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# Definite Contracts

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# Definite Contracts

- In December 2020, several amendments to the rules on definite contracts were enacted
- The situation pre-2021:
  - Issues on definite contracts of employment had to be dealt with before the regular civil courts
  - Claims for unpaid dues on definite contracts also had to be chased via the regular civil courts, which may constitute a disproportionate expense



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# The Amendments

- Definite contract issues are to be dealt with before the Industrial Tribunal, except if the termination is a case of **expiration**
- The 'dismissal/resignation without penalty' clause has naturally been retained
- Note that both the employer and employee can sue for any sums which may be due before the Tribunal



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## Saving Provisions

- Cases already pending before the civil courts may continue to be heard before such court
- Cases which have begun before the Industrial Tribunal and are still at the determination of jurisdiction stage can continue to be heard before the Tribunal, even though they were initiated before the enactment of the new amendments



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## Remaining Issues

A few issues still remain unaddressed:

- Competence of the civil court, or lack thereof
- Prescriptive vacuum



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# Whistleblowing



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## Whistleblowing

- What is whistleblowing?
- Why is it important?
- What protections can be afforded to the whistleblower?
- What kind of disclosures does whistleblower protection legislation cover?



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# Whistleblowing in Malta

Chapter 527 of the Laws of Malta

*Protection of the Whistleblower Act*

2013



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## The Whistleblower

*"whistleblower" means any employee who makes a **disclosure** to a whistleblowing reporting officer or a whistleblowing reports unit, as the case may be, whether it qualifies as a protected disclosure or not under this Act*

Article 2  
Protection of the Whistleblower Act



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# Protected Disclosure

*"protected disclosure" means an internal disclosure or an external disclosure of information, made in writing or in any format which may be prescribed*

Article 2  
Protection of the Whistleblower Act



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# The EU Whistleblower Directive

- The Directive sets out minimum EU-wide conditions for whistleblowing law to be applied in Member States
- It also comes as a consequence of uneven (if even existent) laws and policies across the EU
- Several problems were arising in the case of cross-border whistleblowing issues which are becoming increasingly common due to open borders and increased cross-border commerce



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## Scope – Maltese Act

### “Improper practice”:

- Anyone’s (likely) failure to comply with law/legal obligation
- Danger to health and safety
- Environmental damage
- Corrupt practices
- Criminal offences
- Miscarriages of justice
- Bribery
- Person acting above their authority
- Any information regarding the above which is being concealed



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## Scope – Directive (EU) 2019/1937

- breaches affecting the **financial interests** of the Union
- breaches relating to the **internal market**
- breaches falling within the **scope of the Union acts...**



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## Scope of Union Acts

- public procurement;
- financial services, products and markets, and prevention of money laundering and terrorist financing;
- product safety and compliance;
- transport safety;
- protection of the environment;
- radiation protection and nuclear safety;
- food and feed safety, animal health and welfare;
- public health;
- consumer protection;
- protection of privacy and personal data, and security of network and information systems;



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## Personal Scope under the Directive

The persons who are to be guaranteed protection under the law will be largely extended under the Directive, encompassing:

- “Workers” & self-employed persons
- Shareholders, administrators, managers or supervisory body members of an organisation, including volunteers and trainees (paid/unpaid)
- Persons working under contractors/subcontractors/suppliers
- Former employees
- Job recruits
- Facilitators (a natural person who assists a reporting person in the reporting process in a work-related context, and whose assistance should be confidential)
- Persons connected with the reporting person at risk of retaliation (work context)
- Legal entities owned by/engaging/connected to the reporting person or connected (work context)



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# Applicability

Currently, the Maltese Act only applies for employees of the following entities:

- Governmental ministries
- Voluntary organisations which raise over €500,000 annually
- Private entities which meets any **two of the following**:
  - Averagely employ more than 250 employees in a year
  - Has a total annual balance sheet of over €43,000,000
  - Has an annual turnover of over €50,000,000



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# Applicability

- The requirements under the Maltese Act are inapplicable to the majority of private entities owing to Malta's limited size
- The Directive:
  - **Lowens the minimum number of employees to only 50**
  - Does not include any requirements regarding finances and annual turnover as eligibility criteria
- Specific legislation can establish lower thresholds for environmental and public health issues



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## Applicability

- A contract of employment/service **can never exclude the applicability of this law**
- The Directive clarifies that it will apply without prejudice to any national laws on professional secrecy
- External third parties may also be engaged for purposes of compliance with the law



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## Specific Procedures/Applicability

- Note that some reporting procedures are already spelt out in other EU acts, such as the AML Regulations
- In such cases these tailored and more industry-specific procedures provided in these regulations and directives will apply over and above the provisions of the Whistleblower Directive



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## Internal Disclosures

- Employers are obliged to have adequate procedures in place for internal disclosures to be made:

*Every employer must have in operation internal procedures for receiving and dealing with information about improper practices committed within or by that organisation; such internal procedures must at least identify the person or persons within the organisation, in this Act referred to as the whistleblowing reporting officer, to whom a protected disclosure may be made.*



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## Internal Procedures

- WB procedures must:
  - Identify the whistleblowing reporting officer within the organisation
  - Be internally published, and training should also be given where necessary
  - Be regularly updated and republished

### DIRECTIVE OBLIGATIONS:

- Whistleblowing reporting officers must keep whistleblowers updated – under the directive, acknowledgment of receipt must be given **within 7 days**
- Investigations must be concluded within **3 months** from the date of acknowledgement



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## Internal Procedures

- Internal disclosures which may constitute criminal offences can be reported to the police
- Disclosures may be made to the head of the organisation if the discloser believes the Officer is involved/related to someone involved in the improper practice



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## Internal Policy – what should it include?

- Definitions
- How an internal disclosure can be made
- Specific procedures applicable to particular disclosures (ex. financial)
- Identify the Whistleblowing Reporting Officer
- Confidentiality
- Your investigative and referral process
- Guarantee of protection from retaliation
- Disciplinary action in case of vexatious/false disclosures



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## Confidentiality

- The WBR Officer / such other person receiving the discloser must keep the whistleblower's identity confidential
- The receiving party must also make an effort to not disclose details which may indirectly lead to the identification of the whistleblower
- Anonymous disclosures shall not be considered as protected under the Act. **However, the Directive states that they become so protected if the identity of the discloser subsequently becomes known**
- Confidentiality may be derogated where necessary and proportionate, so long as the discloser is informed



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## External Disclosures

- External disclosures are made to authorities appointed to receive them, depending on the nature of the disclosures, such as the FIAU (AML), the Commissioner for Inland Revenue (tax) etc.
- External disclosures may only be made **after** an internal one has been made/attempted, and only if there are:
  - risks of key persons being involved in the improper practice
  - urgency
  - risk of tampering of evidence
  - risk of occupational detriment upon disclosure
  - no follow up/updates on internal disclosures



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FIRST SCHEDULE [Articles 16, 17 and 20] Authorities Prescribed To Receive External Disclosures Part 1 – Private Sector	
Authority	Description of Matters
Auditor General	Failure to observe laws, rules and regulations relating to public finance and misuse of public resources.
Commissioner for Revenue	Income tax, corporation tax, capital gains tax, stamp duties, national insurance contributions, value added tax or "revenue acts" as defined in the Commissioner for Revenue Act.
Commissioner for Voluntary Organisations	Activities of a voluntary organisation
Financial Intelligence Analysis Unit	Money laundering or financing of terrorism in terms of the Prevention of Money Laundering Act.
Malta Financial Services Authority	The business of credit and financial institutions, the business of insurance and the activities of insurance intermediaries, the provision of investment services and collective investment schemes, pensions and retirement funds, regulated markets, central securities depositories, the carrying out of trustee business either in a professional or a personal capacity and such other areas of activity or services as may be placed from time to time under the supervisory and regulatory competence of the Malta Financial Services Authority.
Ombudsman	(i) Conduct involving substantial risk to public health or safety or the environment that would if proved, constitute a criminal offence; and (ii) All matters which constitute improper practices and which are not designated to be reported to any other authority
Permanent Commission Against Corruption	corrupt practices

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## Data Storage

*"Records [of disclosure reports] ... shall be stored for no longer than it is necessary and proportionate"*

Article 18  
Directive (EU) 2019/137

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## Remedies – the Maltese Act

- When one believes detrimental action has been/will be taken against him regarding a protected disclosure they may apply to the Court:
  - A remedial action order
  - An injunction
- The court may make/order/grant:
  - interim orders
  - injunctions (which may be indefinitely applicable)
  - damages, including moral damages
- No court registry fees are due, but if the claim is upheld, an award on costs on the respondent (employer) shall be made.



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## Penalties – the Maltese Act

Any person who compels/tried to compel a person from making a disclosure by:

- Violence/threats against the discloser or his family
- Stalking one's movements or residence
- Deprives the person of own property

shall be guilty of an offence – imprisonment up to 1 year and a fine €500 - € 5,000, or both. If by such conduct the person would have achieved his aim, the imprisonment shall be increased by 1 to 2 degrees and the fine shall be between €1,500 - €10,000



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## Prohibited Retaliation

The Directive provides for specific prohibited retaliation:

- suspension, lay-off, dismissal or equivalent measures;
- demotion or withholding of promotion;
- transfer of duties, change of location of place of work, reduction in wages, change in working hours;
- withholding of training;
- a negative performance assessment or employment reference;
- imposition or administering of any disciplinary measure, reprimand or other penalty, including a financial penalty;



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## Prohibited Retaliation

- coercion, intimidation, harassment or ostracism;
- discrimination, disadvantageous or unfair treatment;
- failure to convert a temporary employment contract into a permanent one, where the worker had legitimate expectations that he or she would be offered permanent employment;
- failure to renew, or early termination of, a temporary employment contract;
- harm, including to the person's reputation, particularly in social media, or financial loss, including loss of business and loss of income;



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## Prohibited Retaliation

- blacklisting on the basis of a sector or industry-wide informal or formal agreement, which may entail that the person will not, in the future, find employment in the sector or industry;
- early termination or cancellation of a contract for goods or services;
- cancellation of a licence or permit;
- psychiatric or medical referrals

All the above include threats/attempts on the same



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## Penalties

*Member States shall provide for effective, proportionate and dissuasive penalties applicable to natural or legal persons that:*

- (a) **hinder** or attempt to hinder reporting;*
- (b) **retaliate** against persons referred to in Article 4;*
- (c) bring **vexatious** proceedings against persons referred to in Article 4;*
- (d) breach the duty of maintaining the **confidentiality** of the identity of reporting persons*

Article 23

Directive (EU) 2019/1937



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## BMI Healthcare Ltd vs. Shoukrey

- Claimant had made a disclosure, suffered occupational detriments by consequence of such, and subsequently resigned
- The employer was made to pay £920,202:
  - **£880,302** compensation for loss of earnings as a consequence of the detrimental action
  - **£30,000** injury to feelings
  - **£10,000** aggravated damages



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## BMI Healthcare Ltd vs. Shoukrey

- The employer appealed on the following grounds:
  - The possibility that the claimant was partly at fault for his losses
  - Failing to apply evidence on the hospital's own current situation
  - Inadequacy of reasons/error of law regarding the claimant's career potential
  - Error of expecting the claimant to relocate to mitigate loss
- The Employment Appeal Tribunal actually accepted these considerations and remitted the case back to the ET to re-assess the compensation awarded



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# Cannabis White Paper

*Towards the Strengthening of the Legal Framework on the Responsible Use of Cannabis*



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## Current Legislation

### Medical Cannabis

- 2018 medical cannabis was legalised for limited medical conditions
- chronic pain, spasticity in multiple sclerosis and side effects of chemotherapy
- use is very rare
- patients may be asked to rescind their driving license\*
- no guidelines for employers

\*S.L.65.18 (Schedule 8) Driving licences shall not be issued to, or renewed for, applicants or drivers who regularly use psychotropic substances, in whatever form, which can hamper the ability to drive safely where the quantities absorbed are such as to have an adverse effect on driving. This shall apply to all other medicinal products or combinations of medicinal products which affect the ability to drive.



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# Current Legislation

## Recreational Cannabis

- 2015 partial liberalisation
- Drug Dependence (Treatment not Imprisonment) Act, Chapter 537
- Introduced
  - rehabilitation, for those dependants on drugs,
  - treatment, for those in possession of small amounts



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# The White Paper

## Salient Proposals

- Decriminalisation of up to 7 grams of cannabis possession
- Personal cultivation and private consumption
- Expungement of criminal records
- The distinction between Cannabidiol (CBD) and Tetrahydrocannabinol (THC) at law
- The prohibition of cannabis consumption in public
- Administrative measures for minors
- A dedicated Cannabis Authority
- Education



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# Cannabis Trends in Malta

Our workforce already makes use of cannabis - we do not know to what extent

- 2013 Census 4.5%
- 2019 MaltaToday survey 9.3% - 33,000
- 2020 Government Study ? - 40,000+

Potential social desirability bias

Lifetime use and not necessarily regular or occasional use



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# Cannabis Trends in Malta

ESPAD

	2011	2015	2019
Lifetime use of cannabis	9.8	12.6	11.5
Cannabis use during the last 12 months	7.8	10.4	9.4
Cannabis use during the last 30 days	4.5	5.4	4.7
Cannabis use at the age of 13 or younger	2.8	2.7	2.1

Cannabis consumption among Maltese students aged 15 to 16 years (ESPAD, 2020)



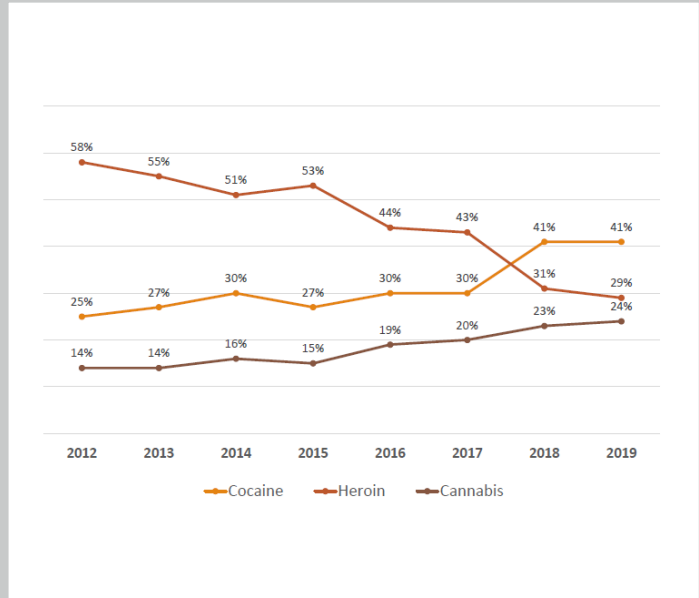
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# Cannabis Trends in Malta

Caritas Services

Caritas admitted clients drug used  
(Caritas, 2021)



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## The Maltese Workforce

- 30% are foreign nationals
- 56% EU nationals    44% TCNs
- 50% of EU Nationals are from Italy, UK\* & Bulgaria
- 46% of TCNs are from Phillipines, Serbia & India

Data Source: Jobsplus 2019



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# The Maltese Workforce

- Cannabis use trends in these countries seems to be generally higher than in Malta
- These 6 countries alone potentially contribute a few thousands of employees using cannabis

Data Source: Jobsplus



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# The Maltese Workforce

If cannabis is already consumed by the workforce what is the issue with the White Paper proposals?

- No mention of employment related issues
- Increased Consumption?
  - More injuries?
  - More occupational accidents?
  - Increased absenteeism/sick leave?
  - Increased mental health incidence?
  - Decreased productivity?
- Consumption at home - Teleworking?



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# Impairment

- THC intoxication - impairs **cognitive function on a number of levels**, from basic motor coordination to more complex ones.
- Heavy use during **adolescence may result in some executive functions not maturing successfully** - lower education levels, lesser earning capabilities, a higher dependence on welfare provisions, increased chances of unemployment, and reduced satisfaction in life and relationships in general
- Impaired inhibition and increased impulsiveness are two of the most significant effects of acute cannabis use. **Planning, concept formation and sequencing prove difficult. Working memory could be highly compromised with acute cannabis use.**
- Research shows that even **occasional cannabis use affects concentration, focus, decision-making, impulsive actions, inhibitions and also working memory.**



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# Impairment

Impairment impacted by:

Consumption method

THC dose

Consumption patters

Low THC dose, smoked or vaporised - 4 hours

High THC dose, orally - 10 hours

Impairment is much less obvious in regular marijuana users than intermittent users

McCartney, D., Arkell, T., Irwin, C. and McGregor, I., 2021. Determining the magnitude and duration of acute Δ9-THC induced driving and cognitive impairment: A systematic and meta-analytic review. *Neuroscience & Biobehavioral Reviews*, 126, pp.175-193.



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# What should you do

Risk Assessments

Policies

Training managers, supervisors and workers

Tests

Guidelines



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# Right to Disconnect



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## A new concept?

- The right to disconnect basically safeguards a worker's right to refuse to answer emails, phone calls, messages (or other kinds of work communications) **outside working hours**
- This is not a totally new idea – it's been debated for years, since employees are easily reachable via communication technology which can 'follow' them home after work
- In fact, France introduced this right under its body of employment law (Code du Travail) in 2016 (applicable for entities with 50 or more employees)



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## A new concept?

- Furthermore, it may be argued that the right to disconnect is an implicitly guaranteed right at EU level by virtue of the Working Time Directive, which provides for maximum working hours, rest periods etc.



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## Developments in the EU

- In 2020, the pandemic helped shift a lot of workers to either permanent or regular teleworking patterns, rather than spending all their working time from their place of work
- With employees working from home, the borders of working time become blurred, with employees being expected to be on-call for much longer than usual
- In early 2021, the EU Parliament called on the Commission to draft Directive a law to cater for the right to disconnect across the EU



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## Proposals

- Protection of right to disconnect from work communications outside of working time
- The right is also to extend to holidays and paid leave
- Adequate payment for time worked in excess of contracted hours
- Protection from retaliation
- Right to request working time records
- Currently, there are rumblings that Malta may attempt to introduce the right prior to the enactment of the Directive



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## Potential Issues

- Flexible working requests
- Adequate compensation = overtime?
- Will its applicability depend on the nature/type of work?
- Certain roles (ex. managerial) require employees to work over and above their regular contracted hours, which working hours are often not remunerated as overtime. What will happen in such cases?
- It has however been noted that a degree of flexibility will be retained



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## Federación de Servicios de Comisiones Obreras (CCOO) vs. Deutsche Bank SAE (CJEU)

- The Spanish trade union demanded a declaration that the employer is obliged to record employee working hours in order to enable observance of working hours agreed and calculating overtime
- The bank argued that Spanish law only obliged them to keep record of **overtime** hours
- The CJEU stated that without calculating regular hours worked, it will be very hard to calculate overtime hours and thus workers' rights may be in breach



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# Work Life Balance Directive



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## Aims & Applicability

*This Directive lays down minimum requirements designed to achieve equality between men and women with regard to labour market opportunities and treatment at work, by facilitating the reconciliation of work and family life for workers who are parents, or carers.*

*This Directive applies to all workers, men and women, who have an employment contract or employment relationship as defined by the law, collective agreements or practice in force in each Member State, taking into account the case-law of the Court of Justice.*



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# Directive on Transparent and Predictable Working Conditions



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## The Directive

- The Directive aims to improve working conditions by promoting more transparent and predictable employment while ensuring labour market adaptability.
- This Directive lays down minimum rights that apply to every worker in the Union who has an employment contract or employment relationship as defined by the law, collective agreements or practice in force in each Member State with consideration to the case-law of the Court of Justice



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