

8 December 2017

Follow-up to second phase consultation on a possible revision of the written statement 91/533/EEC

KEY MESSAGES



- 1** The nature and purpose of the written statement directive is to inform employees about their working conditions at the beginning of the employment contract or relationship. A Commission's proposal to revise the written statement directive must ensure that the directive's nature and purpose are respected.
- 2** We call on the Commission to carefully assess and take into account the outcome of the second phase social partner consultation, including the impact on the future of the European social dialogue. BusinessEurope offered negotiations to ETUC in good faith with a view to revise the written statement directive in a targeted manner. We were very disappointed by ETUC's decision not to negotiate.
- 3** A Commission's proposal must remain fully coherent with its 2018 work programme's commitment to proceed with a REFIT revision. A REFIT revision should focus on improving the written statement directive to make it simpler and adapt it, where needed, to make sure it delivers its intended benefits for companies and workers, while removing red tape and lowering costs in particular for SMEs. Introducing minimum rights would completely change the character of the directive and go much beyond the scope of the REFIT evaluation.



I. General comments

On 21 September 2017 the Commission published the second phase consultation of social partners on a possible revision of the Written Statement Directive (Directive 91/533/EEC). After the ETUC decision not to enter into negotiations with employers, BusinessEurope would like to present to the Commission the following general comments:

- BusinessEurope offered to the ETUC negotiations on the revision of the Written Statement Directive to ensure it continues to reflect the needs of companies and workers and practices across the EU. BusinessEurope was ready through such negotiations to improve the directive which brings clarity for companies and employees on what rights and obligations apply in an employment relationship, including addressing some of the related concerns on minimum rights, without changing the nature and purpose of the directive.
- Employers are disappointed that the ETUC has rejected this offer in particular as the directive deals with issues at the core of employment relations between employers and workers. The European social partners would have been much better placed than EU institutions to consider changes.
- The Commission has launched a possible revision of the directive as a REFIT exercise. The purpose of REFIT is in the Commission's own words *"to make sure that EU laws deliver their intended benefits for citizens, businesses and society while removing red tape and lowering costs. It also aims to make EU laws simpler and easier to understand"*.
- BusinessEurope agrees with the objectives of REFIT. We therefore expect the Commission to preserve the nature and purpose of the directive which is to inform employees about their working conditions. Introducing minimum rights would completely change the character of the directive and go much beyond the scope of the REFIT evaluation.
- We reaffirm the Commission should pay particular attention to Article 153 TFEU, which sets out that EU directives shall achieve the objectives of Article 151 TFEU which includes taking account of national practices in particular the role of social partners and the need to maintain competitiveness of the EU economy.



- Furthermore, the Commission's initiative is taken in the framework of the inter-institutional proclamation on the European Pillar of Social Rights. We therefore expect that the Commission will respect what is stated in the Pillar i.e. that it "*should be implemented at both Union and Member State level within their respective competences, taking due account of different socio-economic environments and the diversity of national systems, including the role of social partners, and in accordance with the principles of subsidiarity and proportionality*". Moreover, the Commission's upcoming proposal should respect the pillar principle 5.b stating that "*the necessary flexibility for employers to adapt swiftly to changes in the economic context shall be ensured*".
- In line with the idea of "doing less more efficiently" at EU level, the Commission should avoid regulating on issues that are best addressed by law or collective agreements closer to employers and workers' realities. The Commission should always consider first if adaptations to the legal framework can be made more efficiently at national level.
- BusinessEurope is particularly concerned that a number of the suggestions on minimum rights in the consultation document risk interfering in national collective agreements thereby not respecting the Pillar. Introducing a derogation possibility for social partners - as proposed by some stakeholders –would not solve that problem. Social partners would have to renegotiate existing agreements. And in a number of Member States legislation would be introduced where today it is only for social partners to regulate.
- If the Commission decides to follow a REFIT approach, the directive could be improved in a number of ways. Consideration could for example be given to simplification of the exemptions under Article 1(2) of the Written Statement Directive, shortening the deadline to provide information in line with national developments, giving possibility to deliver the written statement electronically, as well as adapting the information package for example on timely information on vacancies as foreseen in the existing EU directives/agreements on part-time and fixed-term work.
- The revised directive should, as the existing directive, leave it to Member States to define who are workers/employees. Self-employed should not be covered by the written statement directive as they do not have an employer.



II. Specific comments

Scope of application of the Written Statement Directive

The Commission suggests clarifying the scope of the Written Statement Directive *“in line with the parameters set out by the CJEU to identify an employment relationship by including criteria which would help achieve more consistency in the personal scope of application of this Directive while making clear that it applies to every type of person that for a certain period of time performs services for and under the direction of another person in return for remuneration, including domestic workers, temporary agency workers, on-demand workers, intermittent workers, voucher based-workers, and platform workers.”*

BusinessEurope is against the idea of developing an EU definition of worker or employee for the purpose of the application of the Written Statement Directive.

The EU definition of a worker used in the context of the free movement of workers is broad and extensive. National definitions used for the purpose of the application of labour law or social security provisions are more precise, as over years they have been clarified by case law. Introducing the EU definition would lead to legal uncertainty, as the interpretations developed in national case law could become irrelevant. Any EU definition would necessarily create clarification issues; triggering EU jurisprudence over the coming years.

Moreover, at national level, definitions sometimes vary between sectors, branches of law (social security & labour law) and collective agreements, and this is considered useful in order to adapt to different realities and work organisation practices.

National definitions are adapted when needed, including by case law, to the new developments on the labour markets. As developments and practices differ between countries (e.g. the ways casual work is organised including the existence of e.g. voucher work, zero hours contract), introducing a “one size fits all” EU definition would not be practical and less agile.

We are also concerned that the impact of such an EU definition would in fact not be limited to the application of the Written Statement Directive. There could be wider implications on classification of work relationships in general. This is because giving someone a written statement may be seen as an indication of a subordinate work relationship and lead to classification of a person as an employee e.g. for social security purposes.



The Commission consultation document also suggests to provide in the Written Statement Directive the list of particular forms of work to be covered by the directive (domestic workers, temporary agency workers, on-demand workers, intermittent workers, voucher based-workers, and platform workers)).

Listing specific forms of employment as suggested by the Commission would be impractical given the forms of employment and types of work contracts available differ between countries and change over time. Voucher work, for example, exists only in a few EU countries.

Moreover, the term “platform worker” used by the Commission is unclear and can be misleading as it does not correspond to any specific form of work contract. People providing services with the help of online platforms can be employees but can – and often are - self-employed. There is no “one-size-fits-all” solution and national criteria to determine the status of the person (employee/self-employed) can be applied on a case-by-case basis. In any case, **self-employed should not be covered by the written statement directive. We are thus concerned that the reference to “platform workers” in the written statement directive would risk reclassifying genuinely self-employed as employees.**

As for apprentices/trainees, it is important to note that in many countries they are not considered employees, but rather students as their training is part of an educational programme. Therefore, information to be provided regarding their work placement is often covered by specific legislation. We appreciate that the Commission – in its second consultation document – decided to respect this diversity.

The Commission consultation document suggests that *“consideration should also be given to the removal of the exclusion provisions under Article 1(2) of the Directive, under which Member States may exclude people working less than 8 hours a week or whose employment relationship lasts less than one month or is of a casual and/or specific nature”*

While BusinessEurope does not see in practice any significant gaps in coverage of the Directive, the Commission may indeed look into simplification of the exemptions under Article 1(2) to better align the Directive with national practices across the EU. However, some exemptions are needed in order not to place disproportional burden on employers, especially micro and small enterprises in sectors where demand varies greatly and there is a need to adapt work supply frequently and fast.



Extending information package

Overall, BusinessEurope believes there is no particular need to extend the information package required by the Directive, however some adaptations can be done.

Information about probation period is usually already included in the written statement, so this could be reflected in the revised directive.

On the contrary, including information in a written statement about “training entitlements under the work contract” would not always be practicable. Businesses are committed to provide appropriate training to employees. However, in many cases training is decided together by employer and employee depending on the needs of the company and the employee, with a mix of collective and/or individual frameworks tailored to ensure the relevance of training in the light of changing labour market needs. It is thus difficult to include information about training upfront. Providing such advance information could in fact be misleading for an employee (i.e. there may be no formal right to training, but the training will usually take place).

As for the social security system to which the worker and the employer contributes, according to our members this is not usually indicated in the written statement. It is perceived as potentially superfluous obligation. Information about social security contributions is usually mentioned in the pay slips. Moreover, certain types of pension institutions have to inform members about their contributions. It is important not to multiply information obligations.

The Commission suggests that in order to facilitate compliance, templates for written statements/ employment contracts could be developed and made available by the Member States. This can be helpful, especially for SMEs, if Member States and social partners agree. However it is important such templates are developed at national not the EU level, and if need be taking into account diverse requirements in different sectors or regions.

Reducing the two month notification deadline

It has to be taken into account that 22 Member States already impose a stricter deadline in their transposition of the Directive. If it is decided to change the Written Statement Directive, a deadline of 1 month, used currently in the majority of Member States, could seem appropriate, as also indicated in the REFIT study. Shorter deadline could lead to problems. In some Member States and in big organisations, having the contract signed and approved by relevant staff may take time. While in most cases, the contract is signed before the work starts sometimes negotiations between an employer and employee and internal procedures may take more time, particularly in the situations of cross-border



mobility. Also, small employers could have problems in providing all the required information in a short timeframe.

Redress and sanctions

The Commission is suggesting that the means of redress and sanctions could be strengthened e.g. by providing that sanctions can be imposed on the employer for failure to issue the written statement in addition to compensation for damage suffered granted to employees.

BusinessEurope finds the proposal neither necessary nor justifiable. First of all, there is no evidence that there are any major problems in compliance with the written statement directive that would justify the need for strengthening sanctions. On the contrary, REFIT study prepared for the Commission assesses the level of compliance as high. BusinessEurope members are also of the opinion that there are not many legal cases linked to the directive.

BusinessEurope is of the opinion that sanctions, where they are justified, should be as far as possible corresponding to the damage suffered by an employee. When sanctions can be imposed even if there is no damage to employees, this can encourage litigation for even small technical breaches of the written statement directive. Frivolous litigation is already a problem (not directly linked to this directive) in a number of countries.

Defining minimum workers rights

In its second consultation document the Commission proposes to focus on “*rights which address directly the key gaps in protection arising from the expansion of non-standard and casual forms of work, and which derive directly from the bilateral relationship between worker and employer.*” In particular the Commission proposes the **right to predictability of work for workers in “casual or on-demand employment relationships”** (the obligation to agree on reference days and hours, right to minimum advance notice, recourse to exclusivity clauses limited to full-time employment relationships only).

First of all, the Commission’s analytical document and other available figures do not provide evidence of “expansion of non-standard and casual forms of work”. On the contrary, the vast majority of employment contracts are open-ended. According to Eurostat, in 2016 88 % of employees in the EU-28 had contracts of unlimited duration and this figure has barely changed in the last ten years. Eurofound reports that: “*in the last decade, there has been no upward trend in the rate of temporary contracts overall in the European Union; indeed, there was*



a slight decline from 14.5% in 2006 to 14.2% in 2016”¹. This should be acknowledged more clearly by the Commission.

BusinessEurope shares the Commission’s objective of ensuring some degree of predictability of working time for those working in shifts, on-call or on-demand. However, these issues are in many countries at the core of social partners’ competences, and are often regulated through collective agreements. Arrangements differ between sectors and companies. We believe that EU intervention in this area would not respect the subsidiarity principle, as decisions regarding work organisation and working time arrangements need to be taken at lower levels to reflect the changing economic and social realities at company and/or sectoral level in the Member States. In this respect, and positively, a key finding of the European Working Conditions Survey is that in 2015 82% of workers considered that their working hours fit well or very well with family and social commitments.

The Commission document is unclear about what is meant by casual or on-demand employment relationships. Difference should be made between on-demand work (where worker is not obliged to take up any work proposed by a company) and on-call work (where worker has to be available for the employer at the workplace, or at a home). On-call work situations are already regulated by the Working Time Directive. When it comes to on-demand work, we note that – according to the Commission analytical document – such working arrangements (*zero hour contracts*) exist only in a few countries (e.g. Ireland, United Kingdom, Netherlands, Italy). Therefore, we do not consider it an issue to be regulated at the EU level. In any case, it would not make sense to regulate such a specific work contract in a Written Statement Directive which is a cross-cutting directive applicable to various forms of contracts.

The Commission also proposes the **“right for a worker who is not employed on a permanent basis to request another form of employment after achieving a certain degree of seniority with his/her employer, and to receive a reply in writing within a set timeframe from the employer”** According to the Commission this would help increase transitions rates from temporary employment contracts to open-ended contracts.

BusinessEurope shares the goal of facilitating transitions in the labour market and helping individuals progress in their careers. However, policy measures to support that aim should be efficient, proportionate and should not place unnecessary administrative burdens on companies. This is especially important for SMEs.

¹ “Non-standard forms of employment – recent trends and future prospects. Background paper for Estonian presidency Conference “Future of Work – making it E-easy”, 13-14 September 2017”



We note that the fixed-term directive (Directive 1999/70/EC), negotiated by the social partners, foresees a clause obliging employers to inform fixed-term workers about “*vacancies which become available in the undertaking or establishment to ensure that they have the same opportunity to secure permanent positions as other workers*”. This clause helps fixed-term workers access opportunities for internal mobility.

More generally, to promote transitions from fixed-term to more open-ended positions it is also important to ensure that regulations are balanced and the rules governing open-ended contracts are not overly strict, which could prevent companies from offering open-ended positions. etc).

We believe that the EU should make better use of the European semester process to ensure that member states learn from each other and reform their labour market regulations and social systems in line with renewed principles of flexicurity.

The focus should be on:

- Providing a **suitable employment protection legislation environment** to stimulate recruitment in different forms of employment, taking into account the needs of those who are already in employment and of those looking for a job;
- Ensuring that **companies have enough flexibility** to adapt work organisation to changing economic needs;
- Focusing on “**employment**” **security** through well-functioning employment services, safety nets and well-performing labour markets, rather than “job” security;
- Putting in place the conditions to **smooth workers’ transitions on the labour market between jobs, sectors and employment statuses**, while respecting the diversity of industrial relations practices across Europe;
- Promoting **dialogue between management and workers**, leaving in particular the space need for social partners at the appropriate levels to ensure that **investments in training** reflect the changing needs of the labour markets.
