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Non-guaranteed hours employees

Issues Paper

Objective

- 1 The objective of this session is to discuss whether non-guaranteed hours employees can be considered as a subset or breakdown of temporary employees and subsequently whether the two datapoints should be merged.

Information for EFRAG SRB

- 2 LSME Section 5, Disclosure Requirement S1-1, paragraph 10(b) requires the disclosure of the total number by head count or full time equivalent (FTE) of:
 - i. permanent employees, and breakdown by gender;
 - ii. temporary employees, and breakdown by gender;
 - iii. non-guaranteed hours employees, and breakdown by gender.

Description of the issue(s)

- 3 The disclosure requirement splits into two dimensions of the contract temporality. On the one hand, the length of the contract: permanent or temporary. And, on the other hand, the numbers of hours worked: full-time, part-time and non-guaranteed hours. Therefore, the temporary contracts and non-guaranteed hours pertain to two different dimensions of the contract temporality.
- 4 LSME Section 5 S1-1 requires a disclosure of permanent, temporary and non-guaranteed hours employees, aiming to provide information on different types of employment relationships and thus the security of employment.

- 5 The Council Directive 1999/70/EC concerning the Framework Agreement on fixed-term work concluded by European social partners ETUC, UNICE, CEEP defines “fixed-term worker” as: “a person having a contract of employment or relationship entered into directly between an employer and a worker, where the end of the employment contract or relationship is determined by objective conditions such as reaching a specific date, completing a specific task, or the occurrence of a specific event.”
- 6 Non-guaranteed hours employees are defined in ESRS S1 paragraph AR56 (as well as LSME Section 5 paragraph AR14) as: “employed by the undertaking without a guarantee of a minimum or fixed number of working hours. The employee may need to make themselves available for work as required, but the undertaking is not contractually obliged to offer the employee a minimum or fixed number of working hours per day, week, or month.” This definition is based on GRI 2-7.
- 7 ESRS S1 paragraph AR56 (LSME Section 5 paragraph AR14) cites “on-call employees” and “zero-hour contracts” as examples of non-guaranteed hours employees.¹
- 8 Assessing whether non-guaranteed hours employees can be considered as a subset of temporary employees and whether these two datapoints should be merged will consider the following factors: (i) the differences between temporary and non-guaranteed hours employment relationships, (ii) EU legislation on secure employment, (iii) national differences in the legal regulation and prevalence of non-guaranteed hours contracts.
- 9 Whether to consider non-guaranteed hours employees as a subset or breakdown of either temporary or permanent employees has been raised through written feedback by one SR TEG member as well as one SRB member.

EFRAG Secretariat analysis

- 10 Permanent and temporary employment relationships define the duration of a contract, while a non-guaranteed hours contract refers mainly to the working time expected. Hence, this last one could seemingly fall within both categories (depending on national safeguards to protect workers from this type of employment relationship).
- 11 Both temporary and non-guaranteed hours employment relationships provide a level of flexibility for employers, which EU measures have sought to balance with providing security for workers. For example, Council Directive 1999/70/EC aims to improve the quality of

¹ The Directive on Transparent Working Conditions also considers “workers who have no guaranteed working time, including those on zero-hour and some on-demand contracts.”

fixed-term work and introduces safeguards under clause 5, for example a “maximum total duration of successive fixed-term employment contracts or relationships.” The Directive on Transparent Working Conditions² complements the existing protections against discrimination based on type of employment, provided in EU directives on part-time work and fixed-term contracts.³

- 12 The **Directive on Transparent Working Conditions** specifically includes non-guaranteed hours employees into its scope acknowledging their “**particularly vulnerable situation.**”⁴ While the Directive does not prohibit non-guaranteed hour (or zero-hour) contracts,⁵ Article 11 calls for measures to prevent abusive practices, such as “(a) limitations to the use and duration of on-demand or similar employment contracts; (b) a rebuttable presumption or the existence of an employment contract with a minimum amount of paid hours based on the average hours worked during a given period; (c) other equivalent measures that ensure effective prevention of abusive practices.”
- 13 Member States implementing Article 11(a) as safeguards for non-guaranteed hours contract may choose to limit the duration of these contracts, the result being that they legally could only be temporary contracts. The introduction of safeguards differs across Member States, as does the use and prevalence of non-guaranteed hours contracts.
- 14 The use of non-guaranteed hours contracts, or zero-hour contracts are usually not explicitly forbidden but may be significantly restricted depending on national legislation with the safeguards in place. For example, in Germany non-guaranteed hours contracts are regulated under § 12 (“Part-Time and Fixed-Term Employment Act”), determining that if no guaranteed hours are specified in the employment contract, a minimum of 20 hours per week is nonetheless guaranteed. If the duration of the daily working time is not defined, the employer must allow the employee to work for at least three consecutive hours at a

² The Directive is “the first piece of EU legislation explicitly to address the risks of variable work schedules, such as on-demand work, platform work or zero-hours contracts.”

Social Europe, “Better working conditions, more predictable work – the new EU directive,” 19 September 2019, [Better working conditions, more predictable work—the new EU directive \(socialeurope.eu\)](https://socialeurope.eu/better-working-conditions-more-predictable-work-the-new-eu-directive).

³ ETUI, “Regulating uncertainty: variable work schedules and zero-hour work in EU employment policy,” 2019, [Regulating uncertainty: variable work schedules and zero-hour work in EU employment policy | etui](https://www.etui.org/en/Regulating-uncertainty-variable-work-schedules-and-zero-hour-work-in-EU-employment-policy).

⁴ Directive 2019/1152, Recital 12.

⁵ The measures introduced in “the directive is a much-needed step in the right direction, although weaker than expected.”

Social Europe, “Better working conditions,”

time (this would no longer fall into the definition provided in ESRS, whereby “the undertaking is not contractually obliged to offer the employee a minimum or fixed number of working hours per day, week, or month”). Moreover, the employer may only use up to 25% of the weekly working time in addition to the set hours or 20% less.

- 15 France also sets a minimum number of hours per week, unless it is required by a collective agreement, all part-time contracts must provide a weekly minimum of 24 hours. The French Labour Code allows for derogations for, for example employees under the age of 26, who are pursuing their studies.⁶
- 16 In the Netherlands, non-guaranteed hours contracts are usually temporary and require a transition to a permanent contract over time. Dutch law stipulates that zero-hour employees have the right to be offered a fixed-hours contract after 12 months.⁷
- 17 In Italy non-guaranteed hours contracts are regulated in *contratto di lavoro intermittente* Article 13, which introduces an age limit. Contracts may only be concluded with individuals under 24 and over 55. Excluding the tourism, public establishment and entertainment sector, this “intermittent work contract” is only allowed for a period not exceeding four hundred days of actual work within three calendar years, whereby the contract transitions into a permanent contract.
- 18 In Spain, non-guaranteed hours contracts are not recognised by labour law. By collective bargaining agreement or agreement between the employer and workers’ representatives, an irregular distribution of working time throughout the year could be established. In the absence of an agreement, the employer is allowed to irregularly distribute 10% of the working time. In any case, the employer shall give the worker a minimum five-day notice of the day and time the worker is expected to work.⁸ In the case of part-time contracts, these shall specify the number of working hours for the day, week, month or year, as well as the distribution of those hours. If this is not observed, the contract will be presumed to be a full-time one.⁹
- 19 The strict national regulation of non-guaranteed hours contracts, which based on the Directive on Transparent Working Conditions has resulted in limitations on the duration and the provision of a minimum number of hours in Member States. Germany and France

⁶ Article L. 3123-27 of the Labour Code.

⁷ Burgerlijk Wetboek Boek 7, Art. 628a(5).

⁸ Article 34 of the Consolidated text of the Law on the Statute of Rights for Workers.

⁹ Article 12 of the Consolidated text of the Law on the Statute of Rights for Workers.

legally set a minimum guaranteed number of working hours per week. The Netherlands and Italy demand a limit in the duration of a non-guaranteed hours contract, all non-guaranteed hours contracts are thus temporary contracts. Providing information on the number of temporary employees is thus, in an EU-context and within the scope of the definition provided in ESRS S1 relevant.

- 20 Considering overall, the reasoning provided in the Basis for conclusions for the breakdown in ESRS S1 paragraph 51(b) as “intended to give insight into the security of employment, a key concern of the European Pillar of Social Rights Principle 5 and a sustainability matter included in CSRD 29(b)”¹⁰ as well as recent EU legislation, in particular the Directive on Transparent Working Conditions, the question arises whether it is necessary to distinguish between “temporary employees” and “non-guaranteed hours employees” as two separate datapoints. The following table provides an overview of arguments in favour and against merging LSME Section 5 S1-1 paragraph 10(b)(ii) and (iii).

Arguments in favour of merging the two datapoints	Arguments against merging the two datapoints
<p>(1) Purpose of datapoint: The scope of the LSME draft does not require this level of granularity. Providing information on the precariousness of employment does not necessarily require distinguishing between temporary and non-guaranteed hours employees (can be treated as a sub-set of temporary employees and merged).</p>	<p>(1) Purpose of datapoint: It is necessary to provide information on precariousness of employment. Non-guaranteed hours employees can be in a more vulnerable situation than temporary employees.</p>
<p>(2) Definition: The concept of non-guaranteed hours employees and the use of non-guaranteed hours contracts or zero-hour contracts is not as well-established, or as commonly used (and thus not as relevant to include as a separate datapoint) as temporary contracts – regulation also differs across Member States. Depending on national law, the introduction of a legal minimum number of hours (such as in Germany, or by other Member States introducing such safeguards based on the Directive on Transparent Working</p>	<p>(2) Definition: Non-guaranteed hours and temporary employment relationships are distinct concepts and should be differentiated. It is therefore important to provide information on this particularly precarious form of employment (especially in comparison to temporary employment), as recognised by the Directive on Transparent Working Conditions.</p>

¹⁰ Principle 5 of the European Pillar of Social Rights calls for “secure and adaptable employment” and in particular that “employment relationships that lead to precarious working conditions” to be prevented, “including by prohibiting abuse of atypical contracts.”

<p>Conditions) may also no longer comply with the definition provided in ESRS S1.</p>	
<p>(3) National Regulation: National regulation demonstrates that non-guaranteed hours contracts may be temporary contracts, based on EU measures to protect workers from abuse through unpredictable working conditions. Examples of this are Italy and the Netherlands.</p>	<p>(3) National Regulation: Based on the Directive on Transparent Working Conditions, EU Member States have introduced measures to protect workers from abuse through on-demand or similar employment contracts, such as zero-hour contracts. Merging temporary and non-guaranteed hours employees will not capture these differences, especially considering it is more prevalent in some countries (non-guaranteed hours contracts seem to be controversial in most Member States, due to their risks to employees).</p>
<p>(4) Vulnerable Workers: Both temporary and non-guaranteed hours contracts are characterised by the flexibility they provide for workers and employers alike.</p>	<p>(4) Vulnerable Workers: Employers tend to use non-guaranteed hours contracts in sectors that experience fluctuations in demand, such as retail, fast-food restaurants, cinemas and other sectors that experience fluctuations in demand. Skilled workers in low-paid jobs are the most likely to be offered zero-hour contracts.¹¹ For employees, irregular working hours also result in unstable earnings, insufficient work and poor work-life balance (especially planning for responsibilities not pertaining to work).¹² This is more relevant for non-guaranteed hours contracts than temporary contracts (negative consequences may be anxiety and stress¹³).</p>

¹¹ Eurofound, “Zero-hour contracts.”

¹² ETUI, “Regulating uncertainty.”

¹³ The Conversation, “Zero-hour contracts take a huge mental and physical toll,” 9 July 2019, [Zero-hour contracts take a huge mental and physical toll – poor eating habits, lack of sleep and relationship problems \(theconversation.com\)](https://theconversation.com/zero-hour-contracts-take-a-huge-mental-and-physical-toll-poor-eating-habits-lack-of-sleep-and-relationship-problems)

Questions for EFRAG SRB?

- 21 Does EFRAG SRB considers appropriate merging the breakdowns for temporary and non-guaranteed hours employees?