (2017) 202 final

[55] European Parliament, P8_TA-PROV(2019)0348, accessible from http://www.europarl.europa.eu/doceo/document/TA-8-2019-0348_EN.html?redirect

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