POSITION PAPER - 04/2018

Ceemet position on the Transparent and Predictable Working Conditions Directive

On 21 December 2017, the European Commission published its proposal for a Directive on transparent and predictable working conditions in the European Union. The revised Directive is proposed, following a REFIT evaluation of the Written Statement Directive and in the light of the proclamation of the European Pillar of Social Rights.

Ceemet's key messages

- The definition of a worker proposed in article 2 of the Directive interferes with the Member States' discretion to decide whether a person is considered to be an employee or a self-employed person, which not only has a far-going impact on the labour legislation but also on the social security legislation and the taxation law. This is in serious breach of the EU's competences in the field of social policy.
- The definition of a worker as it is currently on the table is very broad and extensive. People, who are usually qualified by the national labour law of a Member State as a self-employed person, such as for example freelancers, may now be requalified as an employee. This will create huge legal uncertainty for employees, self-employed people and companies.
- Defining an employer as a person who is indirectly party to an employment relationship with a worker is very unclear and will create legal uncertainty for both employers and employees.
- The proposal contains numerous elements which create additional administrative burden and increasing costs for companies, regrettably even more so for SMEs. This completely goes against the aim of the REFIT evaluation.
- By introducing new minimum rights, the revision of the Written Statement Directive is used as a backdoor to introduce a pillar of employees' rights. The introduction of these rights goes against the principle of subsidiarity and largely oversteps the EU's competences.

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About Ceemet

Ceemet represents the metal, engineering and technology-based industry employers in Europe, covering sectors such as metal goods, mechanical engineering, electronics, ICT, vehicle and transport manufacturing.

Member organisations represent 200,000 companies in Europe, providing over 17 million direct and 35 million indirect jobs.

Ceemet is a recognised European social partner at the industrial sector level, promoting global competitiveness for European industry through consultation and social dialogue.

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Content

Introduction

Following the REFIT evaluation of the Written Statement Directive and in the light of the European Pillar of Social Rights, the European Commission decided to replace the Written Statement Directive with a new Directive, focusing on employees' working conditions. As the REFIT aims to make EU laws simpler and easier to understand, Ceemet expected a modernised EU Directive which would remove red tape and increase transparency for both employers and employees.

Unfortunately, the proposed Directive is doing the exact opposite. The proposal contains various measures, such as the extension of the information package, the reduction of the 2 months deadline, the obligation to respond to a request for a transition to another form of employment, etc. which create excessive administrative burden, new costs and legal uncertainty for employers. And as confirmed in the Impact Assessment, the financial burden will be the highest for SMEs.

Moreover, the introduction of a series of minimum rights for employees completely changes the aim and the purpose of the Directive and goes far beyond the scope of the REFIT evaluation. Furthermore, the introduced minimum rights are in many countries at the core of social partners' competences and should therefore not be regulated at EU level.

With this position paper, we would like to address two of Ceemet's overarching concerns, i.e. the definitions as laid down in article 2 and the introduction of minimum rights as provided in Chapter 3 of the proposed Directive.

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Definitions – Article 2

Definition of a "worker"

The Commission proposes to define the notion of a "worker" as "a natural person who for a certain period of time performs services for and under the direction of another person in return of remuneration". This definition is based on criteria which have been established in the case law of the European Court of Justice (ECJ).

Ceemet strongly opposes to an EU definition of a worker for numerous reasons.

Firstly, determining whether a person is considered to be an employee or a self-employed person should remain a political decision of the Member States and an agreement between the social partners in case of collective agreements. National definitions are developed over a long period of time, taking into account the specificities of the national level and ongoing developments in labour markets. As these developments differ from Member State to Member State, one uniform EU approach would have practical implications and would interfere with the well-functioning of the national markets.

National definitions may differ between sectors, branches of law and collective agreements in order to correctly reflect the scope of the legal instrument concerned. Also, they can easily be adapted in order to reflect the changing developments in the labour markets and respond to national needs as new forms of work and business activities will inevitably arise in times of digitalisation. The creation of these new forms of work should be supported as they increase competitiveness and growth in the European Union and should not be hampered by a static definition that does not leave any room for flexibility. Member States are better placed to respond to new forms of work and business activities in order to keep up with faster developments in the labour market as they may differ between countries.

Furthermore, the definition as proposed by the Commission is extremely broad and extensive. People, who are usually qualified by the national labour law of a Member State as a self-employed person, such as for example freelancers, may now, due to the very wide application of the Directive, be requalified as an employee. This requalification would not only have far-reaching consequences as regards labour law but also as regards the social security legislation and taxation law. It is needless to say that this will create legal uncertainty for employees, self-employed people and companies.

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The consequences of the qualification of a person, notably the applicable social security legislation, should be left to the discretion of the Member States. EU interference in this regard goes fully against the principle of subsidiarity.

Even though it has been stated by the Commission that the definition only aims to clarify the personal scope of the revised Written Statement Directive, we believe that this will inevitably have far-reaching implications on the classification of an employment relationship in the Member States in general. Providing a person with a contract, stating the relevant work schedule, the amount of paid leave, the applicable notice period, etc., may be seen as an indication of subordinate work. Therefore, the person who will now be entitled to this written statement may be qualified as an employee, even though he would not have an employee status according to national law. This is strengthened by the fact that the Written Statement Directive has been transformed into a minimum employment rights Directive where a person, even though he would be qualified as a self-employed in the Member State, would be granted employees' rights by the Directive.

Furthermore, we believe that it is more appropriate to refer to the notion "employee" rather than a "worker" throughout the text of the Directive. An "employee" solely concerns people who work under a contract of employment while a worker implies a person who works under a contract, whereby he undertakes to do or perform personally any work or services for another party to the contract. The notion "worker" thus covers a broader range of situations than an "employee".

Definition of an "employer"

Further in article 2, the Commission proposes to define the notion of an "employer" as "one or more natural or legal person(s) who is or are directly or indirectly party to an employment relationship with a worker".

Ceemet opposes to this definition as it is very vague, too broad and may have extensive, unintended consequences. Mainly, it is very unclear what is meant with being an indirect party to an employment relationship. As this concept is currently unknown, this definition will inevitably create legal uncertainty. It may lead to numerous people being qualified as the employer of one employee and therefore, all having authority over that person.

We are for example concerned that the proposed definition would cover the relationship between a temporary worker and a host company, rather than the temporary work agency or that it may target the subcontracting relationship between the contractor and the employees of the subcontractor.

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For the abovementioned reasons, we believe that an EU definition of a "worker" and an "employer" is highly unacceptable and needs to remain the prerogative of the Member States. Therefore, we advocate for the reinstatement of Article 1.1 of the Written Statement Directive, which states that "this Directive shall apply to every paid employee having a contract or employment relationship defined by the law in force in a Member State and/or governed by the law in force in a Member State".

Introduction of minimum rights

The proposal introduces various substantive minimum rights for all "workers" in Chapter 3 of the Directive. Article 7 limits the probation period to a maximum of 6 months and can only be extended if justified. Article 8 states that an employer cannot prohibit workers from taking up employment with other employers, except in case of legitimate reasons such as business secrets. Article 9 establishes a minimum predictability of work schedule where employees can only be required to work on indicated reference days and only if the employee is informed a reasonable time in advance. Article 10 states the right of a worker to request the transition to another form of employment to which the employer is obliged to respond. Article 11 provides that mandatory training has to be free of charge for workers.

As a general remark, Ceemet regrets that the proposal includes the minimum rights in the Directive, as it completely changes the aim and purpose of the original Directive, which is informing employees about their working conditions. By including the minimum rights in the Written Statement Directive, the revision has been used as a backdoor to introduce a pillar of employees' rights at EU level.

The EU competences in the field of social policy are rightly limited to complementing and supporting Member States' activities by setting minimum requirements only, while taking into account the diverse conditions and technical rules in different Member States. An EU employees' rights Directive would be in breach with the EU competences in the field of social policy and goes fully against the principle of subsidiarity. In this regard, we want to emphasise that the limited competences of the EU in the field of social policy and the diversity of national systems should be respected.

For each minimum right introduced, it should be assessed whether any action is required and whether the EU level is the right level to take this action. It should be noted that the proposed minimum rights have not been subject to an evaluation assessment and should therefore be thoroughly researched first.

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Furthermore, the proposed rights are at the core of the social partners competences and are mainly regulated through collective agreements as decisions concerning the organisation of the work should be taken at a level as close as possible to the company in order to reflect the fast-moving on-demand economy. Therefore, and in order not to hamper the competitiveness of companies, we strongly believe that the proposed minimum rights should not be regulated at EU level. In this regard, we consider Article 9 especially problematic as it regulates the minimum predictability of work. Decisions relating to the planning of working time should be taken at lower levels in order to better correspond to economic and social realities. We therefore consider that this article encroaches on one of the prime prerogatives of the national social partners.

Ceemet opposes the provision regarding collective agreements in Article 12. In many Member States, the issues which are covered by the proposed Directive are regulated by way of collective agreement between the social partners. The proposed Directive therefore interferes with the collective agreements. It would furthermore imply that the ECJ ultimately will be able to rule on whether a national collective agreement complies with the directive in these regards. This is an unacceptable limitation of the autonomy of the social partners.

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