EU Directive

TRANSPARENT AND PREDICTABLE WORKING CONDITIONS

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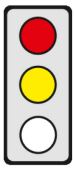
KEY ISSUES

Objective of the Directive: The Commission wants to promote transparent and predictable working conditions for workers whilst at the same time promoting the adaptability of the labour market.

Affected parties: All employers and all workers, particularly in non-standard employment relationships.



Pro: Extending the employer's obligation to provide information, and making it apply earlier, increases transparency and improves legal certainty for workers.

Contra: (1) The introduction of a standard EU definition of the word "worker" is in breach of the principle of subsidiarity.

(2) The scope of the employer's obligation to provide information is partly disproportionate.

The most important passages in the text are indicated by a line in the margin.

CONTENT

Title

Proposal COM(2017) 797 of 21 December 2017 for a **Directive** of the European Parliament and of the Council **on transparent and predictable working conditions in the European Union**

Brief Summary

Note: Unless otherwise indicated, references to Articles and page numbers refer to the Proposal for a Directive COM(2017) 797.

- **Context and objectives**
  - The Written Statement Directive [91/533/EEC] provides that employers must inform workers within two months of the main aspects of the employment relationship.
  - More than half of the jobs that have arisen in the EU in the last ten years are non-standard employment relationships, i.e. not permanent full-time jobs. Between four and six million workers work "on demand" without any prior contractual agreement about when and how long they should work. [p. 1]
  - The Directive replaces the Written Statement Directive [p. 3] extending the employer's current obligation to provide information [Chapter II] and introducing minimum requirements for working conditions [Chapter III].
  - The aim of this is to promote secure and predictable employment and ensure the adaptability of the labour market.

- **Scope of the Directive**
  - The Directive applies to all workers [Art. 1 (2)]. The question of who is a worker and therefore who falls under the scope of the Written Statement Directive is currently determined according to national law [Art. 1 (1) Written Statement Directive]. In future, there will be an EU standard definition of the term "worker" for the proposed Directive [Art. 2 (1) (a)]. This will ensure that the Directive is applied uniformly in all Member States and also that non-standard workers, i.e. workers who do not have a permanent full-time job, are covered [p. 11].
  - Member States can decide that the Directive does not apply to workers who do not work more than eight hours per month [Art. 1 (3)]. This exception does not apply to zero-hours contracts, i.e. employment relationships where no guaranteed amount of paid work is agreed [Art. 1 (4)].

- **Employer's obligation to provide information**
  - Employers must inform workers about the "essential" aspects of the employment relationship [Art. 3 (1)].
  - This includes inter alia [Art. 3 (2)]
    - names and addresses of the parties to the employment relationship,
    - the start and, in the case of temporary employment relationships, the end or estimated duration of the employment relationship,
    - possibilities for giving notice,
    - the basic amount and any other components, as well as frequency, of the remuneration,
    - the length of annual leave and
    - the responsible social security institution,
    - duration and conditions of any probationary period, any training entitlement provided by the employer and any applicable collective agreements.

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– Also included [Art. 3 (2) (k)]:
  - where the work schedule is "mostly not variable", i.e. fixed working days and hours have been agreed, the length of the standard working day or week and any arrangements for overtime and its remuneration,
  - if the work schedule is "mostly variable", i.e. no fixed working days or hours have been agreed, an indication that it is variable, the number of guaranteed paid hours, remuneration of work performed in addition thereto and the "reference days" and "reference hours" within which the worker may be required to work and the minimum advance notice the worker will receive before the start of a work assignment.
– Where essential aspects of the employment relationship – such as probationary period, notice or salary – are regulated by legal or administrative provisions or statutory or collective provisions, the information provided by the employer may be replaced by reference to the corresponding regulations [Art. 3 (3)].
– Additional information obligations apply to workers working abroad [Art. 6].

► **Timing and means of information**
– The employer must inform the worker individually about essential aspects of the employment relationship, at the latest on the first day of the employment relationship, at least in the form of an electronic document that can be stored and printed out [Art. 4 (1)].
– Likewise, employers must inform workers about all changes to essential aspects of the employment relationship at the latest on the day the changes take effect [Art. 5].
– Member States must develop templates for the document used to inform workers and make these templates available to employers and workers – such as on the internet [Art. 4 (2)].

► **Minimum requirements relating to working conditions**
– Where an employment relationship is subject to a probationary period it must not, as a rule, exceed six months, including any extension [Art. 7 (1)]. Member States may permit longer probationary periods where this is justified by the nature of the employment - such as a management position - or is in the interests of the worker - such as following a long illness [Art. 7 (2)].
– Employers cannot prohibit workers from working for other employers, outside the work schedule [Art. 8 (1)]. Employers may, for legitimate reasons - such as the protection of business secrets or the avoidance of conflicts of interests - lay down conditions of incompatibility [Art. 8 (2)].
– Where the work schedule is variable ("work on demand"), employers can only require a worker to work if the work takes place within predetermined "reference days" and "reference hours", and provided the employer informs the worker of a work assignment a "reasonable period in advance" [Art. 9].
– Employees in non-standard employment relationships, who have been employed by the same employer for at least six months, may request employment with "more predictable and secure" working conditions [Art. 10 (1)]. Employers must reply to such requests within one month, in writing. In the case of small and medium-sized companies, Member States can provide for longer deadlines. [Art. 10 (2)]
– Employers must provide workers with training, free of charge, where they are obliged to provide it under EU law, national law or collective agreements [Art. 11].

► **Enforcing workers' rights**
– Member States must provide for sanctions where workers are not properly informed and employers fail to remedy this within 15 days of being requested to do so [Art. 14].
– They can choose between the following provisions [Art. 14]:
  - A rebuttable presumption, that the affected worker is in permanent, full-time employment, will apply if the employer fails to inform the worker of the duration, amount of work and probationary period.
  - Employees can submit a complaint to a competent authority. Where the employer fails to remedy the information within 15 days of a request by the authority, the authority may impose a fine.
– Employees must have access to dispute resolution and to redress [Art. 15] and be protected against any discrimination where they exercise their rights under the Directive [Art. 16].
– In the event of a dismissal, the employer must prove that the dismissal did not occur because the worker exercised its rights under the Directive [Art. 17].

Main Changes to the Status Quo

► The Directive provides a standard EU-wide definition of the term "worker".

► The employer's obligation to provide information to the worker is extended and applies at an earlier stage.

► Minimum requirements relating to working conditions are introduced.

Statement on Subsidiarity by the Commission

According to the Commission, the new minimum requirements relating to working conditions are justified because national measures do not provide the same level of protection in terms of transparency and reliability. Diverging labour and social standards may mean that companies have to compete on an uneven playing field, which is detrimental to the functioning of the internal market. [p. 6]

Policy Context

The "European Pillar of Social Rights" was passed in November 2017, during the EU Social Summit in Gothenburg [cep**Input** 01/2018]. The proposed Directive aims to "realise" the principles of the Pillar on "Secure and adaptable employment" [No. 5] and on "Information about employment conditions and dismissal protection [No. 7] [p. 2].

Legislative Procedure

21 December 2017	Adoption by the Commission
21 June 2018	Debated by the Council
Open	1st Reading in European Parliament
Open	Adoption by the European Parliament and the Council, publication in the Official Journal of the European Union, entry into force

Options for Influencing the Political Process

Directorates General:	DG Employment, Social Affairs and Integration (leading)
Committees of the European Parliament:	Employment (leading), Rapporteur Enrique Calvet Chambon (ALDE Group)
Federal Ministries:	Employment and Social Affairs (leading)
Committees of the German Bundestag:	Employment and Social Affairs (leading)
Decision-making mode in the Council:	Qualified majority (acceptance by 55% of Member States which make up 65% of the EU population)

Formalities:

Competence:	Art. 153 (1) (b) and (2) (b) TFEU (Social Policy)
Form of legislative competence:	Shared competence (Art. 4 (2) TFEU)
Procedure:	Art. 294 TFEU (ordinary legislative procedure)

ASSESSMENT

Economic Impact Assessment

The Commission's statement on subsidiarity, to the effect that diverging labour and social standards in the Member States result in an uneven playing field for companies and thus **are detrimental to the internal market, is unconvincing in economic terms.** The opposite is true: just like lower wages, lower labour and social standards even out productivity disadvantages in the economically less developed Member States and thereby compensate for their competitive disadvantages. This is particularly true within the eurozone where equalisation by way of the exchange rate is no longer possible. The proposed information obligations and minimum requirements for working conditions are not especially rigid, which means that the resulting burden on companies in less economically developed Member States is kept in check. However, the question arises as to whether the EU will continue along this course and raise the minimum requirements once the proposed Directive has been passed.

Irrespective of this basic criticism, the following can be said regarding the individual proposals: **The** substantive **extension of the obligation to provide information** about all "essential" aspects of the employment relationship, **and making it apply earlier,** i.e. on the first day of the employment relationship, **increases transparency and thereby improves legal certainty for employees.** Since Member States have to provide templates, the red tape involved in providing information is reasonable for the employer. In addition, de facto, employers have 15 days in which to remedy the information without having to fear sanctions. This allows for the necessary flexibility such as when an employment relationship takes effect at short notice.

The provision that only allows employers to prohibit multiple jobs in exceptional cases, is appropriate in the case of part-time employment relationships. In the case of full-time employment relationships, on the other hand, it may cause the employee's performance to suffer due to overexertion as a result of having multiple jobs. The fact that the employee can expect corresponding consequences under the employment contract is however sufficient to deal with this.

The provision that "work on demand" is only permitted within the "reference days" and "reference hours" and only with "reasonable advance notice" may – such as in the event of the sudden illness of several employees and particularly in small companies – **mean that companies are unable to meet their delivery obligations.** A rule should therefore be included, at least for urgent exceptional situations.
The rule that employers must respond within one month, in writing, to requests from employees for a change to "more predictable and secure" working conditions, will result in unnecessary red tape and corresponding costs because the employer is free to decide on the reasons for refusing the requests. The employer's obligation should – as in the Directive on fixed-term employment contracts [1999/70/EC] – be restricted to having to inform employees about available jobs.

Legal Assessment

Legislative Competency

The EU can adopt Directives with minimum requirements for employees' working conditions [Art. 153 (1) (b) and (2) (b) TFEU]. Although, in the case of dismissals, the Directive provides for a reversal of the burden of proof in favour of the employee, and thus serves to protect the employee on termination of the employment contract, it does not have to be passed unanimously by the Council [Art. 153 (1) (d) in conjunction with (2) sub-para. 3 TFEU], because this provision is not the main focus of the Directive [CJEU, Judgement of 6 November 2008, Parliament v. Council, C-155/07, ECLI:EU:C:2008:605, para. 34 et seq.].

Subsidiarity

In principle, since the employer's obligation to provide information is already regulated under EU law by way of the Written Statement Directive, changes to the law can only take place at EU level. However, **the introduction of a standard EU definition of the word "employee"** for the purposes of the Directive **breaches the principle of subsidiarity.** In the area of labour and social law, Member States have developed their own definitions of the term "employee" which accommodate the peculiarities of the respective national labour markets and social systems. Therefore – as with the provision in the Temporary Agency Work Directive [Art. 3 (1) (a) and (2) 2008/104/EC] – the definition of the term "employee" should be left up to the Member States and only a definition of non-standard employment relationships included, as well as the stipulation that these must not be excluded from the scope of the Directive.

Compatibility with EU Law in other respects

The scope of the employer's obligation to provide information is partly disproportionate: The employer's obligation to provide information should not apply where the appropriate information is already contained in a written employment contract. In principle, the rights and duties of employees can also be regulated by way of works agreements. It should therefore be stipulated that employers can also comply with their obligation to provide information by referring to valid works agreements.
It should also be clarified that – as under the currently applicable Written Statement Directive [Art. 5 (2) 91/533/EEC] – employers do not have to inform their employees about changes to those aspects of the employment relationship arising from a change in legal or administrative provisions as well as statutory or collective provisions, and especially that, even at the beginning of the employment relationship, instead of providing employees with information, employers can refer to the applicable legislation in this regard.
In the interests of legal certainty, it should be clarified that the Directive does not affect national legislation on the formation or form of employment contracts [cf. Art. 6 Written Statement Directive].

Impact on German Law

As a result of the extension of the employer's obligation to provide information, the Written Statement Act [NachwG] must be amended. As a result of the minimum requirements for working conditions, changes to the Part-Time Work and Fixed-Term Employment Act [TzBfG] are necessary. Work on demand already requires at least four days advance notice by the employer [Section 12 (2) TzBfG].

Conclusion

The Commission's statement on subsidiarity, to the effect that diverging labour and social standards are detrimental to the internal market, is unconvincing in economic terms. Extending the obligation to provide information, and making it apply earlier, increases transparency and improves legal certainty for workers. The provision that "work on demand" is only permitted within the "reference days" and "reference hours" and only with "reasonable advance notice", may mean that companies are unable to meet their delivery obligations. The introduction of a standard EU definition of the word "worker" is in breach of the principle of subsidiarity. The scope of the employer's obligation to provide information is partly disproportionate.