23 June 2017

CEEMET response to a possible revision of the Written Statement Directive

On 26 April 2017, the European Commission launched within the framework of the European Pillar of Social Rights a first phase social partner consultation on a possible revision of the Written Statement Directive. The aim is to consult the social partners on a possible revision to improve the effectiveness of the Written Statement Directive and on a possible broadening of its objectives.

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1. Do you consider that the Commission has correctly and sufficiently identified the issues and the possible areas for further EU action?

a. Preliminary observations

As a general observation CEEMET would like to point out that the aim of the Commission does not seem to be to improve the Written Statement Directive as such, but rather to introduce a common EU definition of the concept of employee and a pillar of employees' rights.

While the overall positive evaluation should lead to the conclusion that the Written Statement Directive is still sufficiently fit for purpose, the suggested revision seems to lead towards a broader EU legislative framework for employment conditions.

The direction the Commission is heading with this revision, should be considered part of the broader debate on so-called 'new' forms of employment /work, and the debate on social protection, but also the general debate on the future of Europe and its social dimension.

These debates should be held openly, at a level and in a context fit for such debate. The revision of the Written Statement Directive – an overall well-functioning EU Directive – should not be used as a backdoor for these discussions. Neither the far-reaching legal implications, nor the political dimension of these debates can be ignored.

b. Improvement of the effectiveness of the Written Statement Directive

The Commission makes suggestions with regards to the revision of the current text of the Written Statement Directive to increase the transparency of working conditions.

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i. A common EU definition of the concept of employee

Defining what an employee is, inevitably also means defining the difference between an employee and a self-employed person.

It is up to the Member States to decide whether a person is to be considered an employee, as opposed to self-employed. The same is true for the development of legal criteria to distinguish between self-employment and bogus self-employment.

Defining the concept of employee on EU level would not only redefine the scope of application of all EU directives within the field of social policy, but would also have far-reaching consequences on the Member State's labour and social security legislation, and even taxation law. Such fundamental interference in the Member States' labour legislation and social security schemes is in breach of the EU's competences in the field of social policy.

The principle of subsidiarity is key in this context. Member States have sufficient legal tools at hand to qualify the nature of the employment relationship. These national tools will also allow adaption to accurately fit new forms of work in times of digitalisation into the national systems. Hence, whether a person is employed on the basis of an employment contract, or self-employed, should be defined on the basis of these national tools and in line with the corresponding national labour laws and traditions which are highly divergent. Also, the consequences of this qualification, notably – but not only – the applicable social security legislation, should be left to the Member States. CEEMET refers in this context to the Rome Declaration signed on 25 March 2017, in which it is clearly stated that the diversity of national systems should be taken into account within the framework of a social Europe.

It is also important to highlight that new forms of work and business activities are arising in times of digitalisation in all Member States and increase growth and competitiveness in Europe. The creation of new forms of activities and jobs should be supported, regardless whether this concerns work on the basis of an employment contract or self-employed work. It is important that these new forms of work and business activities are not considered inferior to work on the basis of an employment contract. A requalification of a self-employed worker into an employee driven by this assumption would disregard the interests of the person who is delivering the work, the nature of the activity, the organisation of the work, the contractual relationship between the contractor and the principal, and so forth.

Finally, even if the Commission seeks for a common EU definition of the concept of employee solely "*for the application of this Directive"*, it goes without saying that the impact of such common EU definition will go far beyond the application of the Written Statement Directive itself:

- Even if the objective of the Written Statement Directive would remain to inform employees of their rights, a common EU definition of the concept of employee would lead to the EU defining to whom a written statement should be delivered, indirectly implying to whom the work conditions as listed in the Written Statement Directive, would apply.

  Even if the EU definition would only apply to the Written Statement Directive, by providing information on the title, grade, nature or category of work, the amount of paid leave, the notice periods applicable to be observed by the employer and employee, the working time, the applicable

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collective bargaining agreements, etc., the worker – even if he or she is not an employee according to national legislation, including settled case law – would be pushed into an employee status.

- The above would apply even more if the Written Statement Directive would be transformed to a minimum employment rights directive (cf. infra, c): a worker, regardless of the employment status as defined on the basis of the Member States' tools, would be granted employees' rights.

The Written Statement Directive is – and should remain – solely applicable to employees as defined by the Member States and should not become a tool to define the concept of employee as opposed to self-employed person.

ii. A clarification of the application of the Directive to new and atypical forms of employment

CEEMET does not see the need for this clarification. As soon as a person is identified as an employee based on the Member State's legislation, the employee falls under the scope of the Written Statement Directive. Hence, the Directive already covers all forms of employment.

Identifying to which forms of employment the Directive applies would only lead to the adverse effect that unidentified forms of employment, would fall out of the scope of the Directive. Hence, as soon as new forms of employment would emerge, the Directive would be outdated. The proposed change would rather have the effect of excluding future forms of employment than ensuring the application of the Directive to all forms of employment.

iii. Removal or simplification of article 1, 2 of the Written Statement Directive

It should be borne in mind that a REFIT evaluation notably aims at making EU law simpler, fit for purpose and to reduce regulatory costs.

The exemptions Member States may provide in accordance with article 1, 2 ensure that the administrative burdens and costs for companies remain proportionate to the duration, the magnitude or the nature of the employment.

In this context, it should be recalled that it has been proposed by the High-Level Working Group on Administrative Burdens to even provide an exemption for micro-entities from the scope of the Written Statement Directive. Even if such an exemption no longer appears to be necessary, removing the optional exemptions in article 1, 2 would inevitably lead to an increase of the administrative burdens for companies, notably for SMEs.

iv. Extension of the information package

Reference can be made to comments under iii:

- the aim of a REFIT evaluation is to make EU law simpler, fit for purpose and to reduce regulatory costs, notably by reducing the administrative burden for companies;

- an extension of the information package would go against this aim and lead to an increase of the administrative burden for companies, notably for SMEs.

As to the suggestion to require that Member States should make available on-line standard Written Statement Models it should be noted that the evaluation showed that there is an overall good compliance with the Written Statement Directive. Hence, it appears that there is no need for such model. Also, template written statements – or template employment contracts containing the information as required by the Written Statement Directive – are usually widely available.

v. Redress or sanctions

The principle of subsidiarity, as well as the limited legislative powers of the EU in the field of social policy must be adhered to. It should remain up to Member States to decide if sanctions should be applied, and if so which remedies and sanctions are best fit to ensure compliance.

In the field of social policy, Member States may decide that a compensation for damages actually suffered is a remedy fit for purpose, while the proposed changes focus on sanctioning rather than repair.

Sanction should – if considered appropriate by the Member States - only be a last resort, and reserved for serious, intentional breaches of social law.

Obliging Member States to introduce penalties is not the right approach. Member States should decide on their own policies on enforcement of social policy provisions. Member States should have the choice to focus on prevention or repair.

vi. Reduce the two-month notification deadline

As pointed out correctly in the evaluation, a suggestion was made by the High-Level Group on Administrative Burdens to *extend* the notification deadline. Hence, if too high administrative burdens were identified, there is no justification for a reduction of the notification deadline.

Notably requiring that the information listed in the Written Statement Directive should be provided to the employee at the beginning of the employment relationship would be problematic in case of employment in an international context, e.g. if the employee is employed in another Member State than the Member State in which the headquarters of the employer are located, as well as in case of an urgent employment. It could unintendedly slow down the hiring of employees.

Also, whereas combating undeclared work is a necessary aim, the notification of employment as such is done through various channels. Hence, any need for stricter requirements regarding the notification of employment should not be assessed on the basis of the Written Statement Directive solely.

Therefore, the two-month notification deadline should not be reduced.

c. A possible broadening of the objectives of the Written Statement Directive: setting minimum rights

As pointed out above, the revision of the Written Statement Directive should not be used as a backdoor to introduce a pillar of employees' rights.

Firstly, an EU employee rights' directive would go against the principle of subsidiarity and be in breach with the EU's competences in the field of social policy. The EU's competence in the field of social policy is rightly limited to complementing and supporting Member States' activities by setting minimum requirements only, taking into account the diverse conditions and technical rules in the different Member States. The diversity of national systems and the EU's limited competences in the field of social policy should be respected.

In this context, national labour law reforms, whether implemented already, in progress or planned in view of a modernisation of labour markets, should not be hampered by an initiative that risks aiming at consolidating a view on labour law and workers protection that is not future proof.

For each minimum right the Commission would consider, it should be assessed whether any action is needed and justified and whether the EU level is the right level to take action.

CEEMET points out that the suggestions on minimum rights have not been subject to an evaluation or assessment. Any serious debate on this should at least be based on research and evidence.

It also appears that the suggestions go far beyond setting minimum requirements and would lead to largely overstepping the EUs competences.

> E.g. rules on the termination of employment contracts differ strongly in the Member States. While some Member States have opted for protection through the need of prior approval of the dismissal by an independent authority or court, other Member States have opted for notice periods. The EU-level is not the right level to set minimum requirements in this respect, risking putting well-functioning legislation at stake by not taking into account these diversities.
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> E.g. the right to request a new form of employment, combined with an obligation for the employer to reply, as suggested in the consultation document, would lead to the possibility for employees to request forms of employment that do not correspond to the needs of the company, nor the function the employee is hired for. An example of this possibility can be found in the proposal of the Commission on work-life balance for parents and carers and indicates a lack of understanding of the practical implications for employers. Employers need to run a business in the first place. The obligation of employers to reply to such unilateral request would lead to an unbalanced burden for employers.

Moreover, the broadening of the objectives of the Written Statement Directive would inevitably lead to a great legal uncertainty as the rights defined in it would overlap – and possibly contradict – rights defined in existing directives.

For all these reasons, CEEMET strongly opposes to the intention of the Commission to turn the Written Statement Directive into a minimum rights directive.

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2. Do you think that the Commission should engage into legislative work in one or several of the identified possible areas for further EU action?

Referring to the above, CEEMET does not believe that the Commission should engage into legislative work in any of the areas indicated in the Commission's consultation document.

The evaluation of the Written Statement Directive, taking into account its objectives, is overall positive. A revision of the Written Statement Directive is not justified.

3. Would you consider initiating a dialogue under Article 155 TFEU on any of the issues identified in this consultation?

No, for the above-mentioned reasons we do not wish to initiate a dialogue under Article 155 TFEU.

About CEEMET

CEEMET (Council of European Employers of the Metal, Engineering and Technology-Based Industries) is the European employers' organisation representing the interests of the metal, engineering and technology-based industries. Through its national member organisations, it represents 200 000 companies across Europe. The vast majority of them are SMEs, providing over 13 million jobs.

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