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OPINION

Brussels, 07 July 2018
Opinion.02

TRANSPARENT AND PREDICTABLE WORKING CONDITIONS IN THE EUROPEAN UNION REPEALING DIRECTIVE 91/533/EEC

Executive summary

- CEEP opposes changing the purpose of the Written Statement Directive from an information instrument to a rights-based framework Directive. The proposed minimum requirements relating to working conditions are new rights seen in a European perspective, as they have always been core elements of national laws and collective agreements and contracts.

- The Proposal conflicts with the principle of subsidiarity, i.e. the principle that EU decisions should be taken as close to citizens as possible. There are great differences between EU Member States regarding both what constitutes balanced working conditions and how the labour market is regulated. The EU Proposal would constitute excessive interference with the labour market model of several Member States, especially those regulating working conditions by collective agreements.

- In Europe, we have a vast variety of social- and labour market models and different traditions. Many of CEEP's members have a strong and long-standing tradition for wage and working conditions to be regulated by social partners through collective agreements. It ensures flexibility and adaptability in relation to labour market developments, the differences in the different sectors and a balance of both parties' interests.

- CEEP emphasizes the necessity to respect the social partners' autonomy and their right to negotiate and conclude collective agreements at the appropriate level as stated in Principle 8 of the European Social Pillars Rights.

- CEEP finds it unfortunate that the European Commission introduces within its proposal the definitions for employees and employers in order to define the employment relationship within the scope of article 2. This approach takes a different path from the long tradition of the application of EU Social Law, which is by definition in the hands of the Member States.

- CEEP agrees with the principle that workers should have the right to be informed about their rights and obligations resulting from the employment relationship in a timely and comprehensible manner. At the same time, the obligations imposed on the employer should be realistic and feasible. CEEP suggests several adaptations to allow of a sound application of the Directive without creating a disproportionate administrative burden for both the employer and the worker.

- CEEP acknowledges the need for protection of workers that are not covered by a collective agreement and the need for minimum rights for those. Nonetheless it is very important that this Directive ensures the right for national social partners to enter into collective agreements that are not governed by the minimum provisions. An agreement made by national social partners must be regarded as a guarantee of secure and fair working conditions and the European Court of Justice should honor the content of such collective agreements. Conditions in collective agreements cannot be seen in isolation, but must be seen as a whole, giving regard to all conditions in collective agreements that apply to a worker.

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The proposed amendments below refer mainly to the original text of the Commission directive proposal

CHAPTER I
GENERAL PROVISIONS

Article 2 - Definitions

"For the purposes of this Directive, the following definitions shall apply:
~~(a) 'worker' means a natural person who for a certain period of time performs services for and under the direction of another person in return for remuneration~~;"

➔ **JUSTIFICATION:** CEEP welcomes the general approach of the Council of the European Union deleting the definitions of workers, employers and employment relationship.

The European Commission proposes to align the notion of worker to the case-law of the European Court of Justice (ECJ). It suggests that for the application of the Directive a "worker" should be defined as a *natural person who for a certain period of time performs services for and under the direction of another person in return for remuneration.*

In most cases, EU legislation leaves the definition of 'employee' to the Member States. Thus, the Acquired Rights Directive of 1977 (Council Directive 77/187 , consolidated in Directive 2001/23) defines an employee as 'any person, whom, in the Member State concerned, is protected as an employee under national employment law'. Directive 80/987 of 1980 on the protection of employees in the event of insolvency stipulates that the Directive is 'without prejudice to national law as regards the definition of the terms "employee"...'. Council Directive No. 2002/14 , establishing a framework for informing employees and consulting with them in the European Community, defines an employee as 'any person who in the Member State concerned is protected as an employee under national employment law and in accordance with national practice'.

The Directives incorporating framework agreements negotiated by the European social partners follow this approach. For example, Council Directive 96/34/EC of 3 June 1996 on the Framework Agreement on parental leave states: '*This Agreement applies to all workers, women and men, who have an employment contract or employment relationship as defined by the law, collective agreements or practices in force in each Member State'*.

CEEP believes that it is inappropriate for the European Commission to introduce within its Proposal the definitions for employees and employers in order to define the employment relationship within the scope of article 2. This approach takes a different path from the long tradition of the application of EU Social Law, by definition in the hands of the Member States.

Leaving to the Member States the care to define the field of application of the directive would allow adapting to the reality of different sectors as well as different branches of law, such as labour law, social security law or even tax law. The National and European Court(s) of Justice

have proven their ability to respond to the uncertainties when they arise, including the addressing legal question as for who should be considered an employee with regard to EU law.

CEEP members have already reported that a new definition for the Purpose of the Directive would create difficult situations:

The proposed definitions would, for instance, change the corresponding prevalent definitions in many Member States, which play an important role within labour law as they define the scope of labour legislation. The definitions also affect other areas such as social security and taxation.

Leaving the definitions for the EU level would also hamper the necessary flexibility to adapt to future developments of the Labour Market. The digitalization and transformation of the labour market has indeed created complex situations in terms of the definition of the employment relationship. However, it is CEEP belief that it is for the social partners in cooperation with Member States authorities to foster this adaptation of national law to new circumstances. Fostering now, at EU level, a standard definition of the employment relationship would only bind us in the future.

CHAPTER II
INFORMATION ON THE EMPLOYMENT RELATIONSHIP

Clarity on essential conditions underlying the employment relationship is a *conditio sine qua non* for a healthy employment that is beneficiary for both worker and employer. CEEP, therefore, agrees with the principle that workers should have the right to be informed about their rights and obligations resulting from the employment relationship **in a timely and comprehensible manner**. At the same time, the obligations imposed on the employer should be **realistic and feasible.**

CEEP, therefore, proposes a couple of refinements of the Directive based on:

- the principle of the necessary consistency of this proposal with other European and national policy such as the reduction of administrative burden and tackling the complexity of different procedures;
- the distinction between types of information and between the moments at which the different types of information are best communicated;
- a reasonable time-lapse within which the above-mentioned information should be communicated to the worker in order to inform the worker about all the rights and obligations.

Article 1 – Purpose, subject matter and scope

Article 1, paragraph 3

"Member States may decide not to apply the obligations in this Directive to workers ~~who have an employment relationship equal to or less than 8 hours in total in a reference period of one month~~ ***working very low number of hours or very short working periods****. ~~Time worked with all employers forming or belonging to the same enterprise, group or entity shall count towards that 8 hour period.~~"*

➔ **JUSTIFICATION:** CEEP considers that the status definition of those workers should belong to the Member States to take into consideration the length of the overall contract and the duration of the employment and to decide whether or not to create an exemption.

Article 1, paragraph 5a

*"Member States may provide, on objective grounds, that provisions laid down in Chapter III shall not apply to **essential services such as** civil servants, public emergency services, **social services, healthcare and long-term care,** the armed forces, and to police authorities, judges, prosecutors, investigators and other law enforcement services."*

Article 1, paragraph 6

*"Member States may decide not to apply the obligations set out in **Article 3, point 2 (l), i) and ii) and in article 9 of the current directive to social services, healthcare and long term care and** Articles 10 and 11 and Article 14(1)(a) to natural persons in households acting as employers where work is performed for those households."*

➔ **JUSTIFICATION:** CEEP believes that adding an exemption for some specific sectors which require essential flexibility such as social services, healthcare and long-term care.

Article 3 – Obligation to provide information

Article 3, paragraph 2 (g):

~~*"any training entitlement provided by the employer;"*~~

➔ **JUSTIFICATION:** CEEP urges for the suppression of this provision as it is neither an essential element of the contract nor an element that needs to be communicated at the beginning of an employment relationship.

If the provision is nevertheless withheld, CEEP urges that the wording of this provision be clarified in accordance with the Council Compromise Proposal. Accordingly, the provision should be reformulated as follows "training entitlement provided by the employer, if any" as stated in the compromise reached by the EPSCO Council on the 21.06.2018.

Article 3, paragraph 2(m):

*"any collective agreement governing the worker's conditions of work **in the case of collective agreements concluded inside the business**; in the case of collective agreements concluded outside the **business** by special joint bodies or institutions, the name of the competent body or joint institution within which the agreements were concluded"*

➔ **JUSTIFICATION:** This proposal prevents that an individual employer is presumed to inform an individual worker about all the collective agreements concluded on a cross-sectoral and sectoral level which would be disproportionally burdensome from an employer's point of view, especially since collective agreements are regularly subject to adjustments and the individual employer does not participate directly in these negotiations.

Article 3, paragraph 3:

"The information referred to in paragraph 2(f) to (l) and (n) may, where appropriate, be given in the form of a reference to the laws, regulations and administrative or statutory provisions or collective agreements governing those particular points."

➔ **JUSTIFICATION:** The legal instruments governing the reference hours and days within which the worker may be required to work and the minimum advance notice the worker shall receive before the start of a work assignment are various and/or may be different from one country to another. The employer should, therefore, have the possibility to fulfil his/her obligation by simply referring to these laws, regulations/statutory provisions and/or collective agreements.

Article 4 – Timing and means of information

Article 4, paragraph 1:

"The information referred to in Article 3/2 ***a, b, c, d, e, f, and j*** *shall be provided individually to the worker in the form* ***of one or more*** *document****s*** *at the latest ~~on the first~~* ***~~working~~ day within one calendar week from the first working day****.* ***The other information referred to in Article 3(2) shall be provided individually to the worker in the form of one or more documents no later than two months after the first working day. Those documents may be provided and transmitted electronically as long as it is easily accessible by the worker and can be stored and printed.****"*

➔ **JUSTIFICATION:** This proposal imposes the communication of the most essential and urgent information governing the employment at the first working week at the latest, which is unrealistic. For example, for organisations that provide services 24 hours per day, 365 days per year, their administrative services, that would provide the information referred to, may only work Monday to Friday. As a result, any workers commencing employment after administrative working hours on a Friday and Saturday and Sunday could only provide information on the following Monday at the earliest.

The rest of the information can be released within two month of employment, each **time at the moment when most appropriate**. It would be administratively challenging for the employers particularly for SMEs to provide at the beginning of the employment this information. It would jeopardise the objective of the proposal of the Directive.

Article 5 – Modification of the employment relationship

Article 5, paragraph 2 (NEW):

"The written document referred to in paragraph 1 shall not apply to changes that merely reflect a change in the laws, regulations and administrative or statutory provisions or collective or works council agreements cited in the documents referred to in Article 4(1) and, where relevant, in Article 6."

➔ **JUSTIFICATION:** CEEP considers that informing workers about changes in legislation governing employment relationships is a shared responsibility of the employer, the government and the organisations representing the interests of the workers. It should be left to the national level

and practices to determine the most relevant channel to transmit in order to adapt best to each national situation.

CHAPTER III
MINIMUM REQUIREMENTS RELATING TO WORKING CONDITIONS

CEEP is not in favour of changing the purpose of the Written Statement Directive from an information instrument to a rights-based framework Directive. The proposed minimum requirements relating to working conditions are new rights seen from a European perspective, as they have always been core elements of national laws and collective agreements and contracts.

In Europe, we have a vast variety of social- and labour market models and different traditions. Many of CEEP's members have a strong and long-standing tradition for wage and working conditions to be regulated by social partners through collective agreements. It ensures flexibility and adaptability in relation to labour market developments, the differences in the different sectors and a balance of both parties' interests.

The Proposal for this Directive originates from the European Pillar of Social Rights. It is stated several times in the preamble, that when reinforcing social rights, the Union will take into account the diversity of national systems and the key role of social partners. CEEP is of the opinion that the European Commission has not respected this proclamation when introducing these minimum rights.

CEEP acknowledges the need for protection of workers that are not covered by a collective agreement and the need for minimum rights for those workers. Nonetheless, it is very important that this Directive ensures the right for national social partners to enter into collective agreements that are not governed by the minimum provisions. An agreement made by national social partners must be regarded as a guarantee of secure and fair working conditions.

Article 7 – Maximum duration of any probationary period

*"1. Member States shall ensure that, where an employment relationship is subject to a probationary period, that period shall respect a period ~~from 6 to~~ **of** 12 months, including any extension.*
2. Member States may provide for longer probationary periods than mentioned in art. 7, nr. 1. In cases where the worker has been absent from work during the probationary period, Member States may provide that the probationary period can be extended correspondingly, in relation to the duration of the absence."

➔ **JUSTIFICATION:** It has to be possible to extend the probation period in certain situations where this is justified by the nature of the employment eg. key civil servants such as judges, police, military or in case of sickness during the probationary period.

Article 8 – Employment in parallel

"1. Member States should ensure that an employer shall not prohibit workers from taking up employment with other employers, outside the work schedule established with that employer.
2. Member States and Employers may however lay down conditions of incompatibility, in particular, where such restrictions are justified by legitimate reasons such as legislative requirements protection of business secrets, ***~~or~~*** *the avoidance of conflicts of interests* ***protection of public/national interest and public health and safety****."*

➔ **JUSTIFICATION:** CEEP recognizes the possibility for an employee to be able to have parallel employment. On the other hand, it is in some cases necessary for employers to have the power to ban incidental employments regulated by law, which presents competition, for reasons of protection of public health and safety, protection of business secrets, conflicts of interests, or which may adversely affect confidence, in order to run a functioning business, as well as protection of national security. The scope of this provision is too broad.

Article 9 – Minimum predictability of work

"Member States shall ensure that where a worker's work pattern is entirely or mostly variable and entirely or mostly determined by the employer, the worker may be required to work by the employer only:
(a) if work takes place within predetermined reference hours and reference days, established in writing at the start of the employment relationship, in accordance with Article 3(2)(l)(i), and
(b) if the worker is informed by their employer of a work assignment a reasonable period in advance, in accordance with Article 3(2)(l)(ii).
Member States may lay down conditions for the application of this article for example excluding certain professions or sectors which have to deliver essential public services*."*

➔ **JUSTIFICATION:** CEEP acknowledges the need for some degree of predictability in the employment relationship, but this provision goes beyond the objective. Decisions regarding work organisation and working time are mainly regulated by collective agreements and vary between sectors.

It is very unclear what the Commission means by a "reasonable time" as this varies from sector to sector. In many public services, especially in the health sector, social services and long term care, there is a great need for flexibility as they deliver services necessary for inclusion and participation in the society, 24 hours a day. It is, therefore, necessary for the Member States to be able to exclude certain sectors or professions form this provision. Indeed, given the specificities of certain sectors there should be either the possibility to exclude entire sectors (or professional groups) from the Directive or there should be more explicit room for social partners to find innovative solutions that strike the right balance between the rights of employees on timely information and the need for employers to keep a necessary level of flexibility in the planning.

Article 10 – Transition to another form of employment

"1. Member States shall ensure that workers with at least six months' seniority with the same employer may request a form of employment with more predictable and secure working conditions where available.
2. The employer shall, ***when the employee has adequate qualifications for the position and there is an open position****, provide a written reply within one month of the request. With respect to natural persons acting as employers and micro, small, or medium enterprises, Member States may provide for that deadline to be extended to no more than three months and allow for an oral reply to a subsequent similar request submitted by the same worker if the justification for the reply as regards the situation of the worker remains unchanged.*
3. The Member States may restrict the frequency of requests and the employers' written reply*."*

➔ **JUSTIFICATION:** In CEEP's view, it is already possible for an employee, at any given moment under the employment, to request a form of employment with more predictable and secure working conditions where available.However, the written reply will pose a significant administrative burden for the employers and CEEP sees this as an unnecessary burden for the employer.

It is necessary to restrict the frequency of requests by e.g. demanding that the person has completed the probation period, that the employer only has to reply when the employee has the adequate qualifications for the position.

Article 11 – Training

"*Member States shall ensure that where employers are required by ~~Union or~~ national legislation or relevant collective agreements to provide training to workers where the* ***training is compulsory*** *to carry out the work for which they are employed, such training shall be provided cost-free to the worker****, in accordance with national practice****.*

➔ **JUSTIFICATION:** CEEP finds that the provisions are very unclear and unproportioned. It should be clearly defined what kind of training the provision concerns and how the words "cost-free" should be understood.

As education is a national competence, there are many different systems for financing training of employees, some are paid by the State, the social partners, the employer, the union and the employee. It seems unproportioned to change all these national systems and put the entire burden on the employer if it is a training demanded by the union or agreed upon by the national social partners.

CHAPTER IV
COLLECTIVE AGREEMENTS

Article 12 – Collective agreement

*"Member States **shall** ~~may~~ allow social partners to negotiate and conclude collective agreements, in conformity with the national law or practice, **~~which, while respecting and the overall protection of workers~~**, establish arrangements concerning the working conditions of workers which differ from those referred to in Articles 7 to 11."*

➔ **JUSTIFICATION:** An agreement made by national social partners must be regarded as a guarantee of secure and fair working conditions. See the executive summary and introduction of chapter III for further explanation.

CHAPTER V
HORIZONTAL PROVISIONS

Article 13 – Legal presumption and early settlement mechanism (DELETION of the Article)

➔ **JUSTIFICATION:** The social partners right to make collective agreements shall be safeguarded and respected as pointed out in art. 12. Therefore CEEP supports the complete deletion of article 14. Article 15 about Right to redress is sufficient.